VERMONT LABOR RELATIONS BOARD

AFSCME COUNCIL 93	)	
	)	
v.	)	DOCKET NO. 18-25
	)	
BURLINGTON SCHOOL DISTRICT	)	

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 AFSCME Council 93 ("Union") on May 3, 2018, against the Burlington School District ("Employer"). The Union 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 failing to engage in discussions to attempt to mutually agree to an arbitrator in a grievance of a dismissed employee and by considering the matter settled. The Employer filed a response to the charge on May 21, 2018.

Timothy Noonan, Labor Relations Board Executive Director, met with the parties on July 18, 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.

Factual Background

The pertinent factual background for deciding whether to issue an unfair labor practice complaint is based on the materials filed by the parties and the information gathered during the July 18 meeting in furtherance of the investigation of the charge. The following pertinent facts are undisputed.

Dilbar Temirov, an employee of the Employer represented by the Union, was dismissed by the Employer. The collective bargaining agreement between the Union and the Employer

contains a grievance procedure culminating in final and binding arbitration. The Union filed a grievance on Temirov's behalf. The grievance was processed through the pre-arbitration steps of the procedure, and was denied by the Superintendent at Step 2 of the grievance procedure on March 30, 2017. The collective bargaining agreement contains the following provisions concerning a grievance proceeding to arbitration:

> The Union, upon written notice to the Board within twenty (20) days following the unsuccessful consideration of the grievance by the Superintendent as provided in Step 2 of Section 704, may request arbitration of any grievance which involves the interpretation or application of a specific term or provision of this Agreement. Arbitration is possible only if such grievance has not been settled after being fully processed through the grievance procedure in accordance with the time limits and provisions of Section 704 and arbitration is timely requested. If the Board and the Union are not able to agree on the selection of an arbitrator within a period of fourteen (14) days of the date of such written request, such grievance may be referred by either party to the Federal Mediation and Conciliation Service for the selection of an arbitrator, in accordance with the rules of the service. If the grievance is not so referred within thirty (30) calendar days of the request for arbitration, it shall be considered settled and shall no longer be subject to the grievance or arbitration provisions of this Agreement. The parties shall share equally in the compensation and expense of the arbitrator. The decision of the arbitrator shall be final and binding upon the parties.

The Union filed a notice of its intent to proceed to arbitration on the grievance on behalf of Temirov on April 7, 2017. Shortly thereafter, Colin McNeil, Attorney for the Employer, and Vincent O'Connor, Union Representative, had a conversation about the grievance. Following this conversation, there was an email exchange between them. On April 19, 2017, O'Connor sent an email to McNeil providing in part: "(A)s a reminder, we spoke about the arbitration selection process and time extensions. Please respond tomorrow if you can." McNeil sent O'Connor an email on April 21, 2017, providing in pertinent part:

> Lastly, with regards to the arbitration. I have not seen the packet that you sent to HR or confirmed with them that they received it but I trust that you did submit it based on your representation. Per the contract we are to choose an arbitrator within 14 days of the Union submitting the request for arbitration. I am not sure where we are with that deadline as I don't know when the request was submitted. However, if we are running up against that deadline, we are willing to temporarily waive it so that we can attempt to agree upon an

> arbitrator. I believe it is helpful, however, to set a date. So, we are willing to extend the deadline to next Friday, May 5, to reach an agreement on the arbitrator.
>
> To assist in this regard, here is a list of arbitrators that we would be agreeable to use (in no particular order): Leo Bisson, Gary Altman, Richard Boulanger, Mike Ryan, John Cochran, Bonnie DiSpirit.
>
> They are all regulars on the arbitration circuit but if you would like additional information about them, please let me know,

O'Connor sent an email on April 21, 2017, to McNeil in response, stating: "With regards to the arbitration case, I would like to talk to you on the phone about our process." In an April 21, 2017, telephone conversation, or shortly thereafter, O'Connor informed McNeil that McNeil should expect to hear soon from AFSCME Counsel in Boston regarding the arbitration matter and selecting an arbitrator. McNeil did not hear again from O'Connor on the subject and did not hear from AFSCME in Boston until receiving an email on November 6, 2017, requesting that McNeil forward a list of arbitrators for the review of AFSCME Counsel. McNeil informed AFSCME Counsel on January 12, 2018, that the "Burlington School District considers the Dilbar Temirov Grievance to be settled and no longer subject to the grievance or arbitration provisions of the Agreement".

Discussion

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 Union contends that the Employer failed to bargain in good faith and interfered with employee rights in violation of the Municipal Employee Relations Act . The Union asserts that

the Employer did so by not attempting to mutually agree with the Union on an arbitrator prior to relying on the language of the collective bargaining agreement, and determining the matter to be settled and no longer subject to the grievance procedure.

We conclude that this allegation by the Union is not supported by the undisputed factual background set forth above. The Employer did attempt to mutually agree with the Union on selecting an arbitrator. The Employer was willing to extend the 14-day deadline under the collective bargaining agreement for mutually agreeing to an arbitrator and proposed to the Union a list of several arbitrators from which to choose. The Union did not timely respond to this attempt by the Employer to mutually agree to an arbitrator, and did not timely refer the matter to the Federal Mediation and Conciliation Service for the selection of an arbitrator.

Given these circumstances, the Employer acted in accordance with the collective bargaining agreement by considering the grievance to be settled and no longer subject to the grievance or arbitration provisions of the agreement. We cannot conclude that the Employer may have interfered with employee rights and failed to bargain in good faith when it asserted its legal right to decline to proceed to arbitration in accordance with the provisions of the collective bargaining agreement. Montpelier Education Association v. Montpelier Supervisory District Board of School Commissioners, 18 VLRB 401, 407-408 (1995) (the employer could not be found to have refused to bargain in good faith when it asserted its legal right to decline to proceed to arbitration in reliance on a statutory provision requiring a specific acknowledgment of arbitration clause in a collective bargaining agreement for an agreement to arbitrate to be enforceable, and such an acknowledgement of arbitration clause was absent from the collective bargaining agreement). Issuance of an unfair labor complaint is not appropriate because the

Union has not set forth sufficient factual allegations for the Board to conclude that the Employer may have committed an unfair labor practice.

Based on the foregoing reasons, we decline to issue an unfair labor practice complaint, and it is ordered that the unfair labor practice charge in this matter is dismissed.

Dated this 15th 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