

## **Practices and Procedures in Unfair Labor Practice Cases**

The State Employees Labor Relations Act, the Judiciary Employees Labor Relations Act, the Municipal Employee Relations Act, the State Labor Relations Act, the Independent Direct Support Providers Labor Relations Act, and the Early Care and Education Providers Labor Relations Act each contain a list of employer and union unfair labor practices.<sup>1</sup> Employees, unions and employers can file a charge with the Board alleging that a union or employer has committed an unfair labor practice as specified in provisions of each of the Acts administered by the Board.<sup>2</sup> In one case, the Board determined that a former employee did not have standing, pursuant to the unfair labor practice provisions of the Municipal Act, to challenge the terms of a collective bargaining agreement entered into after she voluntarily left employment.<sup>3</sup>

In this section, practices and procedures in handling unfair labor practice charges are addressed.

### A. Filing a Charge

Under each of the applicable Acts, unfair labor practice charges generally must be filed within six months of when the alleged unfair labor practice occurred.<sup>4</sup> The unfair labor practice charge may be filed on the form specified by the Board. The charge does not need to be filed on such form, however, if it contains the contents specified in the form.

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<sup>1</sup> 3 V.S.A. §961, §962; 3 V.S.A. §1026, §1027; 21 V.S.A. §1726; 21 V.S.A. §1621; 21 V.S.A. §1637; 33 V.S.A §3612.

<sup>2</sup> 3 V.S.A. §§961 - 965, 3 V.S.A. §§1026 – 1031, 21 V.S.A. §§1621 - 1622, 21 V.S.A. §§1726 – 1729; 21 V.S.A. §§1637 – 1638; 33 V.S.A §§3612(e).

<sup>3</sup> Merchant v. Colchester School District and Vermont-NEA, 23 VLRB 20 (2000).

<sup>4</sup> 3 V.S.A. §965, 3 V.S.A. §1030, 21 V.S.A. §1727(a); 21 V.S.A. §1622(a); 21 V.S.A. §1638; 33 V.S.A §3612.

Among the required contents of the charge is a “concise statement alleging the applicable sections of the Act which are alleged to have been violated”. The most common mistake in the filing of unfair labor practice charges is failure to cite the specific statutory provisions which have been violated. This results in the need to amend the charge, thus delaying the Board processing of the charge. Another mistake which sometimes occurs is failure to adhere to the requirement to have the charge “signed and verified before any person authorized to administer an oath”.<sup>5</sup> Again, if this occurs, the charge needs to be amended and the processing of the charge is delayed.

In addition to filing the charge with the Board, the charging party needs to serve a copy of the charge on the charged party or parties.<sup>6</sup>

## B. Investigation of Charge

The Board has discretion, under each of the statutes it administers, whether to issue an unfair labor complaint and hold a hearing on a charge.<sup>7</sup> 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.<sup>8</sup> If the Board exercises its discretion to decline to issue a complaint, and the Board decision is appealed, the test used by the Supreme Court is whether it was an abuse of discretion for the Board not to issue a complaint.<sup>9</sup> The Board discretion in deciding whether to issue an unfair labor

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<sup>5</sup> Sections 16.2, 26.2 35.2, 55.2, 65.2, 75.2, Board Rules of Practice.

<sup>6</sup> Sections 16.4, 26.4, 35.4, 55.4, 65.4, 75.4 Board Rules of Practice.

<sup>7</sup> 3 V.S.A. §965(a) and §1030(a); 21 V.S.A. §1622(a), §16389(a), and §1727(a); 33 V.S.A §3612 (e).

<sup>8</sup> Burke Board of School Directors v. Caledonia North Education Association, 17 VLRB 187 (1994).

<sup>9</sup> Hinesburg School District v. Vermont-NEA, 147 Vt. 558, 560 (1986). VSEA v. State of Vermont (Re: Health Insurance Premium Increase), 161 Vt. 600 (1993).

practice complaint is broad.<sup>10</sup> 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.<sup>11</sup>

Upon receipt of a valid charge, the Board requests the charged party to file a response to the charge, stating the charged party's position.<sup>12</sup> The response typically is required to be filed within approximately 15 days of the charge being filed. The response is considered by the Board in deciding whether to issue an unfair labor practice complaint. Once the Board receives the employer's response, the Board proceeds in one of two ways: the Board either decides whether to issue an unfair labor practice complaint based on the charge and the response, or the Board conducts further investigation.

If the Board decides to take action without further investigation, the Board either issues an unfair labor practice complaint or issues a Memorandum and Order declining to issue a complaint and dismissing the case. In cases where the Board has not conducted an investigation beyond the pleadings, the Board takes the verified allegations contained in the charge as true for purposes of deciding 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.<sup>13</sup>

If the Board decides to conduct an investigation beyond the pleadings, the investigation is conducted by the Board Executive Director. Investigation can take the form of letters to the parties seeking clarification or more information, conference calls with the parties and/or meetings with the parties. In an investigation,

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<sup>10</sup> Id.

<sup>11</sup> VSEA v. State, 161 Vt. at 602.

<sup>12</sup> Sections 16.7, 26.7, 35.7, 56.7, 65.7, 75.7 Board Rules of Practice.

<sup>13</sup> Burke Board of School Directors v. Caledonia North Education Association, 17 VLRB 187 (1994).

the Board Executive Director typically also seeks to explore possible informal resolution of the unfair labor practice charge.

If the charge is not informally resolved, the Executive Director reports the results of the investigation to the Board. In reporting to the Board, however, the Executive Director does not make known to the Board any discussions with the parties relating to voluntary resolution of the case.<sup>14</sup> The Board then will decide, based on the pleadings and the results of the further investigation, whether to issue an unfair labor practice complaint or issue a Memorandum and Order declining to issue a complaint and dismissing the case.

### C. Issuance of Complaint

If the Board decides to issue an unfair labor practice complaint, the complaint is served on the parties. The complaint contains a concise statement as to the alleged violations of the Act incorporated into the complaint and a notice of hearing at a stated date, time and place.<sup>15</sup>

The party against whom the charge is filed has the right to file an answer within 10 days after service of the complaint. The requirements in filing answers are specified in the Board Rules of Practice.<sup>16</sup> After issuance of a complaint, the parties may submit to the Board a stipulation of facts and a request for a decision by the Board without a hearing.<sup>17</sup>

### D. VLRB Hearing

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<sup>14</sup> Sections 16.8, 26.8, 35.8, 56.8, 65.8, 75.8, Board Rules of Practice.

<sup>15</sup> Sections 16.10, 26.10 35.10, 56.10, and 65.10, Board Rules of Practice.

<sup>16</sup> Sections 16.11, 26.11 35.11, 56.11, 65.11, 75.11 Board Rules of Practice.

<sup>17</sup> Sections 16.12, 26.12 35.12, 56.12, 65.12, 75.12, Board Rules of Practice.

Any evidentiary hearing which takes place is conducted by a three-member panel of the Board. Section 12 contains a detailed discussion of Board hearings, and thus hearings are not discussed in detail in this section. Only two considerations concerning hearings need to be pointed out here. First, at the hearing, the burden of proving that an unfair labor practice occurred lies with the charging party<sup>18</sup>, and the standard of proof is by a preponderance of the evidence.<sup>19</sup> Second, unlike other types of cases heard by the Board, unfair labor practice hearings are governed by the Vermont Rules of Evidence.<sup>20</sup> After the hearing and the filing of post-hearing briefs by the parties, the Board issues a written decision containing findings of fact, opinion and order.

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<sup>18</sup> Sections 16.13, 26.13, 35.13, 56.13, 65.13, 75.13, Board Rules of Practice; Castleton Education Association, Vermont-NEA v. Castleton-Hubbardton Board of School Directors, 13 VLRB 60, 66 (1990).

<sup>19</sup> 3 V.S.A. §965(d), 21 V.S.A. §1727(d), 21 V.S.A. §1622(d), 21 V.S.A. §1638(d), 33 V.S.A. §3612(e)

<sup>20</sup> 3 V.S.A. §965(b), 3 V.S.A. §1030(b), 21 V.S.A. §1622(b), 21 V.S.A. §1727(b), 21 V.S.A. §1638(b), 33 V.S.A. §3612(e).