VERMONT LABOR RELATIONS BOARD

TYLER SAMLER	:	)
		)
v.		) DOCKET NO. 18-40
		)
BURLINGTON SCHOOL DISTRICT:		)

MEMORANDUM AND ORDER

The issues to be decided are whether the Labor Relations Board should: 1) grant Tyler Samler's motion to amend the unfair labor practice charge, and 2) issue an unfair labor practice complaint.

Samler filed an unfair labor practice charge on September 13, 2018, as amended on October 5, 2018, contending that the Burlington School District ("Employer") interfered with his rights in violation of 21 V.S.A. §1726(a)(1) and (10) by involuntarily transferring him to a different school. In the statement of facts concerning the alleged violation, Samler stated:

> Hours after receiving an arbitrator's decision in favor of a good-faith grievance filed by my union, my employer gave me an involuntary transfer to a new place of work, across town. The only rationale provided to me was that my "skill set" matched this new school. I asked for a more professional rationale, and details about what that meant, as this new transfer was from an Elementary School to a Middle School, and I was ignored. I'm far less qualified for working in a Middle School. . . Furthermore, my commute has doubled, and my new caseload is more than double that of my previous caseload, and I have to learn entirely new curricula, form new relationships and learn about the developmental characteristics of these new students whom I will be teaching. This new role is not within my "skill set". . . An involuntary transfer is incredibly demeaning, allows for the creation of rumors about one as a professional. This is the latest in a long line of retaliatory actions taken against me for exercising my rights guaranteed by law.

The Employer filed a response to the charge on October 24, 2018. On November 28, 2018, the Burlington Education Association ("Association") filed a Motion to Intervene and a Motion to Amend Unfair Labor Practice Charge. The Association made additional charges that the Employer had violated 21 V.S.A. §1726(a)(1) and (3), and 16 V.S.A. §1982(c), by disciplining and involuntarily transferring Samler in retaliation for his filing of complaints and grievances. The additional facts cited by the Association in support of these allegations were limited to

specifying that 1) the grievance that ended up in arbitration, cited in the charge initially filed by Samler, was filed by the Association on behalf of Samler in January 2017, 2) the arbitration hearings on the grievance occurred between January and April, 2018, and 3) the parties submitted post-hearing briefs in the arbitration on May 11, 2018.

The Employer filed a response to these motions on December 19, 2018. The Employer did not object to the Association's motion to intervene in the charge. The Employer had no objection to the Associations' motion to amend the charge as to proposed additional facts, but objected to allowing amendment of the charge to the extent it makes additional alleged violations.

Timothy Noonan, Labor Relations Board Executive Director, met with the parties on April 8, 2019, in furtherance of the Board's investigation of the charge and to assist the parties in attempting to informally resolves issues in dispute. The parties continued settlement attempts following the meeting, but were unable to resolve the matter.

On September 17, 2019, the Association withdrew as a party in this matter. The Association indicated that Samler would be representing himself and that Samler is maintaining the motion to amend the charge filed by the Association on November 28, 2018.

Factual Background

The following pertinent factual background for the purpose of deciding whether to issue an unfair labor practice complaint is based on factual allegations made in the amended charge filed by Samler, the response to the charge filed by the Employer, and the April 8, 2019, investigation meeting on the charge.

The 2017 – 2019 collective bargaining agreement between the Employer and the Association provides in pertinent part:

ARTICLE VI

. . .

6.10 The Board will use its best efforts to specify the location of a district teacher's assignment for the next school year by the end of the school year.
. . .

ARTICLE XX
GRIEVANCE PROCEDURES

. . .
20.1 . . . (c) No grievance shall be valid unless it is submitted . . . within fifteen (15) school days after either the aggrieved person or the Association had knowledge of the events giving rise to the grievance, whichever is earlier. . .
. . .
20.12 No reprisals of any kind will be taken by the Board or the School Administration against any teacher because of participation in this grievance procedure.

During the 2015-2016 school year, Samler worked at the Champlain Elementary School as a special educator. On April 25, 2016, the Employer notified Samler that he was being involuntarily transferred to a different elementary school for the following school year. On June 8, 2016, the second to the last school day of the year, while Samler was still working at Champlain Elementary School, Samler was involved in an incident concerning the unlocking of doors to the school. More than six months later, Grievant received a 5 day disciplinary suspension for this incident.

The Association filed a grievance in January 2017 on behalf of Grievant contesting the suspension. The grievance ultimately ended up in arbitration before Arbitrator Sarah Kerr Garraty. Arbitration hearings took place on January 16, 2018, and April 3, 2018. The parties submitted post-hearing briefs on May 11, 2018,

Samler worked at the Integrated Arts Academy ("IAA") during the 2017-2018 school year. Bobby Riley was IAA Principal. Laura Nugent was Director of Special Education for the Employer. On May 30, 2018, at 4:49 p.m., Samler sent an email to Riley and Nugent stating:

> In speaking with you both today, I greatly appreciate your commitment to thinking about the big picture. However, I am feeling confused and need a little help. I'm hoping for clarification and guidance.

> I'm loving the work I'm doing with kids at IAA. . . It appears there is some administrative understanding that I have a need to leave. This is not the case. I do not request a transfer.
>
> I have heard that Bobby has some concerns about my affect of late. I can reassure you that I am committed to the mission at IAA, my work, and I feel positive moving forward.
>
> I am seeking clarification about who is transferring. Is Ellen leaving? Am I leaving?
>
> I understand that the time frame for this is June 1st.
> . . .

Nugent responded with an email sent to Samler on May 30, at 4:58 p.m., stating:

> After considering everyone's needs and feelings in this matter, I have decided to move Ellen to EMS as originally planned. Ellen is aware of this. We could move you as well but no longer have any imperative to do so. While no placement is 100% assured until the due date, I do not intend to make another change. There has been enough emotional upheaval.
>
> Please have a conversation with Bobby to resolve issues. I feel you are both being very honest with me and can make this work. It not, please let me know. We have some limited choices for the fall if preferred.

Samler responded by email 25 minutes later, at 5:23 p.m., stating:

> Thank you so much for your thoughts. I will take them under consideration.
>
> I hadn't asked for a transfer from IAA but I'm curious about what some of the options might be?

Nugent responded by email six minutes later, at 5:29 p.m., stating:

> Hms and Ems have openings. I think it's a good idea to explore that.

Nugent sent another email to Samler the following morning, May 31, at 8:22 a.m., stating:

> HMS would like to welcome you. They need someone with your background. It is a very good place to be.

Samler responded by email 23 minutes later, at 8:45 a.m., stating: "Thanks but my heart really is in elementary ed!"

Nugent sent an email at 9:07 a.m. on June 1, 2018, to Riley, Hunt Middle School ("HMS") Principal Mattie Scheidt, Senior Director of Curriculum Stephanie Phillips, and Director of Human Resources and Equity Affairs Nikki Filler, stating:

> I have decided that it is in the best interest of all parties if Tyler Samler is transferred to HMS. He has strong skill set in behavior, which is very necessary and desired by HMS. I want to be clear that this is a serious concern and a good reason to reduce obligations on legal documents.

It is unclear why the decision whether to reassign Samler to a different school changed between May 30 and June 1.

Arbitrator Sarah Kerr Garraty issued an arbitration award on June 1, 2018, on the grievance over the five day suspension imposed on Samler. Therein, she reduced the suspension to a verbal reprimand. The arbitrator informed counsel for the Employer and Association of her arbitration award by email sent at 11:58 a.m. on June 1.

Nugent sent Samler an email on June 1, 2018, at 3:57 p.m., stating:

> Given that HMS is greatly in need of someone with your skill set, I have decided to change your work location there. All the things you bring to the table will be valued at HMS. I think you will be happy in this new location. The HMS team is a great group.
>
> I hope you feel good about this. Call me if you wish.

Discussion

The Board has discretion whether to issue an unfair labor complaint and hold a hearing on the 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).

There are preliminary issues to be addressed before discussing the merits of Samler's allegations. In its response to the motion to amend the unfair labor practice charge, the Employer objects to the addition of new charges in the motion to amend as being prejudicial to the Employer because: 1) it will require additional responses from the Employer and is disruptive to the orderly and efficient processing of cases by the Board, 2) it is devoid of any specific factual allegation or information upon which an unfair labor practice complaint could be issued or an adequate response or defense can be made; and 3) some of the new charges refer to matters occurring outside the six month statute of limitations provided in 21 V.S.A. §1727(a).

The Employer's claim of prejudice is examined pursuant to Board *Rules of Practice* providing that the Board may permit amendment of an unfair labor practice charge as the Board "deems proper". Section 32.7, Board *Rules of Practice* In deciding whether to permit amendment, the Board examines whether amendment would prejudice the employer or be disruptive to the orderly and efficient processing of cases by the Board. Fair Haven Graded School Teachers Association, Vermont-NEA v. Fair Haven Board of School Directors, 13 VLRB 110 (1990). Grievance of VSEA, Barnard, et al, 17 VLRB 203, 225 (1994).

The Employer's claim of prejudice, should the motion to amend be granted, is justified with respect to events occurring outside the statue of limitations. Unfair labor practice charges must be filed within six months of when the alleged unfair labor practice occurred unless the person aggrieved was prevented from filing the charge due to service in the Armed Forces. 21 V.S.A. §1727(a). Therefore, the VLRB has declined to issue unfair labor practice complaints in cases where the charge was filed more than six months after the alleged unfair practice. Davis v. Town of Williston, 32 VLRB 43, 45 (2012). AFT Local 3333, VFT, AFL-CIO v. U32 High

School Board of Directors, et al., 6 VLRB 115, 117 (1983).

One of the additional charges made in the motion to amend the charge is that the Employer committed an unfair labor practice by disciplining Samler in retaliation for his filing of complaints and grievances. The only disciplining of Samler that occurred was the five day suspension that he received in January of 2017. The motion to amend the charge was filed in November 2018, well after the six month statute of limitations had run its course. It would be prejudicial to the Employer to be required to defend against such an untimely allegation. Thus, we do not permit the charge to be amended with respect to this allegation.

We conclude that otherwise permitting amendment of the charge will not prejudice the employer or be disruptive to the orderly and efficient processing of cases by the Board. The remaining allegations in the amended charge relate to the reassigning of Samler from one school to another school, the appropriateness of which reassignment has been at issue since the charge was originally filed. This will not require additional responses from the Employer and will not affect the processing of this case.

We also are not inclined to disallow the motion to amend with respect to the Employer's further claim that the amendment is devoid of sufficient specific factual allegations or information. Instead, we will examine the validity of this claim in applying the general standard that 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.

Another preliminary issue is whether the Board should defer this matter to the grievance procedure. In its response to the charge, the Employer asserted that the Board should defer to the grievance procedure in the collective bargaining agreement. A threshold issue which has been

decided in unfair labor practice cases is whether the Board should defer to a contract's grievance procedure in lieu of issuing an unfair labor practice complaint. The Board has deferred to a contract's grievance procedure and not ruled on an unfair labor practice charge 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). Winooski Police Employees' Association v. City of Winooski, 28 VLRB 102 (2005). International Union of Public Employees, Hartford Police Union v. Town of Hartford, 32 VLRB 357, 361 (2013).

The Employer contends that the standards for deferral have been met here because Samler is essentially alleging that the assignment to Hunt Middle School was improper and this issue is subject to grievance arbitration under the collective bargaining agreement. Samler responds that the allegations in the unfair labor practice charge as amended are properly pursued through the unfair labor practice route because the Employer has violated Sections 1726(a)(1) and (3) of the unfair labor practice provisions of the Municipal Employee Relations Act by involuntarily transferring Samler in retaliation for his engaging in protected grievance activity.

The Employer has not presented a sufficient rationale causing us to defer this matter to the grievance procedure. The Employer's claim that Samler is essentially making the general allegation that his assignment to Hunt Middle School was improper is inaccurate. Instead, Samler is making the specific allegation that the assignment was in retaliation for his engaging in protected grievance activity. Although, as we discuss later, Samler's failure to file a grievance

over his reassignment to Hunt Middle School has some relevance as to whether we issue an unfair labor practice complaint, the Employer's stated basis for deferral is unpersuasive.

We now shift our focus to considering the merits of the unfair labor practice charge. In exercising our discretion whether to issue an unfair labor practice complaint and hold a hearing on the unfair labor practice charge, the Board would issue a complaint if Samler has set forth sufficient factual allegations for the Board to conclude that the Employer may have committed an unfair labor practice by involuntarily reassigning Samler in retaliation for his engaging in protected grievance activity.

It is an unfair labor practice for an employer to discriminate against an employee for engaging in union activities or other protected activities. 21 V.S.A. §1726(a)(1), (3). In determining whether action was taken against an employee for engaging in protected activities, the Labor Relations Board employs the analysis used by the U.S. Supreme Court and National Labor Relations Board in such cases. Once an employee demonstrates protected conduct, he or she must show the conduct was a substantial or motivating factor in the decision to take action against the employee. Then, the burden shifts to the employer to show by a preponderance of the evidence it would have taken the same action even in the absence of the protected conduct. In re McCort, 162 Vt. 481, 492 (1994). Horn of the Moon Workers Union v. Horn of the Moon Cafe, 12 VLRB 110 (1988). Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977). NLRB v. Transportation Management Corp., 462 U.S. 393 (1983). Wright Line, 251 NLRB No. 150 (1980).

A threshold issue in these cases is whether an "adverse action" actually has occurred. The Vermont Supreme Court has indicated that "adverse action" should not be limited to dismissal, suspension, reprimand, adverse evaluation, diminished responsibilities, excessive work

assignments or lost compensation. In re Grievance of Murray, (unpublished decision, Supreme Ct. Docket No. 96-237, 1997). In one case, the Court concluded that assignment of an undesirable snow plowing route to a transportation maintenance worker constituted an adverse action. Id.

At the heart of any employment action allegedly linked with anti-union discrimination is the question of employer motivation. Ohland v. Dubay, 133 Vt. 300, 302 (1975). The Vermont Supreme Court has held that, "because of the difficulty in proving that illegal considerations figure in the employer's subjective motivation", the Court has approved the practice of inferring unlawful motivation from the circumstances where no direct evidence of the employer's intent exists in the record. Kelley v. The Day Care Center, Inc., 141 Vt. 608, 613 (1982). Grievance of McCort, 162 Vt. 481, 492-493 (1994). Grievance of Rosenberg and Vermont State Colleges Faculty Federation, 176 Vt. 641, 644 (2004).

Among the circumstances to be considered in determining whether the protected conduct of engaging in union activities was a motivating factor in an employer's decision to take action against an employee are: 1) whether the employer knew of the protected activities, 2) whether a climate of coercion existed, 3) whether the timing of the action was suspect, 4) whether the employer gave protected activity as a reason for the decision, 5) whether the employer interrogated the employee about protected activity, 6) whether the employer discriminated between employees engaged in protected activities and employees not so engaged, and 7) whether the employer warned the employee not to engage in such activity. Ohland v. Dubay, 133 Vt. at 302-303. Kelley v. The Day Care Center, 141 Vt. at 613. Horn of the Moon, 12 VLRB at 126-127.

A climate of coercion is one in which the employer's "conduct may reasonably be said to

have a tendency to interfere with the free exercise of employee rights". Grievances of McCort, 162 Vt. 481, 494 (1994). The critical inquiry is not whether the coercion succeeded or failed, but whether the employer's conduct reasonably tended to interfere with or restrain an employee's exercise of protected rights. Id. A climate of coercion exists if the employer takes actions compelling employees by pressure or threats to limit their protected activities. Grievance of Carbone, 16 VLRB 282, 305 (1993). Horn of the Moon Workers Union v. Horn of the Moon Cafe, 12 VLRB 110, 127 (1988).

The Board and the Vermont Supreme Court have indicated that coincidence of timing, although cause for rigorous scrutiny, is not sufficient evidence standing alone of improper motivation behind an employee discharge or other adverse action. Vermont Education Association v. City of Rutland School Department, 2 VLRB 186, 193 (1979). Barre City Police Officers Association, AFSCME v. City of Barre, 1 VLRB 223 (1978). Grievance of Rosenberg and Vermont State Colleges Faculty Federation, 176 Vt. 641, 644 (2004).In such cases, there must be some facts other than chronology alone to suggest that the timing of the employer's decision was suspicious. Rosenberg, 176 Vt. at 644.

In applying these standards here, we first conclude as a threshold issue that an adverse action has not occurred. We recognize that Sandler viewed the reassignment undesirably, but he has presented insufficient information to overrule the provision of the collective bargaining contract relating to teacher assignments. Even assuming for the sake of argument that the reassignment was an adverse action, we ultimately conclude that Samler has not set forth sufficient factual allegations that have not been refuted for the Board to conclude that the Employer may have committed an unfair labor practice by involuntarily reassigning Samler in retaliation for his engaging in protected grievance activities.

It is most significant in this regard that a central factual allegation made by Samler in his unfair labor practice charge is not accurate. He stated in the charge: "Hours after receiving an arbitrator's decision in favor of a good-faith grievance filed by my union, my employer gave me an involuntary transfer to a new place of work, across town." It is true that Samler did not become aware of his reassignment to a different school until several hours after the arbitrator notified the parties of her arbitration decision. However, it is equally true based on the clear information before us that the Director of Special Education made this decision, and communicated it to other management officials, hours before the arbitration award was issued. Thus, a central factual underpinning of the unfair labor practice charge – that Samler was reassigned in retaliation for prevailing in his grievance – is unsupported.

Once this factual allegation is eliminated, we conclude that Samler is left without sufficient remaining factual allegations to warrant issuing an unfair labor practice complaint. The fact that he had a grievance pending over the disciplinary action of a five day suspension is insufficient without supporting factual allegations to conclude that the Employer may have retaliated against him in for his protected grievance activities. As discussed above, coincidence of timing, although cause for rigorous scrutiny, is not sufficient evidence standing alone of improper motivation behind an adverse action.

There have been no factual allegations asserted of a climate of coercion tending to interfere with, or restrain, Samler in the exercise of his rights to pursue a grievance. The email exchanges between Samler and the Director of Special Education make it evident that there were relationship and/or other problems in Samler's workplace at the Integrated Arts Academy. However, there is no information before us that ties these problems to Samler's grievance activities.

It is concerning to us that it is unclear why the decision whether to reassign Samler to a different school changed between May 30 and June 1. Nonetheless, once again, there is no information indicating that this may have been motivated by Samler's grievance activities.

We note that, if Samler believed that his reassignment was motivated by his grievance activities, he had the ability to pursue a grievance over this issue pursuant to the collective bargaining agreement. Article 20.2 of the agreement provides that "(n)o reprisals of any kind will be taken by the Board or the School Administration against any teacher because of participation in this grievance procedure." The failure of Samler to file a grievance asserting that his reassignment was a reprisal against him because of his grievance activities reinforces our holding of an insufficient factual basis to support such a claim.

Based on the foregoing reasons, we grant the motion to amend the unfair labor practice charge to the extent set forth in this decision, we decline to issue an unfair labor practice complaint, and it is ordered that the amended unfair labor practice charge filed by Tyler Samler is dismissed.

Dated this 27th day of September, 2019, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Robert Greemore

Robert Greemore

/s/ Karen F. Saudek

Karen F. Saudek

/s/ Roger P. Donegan

Roger P. Donegan