VERMONT LABOR RELATIONS BOARD

VERMONT STATE EMPLOYEES' ASSOCIATION	)	
v.	)	DOCKET NO. 20-02
JUDICIARY DEPARTMENT OF THE STATE OF VERMONT	)	

MEMORANDUM AND ORDER

The threshold issue is whether this unfair charge should be dismissed as moot. The Vermont State Employees' Association ("VSEA") filed this unfair labor practice charge on January 6, 2020, contending that the Judiciary Department of the State of Vermont ("Employer") failed to bargain in good faith during negotiations for a collective bargaining agreement. Specifically, VSEA contended that the Employer committed unfair labor practices by failing to meet at reasonable times and confer in good faith with respect to wages and other compensation, engaging in surface bargaining by delaying substantive negotiations over compensation, refusing to consider or respond to proposals relating to compensation, and by otherwise refusing to engage in good faith negotiations with the intent of reaching an agreement over compensation.

VSEA requested the following remedies in the unfair labor practice charge: 1) an order that the Employer immediately cease and desist from engaging in the activities that constitute unfair labor practices; 2) physical and electronic postings of notices that unfair labor practices were committed; 3) an order that employees be made whole if they suffered an adverse action as a result of the unfair labor practices; and 4) any other relief that the Board deems just and fair.

The Employer filed a response to the charge on January 27, 2020. Labor Relations Board Executive Director Timothy Noonan had conference calls with the parties on March 23 and March 30, 2020, in furtherance of the Board's investigation of the charge and to informally

attempt to resolve issues in dispute. On March 31, 2020, VSEA filed a petition letter in support of issuance of an unfair labor practice complaint. The Employer filed a position statement on April 6, 2020, requesting that the charge be dismissed.

Factual Background

The following pertinent factual background for the purpose of deciding whether this matter is moot is based on factual allegations made in the unfair labor practice charge, the response to the charge filed by the Employer, the March 23 and 30 conference calls, and written position statements, including exhibits, filed by the parties after the conference calls.

VSEA and the Employer are parties to a collective bargaining agreement effective July 1, 2018, to June 30, 2020. Article 31 of the collective bargaining agreement provides: "The parties agree to meet not later than February 1, 2020 to commence negotiations concerning the successor agreement to commence July 1, 2020."

In July 2019, VSEA Senior Representative Brian Morse sent a letter to Court Administrator Patricia Gabel, pursuant to 3 V.S.A. § 1036, requesting that negotiations for a successor agreement commence after July 2019 (VSEA Exhibit A to March 31, 2020, position letter). 3 V.S.A. § 1036(e) provides: "Upon request of either party, negotiations for a new agreement to take effect upon the expiration of the preceding agreement shall be commenced at any time during the year preceding the expiration date of the agreement."

The parties met on September 9, 2019, to discuss ground rules. The parties did not agree on ground rules and decided to proceed with negotiations without ground rules. The parties' first substantive negotiations session occurred on October 21. VSEA submitted a proposal for wage increases. The Employer made no wage proposal or counter proposal at this time. The parties met next on November 14. They discussed VSEA's wage proposal. The Employer made no wage

proposal or counterproposal at this meeting. They next met on November 21. VSEA requested that the Employer submit a wage proposal, and mentioned that VSEA and the Executive Branch of state government had reached an agreement on a successor collective bargaining agreement. The Employer responded that it was not ready to offer a wage proposal, and indicated that generally it was not prepared to "talk about money until January" (VSEA Exhibit B to position letter, pages 9 through 29).

The parties held another negotiations session on December 10, 2019. The Employer offered a "supposal" package that included wages. The parties negotiated again on December 17. The Employer presented a comprehensive "supposal" package that included wages (Employer Exhibit D to April 6, 2020, position statement; VSEA Exhibits B, F and G to position letter).

VSEA filed the unfair labor practice charge in this matter on January 6, 2020. The parties met two days later, on January 8, in a negotiations session. At this session, the Employer made its first wage proposal that was not part of a package "supposal". VSEA lowered its wage proposal at this meeting. The parties had another negotiations session on January 13, and they both modified their wage proposals. The parties met again on January 22 in a negotiations session and reached tentative agreement on a few non-wage issues (VSEA Exhibits B,D and E to position letter; Employer Exhibit D).

Meanwhile, the Employer had filed a petition with the Board on January 17, 2020, to appoint a mediator to assist in resolving an impasse in negotiations between the parties for a successor collective bargaining agreement. The Employer also filed a response to the unfair labor practice charge in this matter on January 27. VSEA and the Judiciary agreed to appointment of a mediator with the understanding that VSEA reserved the right to pursue its pending unfair labor practice charge. The Board issued an order on January 30 appointing a mediator. The parties met

with the mediator on January 30 and February 26, but were unable to reach agreement on a contract. The parties then scheduled a mid-April fact-finding hearing with fact-finder Michael Ryan. The schedule provided for a fact-finding report to be issued by May 8. It turned out that a fact-finding hearing and report was not needed as the parties reached a tentative agreement shortly before the scheduled fact-finding hearing. This tentative agreement has now been ratified by the parties.

Discussion

The fact that the parties have entered into a collective bargaining agreement presents the question whether the Board should dismiss this unfair labor practice charge as moot. VSEA contends that the charge is not moot because the Employer has followed a consistent practice of refusing to negotiate over monetary issues until January or later that will repeat over the next negotiations cycle and every cycle thereafter. VSEA asserts that the resolution of the current contractual dispute does not resolve the basic dispute over the nature and process of their respective rights and obligations in bargaining. This dispute will not be resolved, VSEA maintains, until Board review and issuance by the Board of a cease and desist order that will apply to the next round of bargaining and posting a notice of the Employer's unlawful actions. The Employer contends to the contrary that this case is moot because there is no longer an actual controversy or bona fide litigation.

The Board and the Supreme Court have addressed the threshold issue in unfair labor practice cases whether the charge should be dismissed as moot or not justiciable. The Board and the Supreme Court have dismissed cases as moot or not justiciable where a teachers' association and a school board reached agreement on a collective bargaining contract pending the outcome of an unfair labor practice charge prompted by alleged actions occurring during contract

negotiations. In these cases, the underlying dispute in the unfair labor practice charges was resolved by the parties agreeing to a collective bargaining agreement. North Country Education Association v. Brighton School Board, 135 Vt. 451 (1977). Windsor Southwest Education Association v. Windsor School District Board of School Directors, 11 VLRB 217 (1988). Milton Staff Association / Vermont-NEA / NEA Local 130 v. Milton Board of School Trustees, 17 VLRB 176, 177-78 (1994). Arlington Educators Association, Vermont-NEA/NEA v. Arlington Board of School Directors, 18 VLRB 154 (1995). The Court and Board concluded in these cases that no actual controversy or existing bona fide litigation existed between the parties. Id. The Board has indicated these are not cases that are capable of repetition, yet evading review; that if a similar action occurred in a future round of negotiations, the Board would be able to review such action in a timely manner. Windsor, 11 VLRB at 219. Milton, 17 VLRB at 179.

In other cases, the Board has declined to dismiss charges as moot even though collective bargaining agreements had been finalized after the unfair labor practice charge was filed. In two cases, the subject of the unfair labor practice charge was not raised by either party during contract negotiations and the new contract did not resolve the issue raised in the charge. The Board concluded under these circumstances that an actual controversy still existed between the parties which required resolution. Castleton Education Association, Vermont-NEA v. Castleton-Hubbardton Board of School Directors, 13 VLRB 60, 64-65 (1990). South Burlington Board of School Directors v. South Burlington Educators' Association and Vermont-NEA, 32 VLRB 56, 77-81 (2012).

Also, the Board has indicated that the statute does not require the Board to "play hide and seek" with those guilty of unfair labor practices. Rutland Schools, 2 VLRB 250, 283-284 (1979). The Board has declined to dismiss cases as moot if they are "capable of repetition, yet evading

review." Id. Burlington Fire Fighters Association v. City of Burlington, 4 VLRB 379, 384-385 (1981). South Burlington Board of School Directors v. South Burlington Educators' Association and Vermont-NEA, 32 VLRB at 81.

In one case, the Board declined to dismiss an unfair labor practice charge on mootness grounds where a union alleged in the charge that the unilateral adoption of rules and regulations during the course of contract negotiations was a refusal to bargain in good faith, and the parties had their negotiations dispute resolved pending Board decision on the charge. The Board concluded: "(I)t is important to decide this issue since there is a continuing dispute between the parties over the right of management to promulgate rules and regulations during the course of negotiations. We believe this is the type of case which is 'capable of repetition, yet evading review' . . . and thus should not be dismissed as moot." Burlington Fire Fighters Association v. City of Burlington, 4 VLRB at 384-85.

In addition to these standards on the mootness question, the Board has weighed in recently on timeliness issues in a negotiations dispute between VSEA and the Employer. The Board held in a 2015 decision concerning negotiations between the Judiciary and VSEA that the bilateral nature of the obligation to meet at reasonable times and negotiate in good faith necessarily implies a joint discussion on establishing negotiation meetings. The obligation to bargain collectively encompasses the affirmative duty to make expeditious and prompt arrangements within reason to meet for bargaining. VSEA v. Judiciary Department of the State of Vermont, 33 VLRB 253, 266 (2015). More specifically, the Board stated:

> . . . Section 1016 of the Judiciary Act provides: "The employer and representative of the employees shall bargain collectively, which for the purposes of this chapter means performing the mutual obligation to meet at reasonable times and confer in good faith with respect to all matters bargainable under the provisions of this chapter.
>
> The bilateral nature of the obligation to meet at reasonable times and negotiate in good faith set forth in this provision necessarily implies a joint discussion on establishing

negotiation meetings. The National Labor Relations Board has long held that the obligation to bargain collectively encompasses the affirmative duty to make expeditious and prompt arrangements within reason to meet for bargaining. Professional Transportation, Inc. and International Brotherhood of Teamsters Local 512, 362 NLRB No. 60 (2015). J.H. Rutter-Rex Mfg. Co., 86 NLRB 470, 506 (1949). We concur, and adopt this general standard adapted to the provisions of the particular labor relations statute applicable to the negotiations.

It is necessary to examine the provisions of the Judiciary Act relating to dispute resolution procedures and funding of collective bargaining agreements to establish the "mutual obligation to meet at reasonable times and confer in good faith". Section 1036(c) of the Act provides:

> An agreement between the employer and the employees' exclusive bargaining representative, after ratification or an agreement imposed on the parties pursuant to section 1018 or 1019 of this title shall be submitted to the court administrator who shall request sufficient funds from the general assembly to implement the agreement. If the general assembly appropriates sufficient funds, the agreement shall become effective at the beginning of the next fiscal year. If the general assembly appropriates a different amount of funds, the terms of the agreement affected by that appropriation shall be renegotiated based on the amount of funds actually appropriated by the general assembly, and the agreement with the negotiated changes shall become effective at the beginning of the next fiscal year."

This provision contemplates that the parties will complete negotiations in a timeframe that allows the Court Administrator to request sufficient funds from the Legislature to implement the agreement so that the Legislature may appropriate such funds before its adjournment. The citation to Section 1018 and Section 1019 in this provision refers to the sections of the Judiciary Act containing the dispute resolution procedures of mediation, fact-finding, and selection by the Labor Relations Board between the parties' last best offers; or alternatively to the procedures of mediation and arbitration.

It is "reasonable" in establishing a negotiations timeframe under the Judiciary Act to account for the possibility of invoking these dispute resolution procedures and still have negotiations completed in a timely manner. A timely manner means allowing the Court Administrator to request sufficient funds from the Legislature, and for the Legislature to appropriate funds, to implement the agreement reached by the parties or the terms imposed on the parties by the Labor Relations Board or an arbitrator. . . Id. at 266- 268.

In applying these precedents here, we are not persuaded that the ongoing issue of contention between the parties as to the timing of negotiations over wage and other compensation provisions is "capable of repetition, yet evading review". First, VSEA could have filed its unfair labor practice charge earlier than it did in this matter and allowed for potentially

effective intervention by the Board in a timely manner. VSEA knew at the latest by the November 21, 2019, negotiations session that the Employer was explicitly declining to offer proposals or counterproposals on wages, or engage in any negotiations on wages, even though this was the parties' third substantive negotiations session. VSEA could have filed its unfair labor practice charge then. Instead, VSEA waited more than six weeks, until January 6, to file the charge. Two days later, on January 8, the parties engaged in substantive negotiations on competing wage proposals.

This delay precluded effective informal intervention by the Board since the issue underlying the unfair labor practice charge was immediately addressed by the parties within two days of the charge being filed. If the charge had been filed six weeks earlier, there would have been an opportunity for the Board Executive Director to meet quickly with the parties to investigate the charge and assist the parties in informally resolving it.

For example, VSEA had filed an unfair labor practice charge in the previous round of negotiations between the parties contending that the Employer was committing an unfair labor practice by refusing to engage in collective bargaining prior to the commencement of the budgetary process that would be required to fund any contractual items, and thereby making it impossible for VSEA to negotiate over financial items. The Board Executive Director met with the parties two weeks after the Employer filed its response to the charge and thereafter continued to interact with the parties until the charge was informally resolved. This allowed for negotiations to proceed in a manner agreed upon by the parties (See VLRB Docket No. 17-31).

In this case, similar informal intervention by the Board Executive Director could have occurred quickly that potentially may have assisted the parties resolving the underlying issue. Further examples exist with respect to a series of unfair labor practice charges arising during

negotiations between VSEA and the State of Vermont in 2004 for a successor collective bargaining agreement. On September 23, 2004, VSEA filed an unfair labor practice charge alleging among other issues that the State committed unfair labor practices by refusing to submit a proposal in collective bargaining negotiations on wages and benefits, and attempting to condition bargaining on wages and benefits on the resolution of non-economic matter. The Board required the State to file a response to the charge 7 days later, on September 30. The Board Executive Director met with the parties on October 1 and 4. Following the meetings, the parties had resolved all issues in dispute except for one issue. The Board then issued a Memorandum and Order on October 5, declining to issue an unfair labor practice complaint on the remaining issue. VSEA v. State of Vermont, 27 VLRB 226 (2004). In sum, the case was resolved 12 days after it was filed.

Similarly, in two further unfair labor practice charges filed during the same round of negotiations, the cases were resolved quickly. In one case, involving a claim by VSEA of the State making illegal bargaining demands, the Board Executive Director quickly met with the parties and the matter was informally resolved by the parties within three weeks of the charge being filed (VLRB Docket No. 04-46). In the other case, involving a claim by the State that VSEA had violated negotiations ground rules, the parties met with the Board Executive Director two days after the charge was filed, the Board issued an unfair labor practice complaint four days after the filing of the charge, the hearing before the Board was held 17 days after the charge was filed, and the decision was issued 39 days after filing of the charge. State of Vermont v. VSEA, 28 VLRB 1 (2005).

These cases illustrate that unfair labor practice cases involving negotiation disputes have been resolved quickly if given priority by the Board and the parties. The potential existed for this

to have occurred in this case if VSEA had filed the charge earlier. Also, the potential exists for this to occur in any future negotiations dispute involving the parties to this case. Accordingly, we are not persuaded that the issue involved in this case is capable of repetition, yet evading review. Instead, it can be resolved in a timely manner.

Moreover, the 2015 decision of the Board cited above provided substantial guidance to the parties that could have prevented the charge being filed or, if the charge was filed, facilitating its resolution. The Board stated therein that it is reasonable in establishing a negotiations timeframe under the Judiciary Act to account for the possibility of invoking the dispute resolution procedures of mediation, fact-finding, and submission of last best offers to the Board or an arbitrator, and still have negotiations completed in a timely manner. 33 VLRB at 267. The Board indicated that a timely manner means allowing the Court Administrator to request sufficient funds from the Legislature, and for the Legislature to appropriate funds to implement the agreement reached by the parties or the terms imposed on the parties by the Labor Relations Board or an arbitrator. Id. at 267-68.

Despite this clear direction from the Board, the parties were on track in this round of negotiations for a negotiations timeframe that did not adhere to the guidance that the Board provided. They established a schedule that would have a fact-finder's report issued on May 8. If agreement was not reached at fact-finding, last best offers would have been submitted to the Board by approximately May 25. The Board then would have to issue a decision within 30 days. This would have meant a Board decision by approximately June 24, beyond the date that the legislature normally would adjourn for the session. If the parties went the route of an arbitrator rather than the Board for submission of last best offers, the timeframe could have been extended even further.

If the parties had adhered to a negotiations schedule consistent with the Board's 2015 decision, it would have increased the likelihood that the parties would have had more time to address the issue underlying the charge and possibly resolve it. If not, the Board could have reviewed it in a timely and effective manner. These consequences of failing to do so in this round of negotiations should be evident to the parties heading into the next round of negotiations. The guidance provided by the 2015 decision increases our inclination to conclude that the issue in this case can be reviewed in a timely manner. There simply must be clearer focus by the parties on factoring in the possibility of invoking all the dispute resolution procedures of the Judiciary Act.

Based on the foregoing reasons, it is ordered that the unfair labor practice charge filed by the Vermont State Employees' Association in this matter is dismissed.

Dated this 27th of May, 2020, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD
/s/ Richard W. Park
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Richard W. Park, Chairperson
/s/ Alan Willard
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Alan Willard
/s/ Robert Greemore
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Robert Greemore
/s/ David R. Boulanger
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David R. Boulanger
/s/ Karen F. Saudek
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Karen F. Saudek
/s/ Roger P. Donegan
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Roger P. Donegan