VERMONT LABOR RELATIONS BOARD

WINDHAM NORTHEAST EDUCATION, VERMONT-NEA/NEA	)	
	)	
v.	)	DOCKET NO. 20-53
	)	
WINDHAM NORTHEAST SUPERVISORY UNION SCHOOL BOARD and its CONSTITUENT SCHOOL BOARDS	)	
WINDHAM NORTHEAST SUPERVISORY UNION SCHOOL BOARD and its CONSTITUENT SCHOOL BOARDS	)	
	)	DOCKET NO. 20-59
v.	)	
WINDHAM NORTHEAST EDUCATION, VERMONT-NEA/NEA	)	

MEMORANDUM AND ORDER

The Labor Relations Board needs to determine whether to issue unfair labor practice complaints on the unfair labor practice charges filed in these matters with a common set of facts. One of the charges was filed on October 28, 2020, by the Windham Northeast Education Association, Vermont-NEA/NEA ("Association") against the Windham Northeast Supervisory Union School Board and its constituent school boards ("School Boards") (Docket No. 20-53). The Employer filed a response to the charge on November 9, 2020.

The second charge was filed on December 14, 2020, by the School Boards against the Association (Docket No. 20-59). The Association filed a response to the charge on January 12, 2021. The School Board filed a motion to strike the Association's answer and a response to the Association's motion to dismiss the charge on January 14, 2021.

The Association charge in Docket No. 20-53 contends that the School Boards failed to bargain in good faith in violation of 21 V.S.A § 1726(a)(5) by conditioning that bargaining sessions with the Association concerning a successor collective bargaining agreement must be

open to the public and in public session. The School Boards charge in Docket No. 20-59 contends that the Association failed to bargain in good faith in violation of 21 V.S.A. § 1726(b)(4) by conditioning participation in collective bargaining negotiations with the School Boards on being held in private, closed and non-public sessions.

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).

In determining whether to issue unfair labor practice complaints, it is important to keep in mind the Labor Relations Board decision in 2017 that extensively addresses whether negotiation sessions between school board negotiations councils and teacher organization negotiations councils are meetings pursuant to the Open Meeting Law: Washington Northeast Supervisory Union v. Cabot Teachers' Association and Twinfield Teachers' Association, Cabot Teachers' Association and Twinfield Teachers' Association v. Washington Northeast Supervisory Union, 34 VLRB 4. The Board summed up its conclusion in the decision as follows:

> We determine that negotiating sessions between school board negotiation councils and teacher organization negotiations councils are not meetings pursuant to the Open Meeting Law. If we were to rule otherwise, we would be acting contrary to the intent of the Legislature by applying the Open Meeting Law in an internally inconsistent manner, acting inconsistent with the Public Records Act provision exempting records relating specifically to negotiation of collective bargaining agreements from public inspection and copying, and creating a result which does not reasonably reflect the provisions of the Labor Relations for Teachers Act. We also would be acting contrary to the important labor relations principle promoting the bilateral nature of the negotiations process, and would be allowing the balance of power to shift to the unfair advantage of management. 34 VLRB at 28.

The Vermont Supreme Court affirmed this decision in a 2018 ruling. Board of School Directors of Washington Northeast Supervisory Union v. Cabot Teachers' Association and Twinfield Education Association, 2018 VT 24, ___ Vt. ___ (2018). The Court also issued a companion decision on the same day, Negotiations Committee of Caledonia Central Supervisory Union v. Caledonia Central Education Association, 2018 VT 18, ___ Vt. ___ (2018). The Court concluded in these decisions that collective bargaining negotiating sessions between the school board negotiations council and the teachers negotiations council are not public meetings subject to the requirements of Vermont's Open Meeting Law.

In considering whether to exercise our discretion to issue unfair labor practice complaints, we first address the charge filed by the Association in Docket No. 20-53 contending that the School Boards failed to bargain by conditioning that bargaining sessions must be open to the public and in public session. The Association relies in part on a previously agreed-upon negotiations ground rule: "The parties agree to not make unilateral press releases regarding the substance of the negotiations unless or until an impasse is declared by either or both parties. This Ground Rule shall not preclude either the Boards or the Association from discussing the negotiation with its members." The Association asserts that this ground rule indicates that the parties agreed that negotiations would not occur in public.

We disagree. These provisions do not necessarily infer negotiations will be conducted in private. A prohibition on unilateral press releases, and the ability of either party to update their respective constituencies on the status of negotiations, can be applicable whether negotiations are public or private. Washington Northeast Supervisory Union v. Cabot Teachers' Association and Twinfield Teachers' Association, Cabot Teachers' Association and Twinfield Teachers' Association v. Washington Northeast Supervisory Union, 34 VLRB at 29-30. The fairest reading

of these provisions of the ground rules is that they do not specifically address whether negotiations will occur in public or private. Id. Accordingly, the ground rules do not provide a basis for issuing an unfair labor practice complaint.

The Association further supports its unfair labor practice charge by contending that the School Boards rebuffed efforts by the Association to compromise on the issue of having meetings open to the public, thereby resulting in no negotiations session being held. The offer of compromise referred to by the Association was in the form of a July 24, 2020, letter from Norman Bartlett, Vermont-NEA Uniserv Director, to Stephen Fine, Lead Negotiator for the School Boards. It provided in pertinent part:

> . . .
> Since we have not been able to compromise our way out of the current public or private negotiations dispute, we will have to find a way to resolve the problem with the least amount of harm done. The simple solution is to ask the Vermont Labor Relations Board for a ruling. That will solve the problem, but it will take our time and money for filing an unfair labor practice charge, holding a hearing, and submitting a post-hearing brief. All things we should try to avoid.
>
> Before taking that step, let me suggest three possible alternatives. First, we ask our negotiations teams to pretend they have reached an impasse in negotiations and not an impasse negotiating the ground rules and ask the FMCS to assign a mediator. Annie Rutsky is likely to be assigned, she will hold a virtual mediation session that will be closed to the public, and we will avoid the public/private negotiations controversy for another year. Second, appoint some outstanding citizen to the school board's negotiations team to represent the public. And third, agree to have private negotiations, without ground rules, or with ground rules that allow either party to make unlimited press releases or hold press conferences if that suits their purposes.
>
> If none of these compromises are acceptable, please let me know by return email, and I will make the appropriate filing with the Labor Board.
> . . .

Fine responded to Bartlett's letter in an August 4,2020, email as follows in pertinent part:

> Your initial alternative suggestion, that we go to FMCS mediation by creating the "fiction" that we have reached an "impasse in the negotiations and not an impasse negotiating the ground rules", is admittedly quite creative. But it is unacceptable for several reasons.

> First, doing so would trigger the bypassing of the negotiating process, altogether. It would launch us onto the end-time (so to speak) of the process, the next step being fact-finding and so on. We are not prepared to skip over negotiations and go directly to the final dispute resolution mechanisms that follow a true "impasse".
>
> Second, mediation would not be meaningful in any event, since it is not binding on either party.
>
> And third, as you have pointed out, the mediation, itself, would be held in private (as mediation traditionally has been), and that is precisely the issue that is in dispute here. . .
>
> Your suggestion that we appoint some "outstanding citizen" to the Boards Negotiating Team "to represent the public" serves no purpose at all, other than to make one member of the public, and one member only, knowledgeable about what is going on. Needless to say, it is our view that, in a society that values transparency and openness in government, the public-at-large has the right to "sit in" on the discussion and negotiation of matters of public importance and concern that affect them, such as teacher CBA's. . .
>
> And your suggestion, which we have heard before, that there be private sessions but allow "either party to make unlimited press releases or hold press conferences" carries with it the same defect that your "outstanding citizen" suggestion has: it deprives the public-at-large of the right to be present during, and to directly witness, the discussion and debate of governmental matters of direct concern to them.
> . . .
> I do want to leave you and the WNEA Negotiating Team with the Boards' continuing and open-ended invitation to meet at any time convenient to all parties, in open and public discussion and negotiation of any and all matters appropriate for collective bargaining.
> . . .

This exchange indicates that the School Board was conditioning any negotiations between the parties on being held in public, including the discussion on whether negotiations would be conducted in private or in public. The ultimate question on the remaining portions of the unfair labor practice charge in Docket No. 20-53 is whether it is an unfair labor practice for the employer to insist on meeting in public.

There are several factors to consider in determining whether we should exercise our discretion to issue an unfair labor practice complaint on this issue and hold a hearing to determine whether the School Board committed an unfair labor practice. One factor is the

bilateral nature of the obligation to meet at reasonable times and negotiate in good faith. The public policy so providing is set forth in § 2001 of the Labor Relations for Teachers and Administrators Act, which provides that "the negotiations councils of the school board and of the recognized teachers' or administrators' organization shall meet together at reasonable times, upon request of either party, and shall negotiate in good faith on all matters properly before them 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. Vermont State Employees' Association v. Judiciary Department of the State of Vermont, 33 VLRB 253, 266 (2015). The obligation to bargain collectively encompasses the affirmative duty to make expeditious and prompt arrangements within reason to meet for bargaining. Id. at 267. The determination whether negotiations will proceed in public session or in private is one that would be jointly decided by the employer and the union representing employees. Washington Northeast Supervisory Union v. Cabot Teachers' Association and Twinfield Teachers' Association, Cabot Teachers' Association and Twinfield Teachers' Association v. Washington Northeast Supervisory Union, 34 VLRB at 26.

Another factor is that the Board decision and the Court decisions cited above on the inapplicability of the Open Meeting Law to teacher-school employer negotiations make it clear that school board negotiations councils in the state may not rely on the Open Meeting Law to insist on conducting negotiation sessions in public. Association negotiations councils may agree to negotiate in public but are not required by law to do so.

A related factor to consider in deciding this question is the customary practice in Vermont, recognized by the Vermont Supreme Court in the Caledonia decision, for school board

committees and teachers' associations to hold negotiation sessions in private. The Court stated that "it is not disputed that Vermont school board councils and teacher' associations have, until recently, conducted labor negotiations in private", and the "VLRB has long recognized that it is 'accepted practice' within the public sector that negotiations are conducted in private." 2018 VT 18, ¶30, ¶31; *citing* UE Local 267 v. University of Vermont, 21 VLRB 106, 109 (1998).

The factors of the inability to rely on the Open Meeting Law to insist on conducting negotiations in public, the bilateral nature of the obligation to meet at reasonable times and negotiate in good faith, and the customary practice of holding negotiations sessions in private are sufficient for us to conclude that the School Boards may have committed an unfair labor practice with respect to this portion of the unfair labor practice charge. Thus, we exercise our discretion to issue an unfair labor practice complaint on this issue. In so concluding, we are making no determination whether the School Boards have in fact committed an unfair labor practice. We have simply concluded that the Association has set forth sufficient factual allegations to hold an evidentiary hearing on this issue.

We turn to addressing whether to issue an unfair labor practice complaint in Docket 20-59. The School Boards charge contends that the Association failed to bargain in good faith in violation of 21 V.S.A. § 1726(b)(4) by conditioning participation in collective bargaining negotiations with the School Boards on being held in private, closed and non-public sessions.

The School Boards summarize their position as follows: a) the Association permitted the School Boards for many years to determine whether negotiation sessions would be held in public or private; b) the above Supreme Court decisions on the applicability of the Open Meeting Law to collective bargaining negotiations were well known to the Association, but the School Boards were not aware of such decisions until January 2020; c) the Association acted in bad faith by not

advising the School Boards of these decisions; d) the ground rules proposed by the Association, and adopted by the parties; contained no provision for closed, non-public sessions; e) the Association claim they will negotiate the open or closed sessions issue only in a non-public forum, but the Association did not raise this issue in their first two negotiations sessions; f) the Association has provided no basis for sessions being closed; and g) the Association has asked the Labor Relations Board to order the School Boards to return to the bargaining table in a non-public forum even though the Association failed and refused to discuss the open or closed sessions issue.

In considering whether to issue an unfair labor practice complaint in Docket No. 20-59, the appropriate focus is on whether the School Boards have set forth sufficient factual allegations for the Board to conclude that the Association may have committed an unfair labor practice. One allegation of the School Boards is that, over the decades of the parties' relationship, the Association has left to the School Boards the obligation and responsibility to determine the context in which negotiations sessions are undertaken, and historically the School Boards had done this by sending out school board meeting warnings noting there will be an open meeting at the outset that will turn into an executive session for the purpose of collective bargaining negotiations.

The School Boards apparently are requesting the Board to infer that this history indicates the Association left it to the School Boards to unilaterally determine how negotiations would be scheduled. However, the materials on file in this matter simply indicate that historically the parties have conducted negotiations in executive session at a warned meeting. This is consistent with the past practice noted by the Supreme Court in the Caledonia case of negotiations typically being conducted in private in the public sector. Given this history, there is not a logical inference

that the Association left it to the School Boards to unilaterally determine how negotiations would be scheduled. Instead, a more logical inference is that the Association was content with the practice of negotiations being conducted in private and saw no need to intervene with notice sent by the School Boards consistent with this practice.

The School Board similarly request that the Board infer that the Association acted in bad faith by not advising the employer of the inappropriateness of the Open Meeting Law warnings after the Supreme Court decisions in Cabot and Caledonia were issued. It is not logical to infer that the Association acted intentionally to "set up" the School Boards in this regard. Moreover, we are not inclined to hold the Association responsible for the School Boards' ignorance of Labor Relations Board and Vermont Supreme Court decisions that had been issued years earlier.

The School Boards also request that this Board infer that the Association acted in bad faith by not including a provision in the proposed ground rules that negotiations sessions would be closed because the Association did not want to alert the employer to the fact that the Open Meeting Law no longer applied to teacher negotiations, and that open and public negotiations sessions are perfectly legitimate and appropriate. There is no basis to draw such an inference that this was the motivation for the Association's actions based on the factual information provided by the School Board.

The School Boards further support their charge by asserting that the Association has provided no basis for sessions being closed. The information on file in these cases indicate that the Association did provide reasons for sessions being closed. A May 14, 2020, letter from the Chair of the Association Negotiations Team to the Chair of the School Boards Negotiating Committee stated that "(a)n open meeting would certainly violate the intent of . . agreed upon" ground rules", and "(w)e believe that open sessions may disrupt the process". Although, as

discussed above, we have concluded that the ground rules do not necessarily infer negotiations will be conducted in private, the Association asserted that the ground rules presumed sessions would be closed and also that open sessions may disrupt the negotiations process.

Finally, the School Boards contend that the Association has asked the Labor Relations Board to order the School Boards to return to the bargaining table in a non-public forum even though the Association failed and refused to discuss the open or closed sessions issue. We disagree that the materials on file indicate that the Association declined to discuss the open or closed sessions issue. There were various written communications from Association representatives to representatives of the School Board discussing the open or closed session issue, including the letter from Norman Bartlett quoted above making offers of compromise on the issue.

In sum, the employer is requesting the Board to draw various inferences and make certain conclusions from actions of the Association to support a claim of bad faith bargaining. We decline to draw such inferences or reach such conclusions. We ultimately determine that the School Boards have not set forth sufficient factual allegations to support issuance of an unfair labor practice complaint based on alleged bad faith bargaining.

In closing, we note that although we are issuing an unfair labor practice complaint and ordering a hearing in Docket No. 20-53, we urge the parties to endeavor to meet to seek to resolve their differences with respect to private or public negotiation sessions so that negotiations can occur on substantive matters. Numerous sets of negotiations in Vermont between school board negotiations councils and teacher organization negotiations councils have occurred since the Board and Court decisions on the inapplicability of the Open Meeting Law to negotiations without being derailed by the issue of private or public negotiation sessions. Negotiations

between the parties in the cases before us already have been significantly delayed on this issue. We would hope the parties would be able to join their counterparts in Vermont in conducting negotiations without resorting to the time-consuming unfair labor practice process.

Based on the foregoing reasons, it is ordered:

1. The Vermont Labor Relations Board declines to issue an unfair labor practice complaint on the portion of the unfair labor practice charge filed by the Windham Northeast Education Association, Vermont-NEA/NEA, in Docket No. 20-53 alleging that the Windham Northeast Supervisory Union School Board and its constituent school boards failed to bargain in good faith by not adhering to negotiations ground rules agreed upon by the parties; and
2. The Labor Relations Board issues an unfair labor practice complaint on the remaining portions of the unfair labor practice charge filed by the Windham Northeast Education Association, Vermont-NEA/NEA, in Docket No. 20-53 alleging that the Windham Northeast Supervisory Union School Board and its constituent school boards failed to bargain in good faith in violation of 21 V.S.A. § 1726 (a) (5) by conditioning that bargaining sessions must be open to the public and in public session. This complaint is scheduled for a hearing on March 29, 2021, at 9 a.m. The hearing shall be conducted by electronic means through the Microsoft Teams video and audio platform.
3. The Labor Relations Board declines to issue an unfair labor practice complaint on the unfair labor practice charge filed by the Windham Northeast Supervisory Union

School Board and its constituent school boards against the Windham Northeast Education Association, Vermont-NEA/NEA in Docket No. 20-59.

Dated this 15th day of March 2021, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

Richard W. Park, Chairperson

/s/ David R. Boulanger

David R. Boulanger

/s/ Karen D. Saudek

Karen D. Saudek