Vermont Labor Relations Board

SOUTHWESTERN VERMONT EDUCATION ASSOCIATION	]	
- and -	]	DOCKET # 76-19R
MOUNT ANTHONY UNION HIGH SCHOOL BOARD OF SCHOOL DIRECTORS	]	

FINDINGS OF FACT AND ORDER

Statement of the Case.

An Unfair Labor Practice Charge was brought by the Vermont Education Association in behalf of Southwestern Vermont Education Association against the Mount Anthony Union High School Board of School Directors, Mr. David Adler, Chairman. This complaint is dated 30 January 1976. George Sleeman, Superintendent of Schools, John Donoghue, Esquire, advisor to the Board, and David Adler, Chairman of the Board, were named specifically in the complaint but not as parties. The petition was brought under 21 V.S.A., §1727, but was not specific as to the charges. A hearing was held at Bennington, Vermont on September 24, 1976, the petitioner being represented by Robert D. Rachlan, Esquire and Gary S. Barnes, Esquire, of the firm of Downs, Rachlan & Martin, St. Johnsbury, Vermont. The employer was represented by John M. Donoghue, Esquire, of Poughkeepsie, New York. Present were Mr. Kemsley and Mr. Wallace, being a majority of the Commissioners. Mr. Kemsley presided. Donald E. O'Brien, Esquire, counsel to the Board, was also present. Upon the request of the parties, the Board permitted the negotiations to continue on the assurances that a stipulation would be filed. No stipulation has been filed to date.

Discussion of the Evidence.

There was considerable controversy between the parties as to the facts. Essentially, the petitioner alleged that certain non-certified employees of the District, custodians, to be precise, had organized for the purpose of engaging in collective bargaining. This group had sought voluntary recognition from the School District, and had been refused. At this point, it is alleged that they were discharged, on the assumption that the School District was going to engage a contractor or contractors for the purpose of performing the custodial services by contract rather than through its own employees. The School District, in essence, contended that the discharge of the employees was in no way connected with the current labor dispute and negotiations.

Findings of Fact.

1. The parties stipulated that a bargaining unit be designated consisting of all non-teaching, non-supervisory employees of the Mount Anthony School District, including teaching aides. Eligibility for inclusion in the bargaining unit is to be determined from the payroll list of the employer as of September 24, 1976, and revised as to current employees to a date not more than 10 days before the election of a collective bargaining representative and further revised by the inclusion of certain of the names of the discharged employees.

2. The parties further stipulated that the Board would conduct an election by secret ballot and certify the results to the parties, the bargaining unit to include any discharged employees who are ordered to be reinstated by the Board as a result of the evidence introduced at the hearing.

3. The petitioner contends that the discharge of six high school custodians was in violation of Title 21, Vermont Statutes Annotated,

Sections 1726(a) (1) and (3). It was admitted by the petitionee School District that it contracted out the janitorial services, but it contends that such contracts were for valid business purposes and not because of organizational activities on the part of the employees.

4. Between November 1974 and April 1975, the petitioner obtained signatures of various employees of the petitionee School District to a petition that it be recognized as the exclusive bargaining agent for all School District employees "including secretaries, teachers' aides, janitors, substitutes and other nonprofessional and para-professional personnel". Petitioner's Exhibit 1. Authorization cards from the employees were obtained during the period August 1975 through November 1975. Petitioner's Exhibit 2.

5. The Constitution and Bylaws of petitioner were adopted June 20, 1975. Petitioner's Exhibit 3.

6. The petitions (Petitioner's Exhibit 1) were presented to the Chairman of the Board by letter of transmittal dated June 25, 1975 (Petitioner's Exhibit 4) requesting that the School Board contact the petitioner's President if there were any further questions before the School Board met to consider the request for recognition.

7. The attorney for the School District, John M. Donoghue, Esquire, replied by letter dated July 10, 1975 (Petitioner's Exhibit 5) stating that some of the signatures on the petition did not match the payroll signatures of the employees and that he therefore was recommending that the Board reject the request for recognition as unsupported by a proper showing of interest. He also noted in his letter that some of the employees were described as kitchen employees and cooks, who were not employed by the School District but rather by a contractor.

8. On August 22, 1975 the petitioner sent out a notice of a meeting of its organization to be held on August 27, 1975 (Petioner's Exhibit 6). This notice alleged that there had been certain errors in the original recognition petition and that therefore new authorization cards were enclosed to be completed and handed in at the August 27 meeting. It was stated that the cards would be submitted to the School Board for action after commencement of school in September and, after recognition had been obtained, negotiations would proceed. The notice also contained information as to the desirability for seeking recognition and of commencing collective bargaining.

9. On August 25, 1975, George A. Sleeman, Superintednent, sent a notice to all employees of the School District (Petitioner's Exhibit 7). In this letter the Superintendent stated that he would like to "clarify some of the benefits that you enjoy in a non-union employee-employer working relationship". He then listed certain benefits which he felt the employees presently enjoyed. He went on to state that he could not remember when a full time competent employee had been laid off for lack of work, and he felt this was real job security. Further comments were made with respect to the handling of employee grievances and the letter concluded by inviting questions from the receiver, which it was alleged would get the same prompt, courteous consideration that they had in the past, and this without the payment of any dues or requirements for signatures on recognition cards.

10. At a School Board meeting on July 23, 1973 the Board first discussed the question of contracting out the janitor work to an independent contractor. The matter was also discussed at two or three later meetings

in 1973. The minutes also disclose allegations of problems with respect to cleanliness and high turnover of custodial personnel, particularly at the Senior High School. No final action was taken in 1973 because no bidders were found who would be willing to do the work for less than one year, and the Superintendent had requested a trial contract on a 60-day basis.

11. The matter of contracting out again arose at a Board meeting held on September 22, 1975, in the report of the Superintendent as to custodial services and also food services. The principal, Mr. Pelkie, indicated a very high figure for janitorial services (Petitoner's Exhibit 10).

12. One of the High School custodians, Joel Raetz, signed his authorization card on October 5, 1975 (Petitioner's Exhibit 2). Shortly before this time he had been asked to meet with Mr. Pelkie because of some difficulties on the job including a recent fight with another custodian. During the conversation a discussion ensued as to the contracting out of the janitorial services, and Mr. Pelkie admitted that this was under consideration. There was some confusion as to whether the discussion was about the Senior High School or both the Senior and Junior High Schools. The authorization cards (Petitioner's Exhibit 2) were signed only by Senior High custodians and not by the Junior High School custodians.

13. On October 13, 1975 the Superintendent again reported to the School Board. He did not mention the fact that the petitioner had applied for recognition as the exclusive bargaining agent for most of the District employees, or of the fact that the custodians themselves were a part of the newly proposed bargaining unit. The only mention of the custodians

as such was that only one of the present six fulltime custodians at the Senior High School would be retained after the contract had been let for the janitorial work. He recommended that a contract be initiated for a one year period, and that it should take in only the Senior High School. He claimed that the administrators in three other local Bennington School Districts were pleased with similar arrangements which they had made. The cost was also a consideration (Petitioner's Exhibit 11).

14. Again, on October 27, 1975, the matter of the sub-contract for custodial work was discussed. The specifications for bids were passed around and the Board requested authority to solicit bids based on these specifications. Petitioner's Exhibit 12.

15. The matter again came up before the Mount Anthony Board at its meeting of December 8, 1975 (Petitioner's Exhibit 13). A possible bidder was present who was interrogated by members of the Board, as to the scope of the work, hours, the number of people who would be working, supervision, and whether local people would be hired. The Board apparently expected $15,000.00 in savings during the first year. There was discussion of a multi-year contract.

16. The petitioner distributed another news letter on or after November 5, 1975 (Petitioner's Exhibit 8). Comments were made about the Superintendent's letter of August 25. No reference was made to news as to the proposed contracting out of the janitorial work.

17. Again, on January 12, 1976, the Board discussed contracting out the janitorial services. Petitioner's Exhibit 14. A contract signed with one Joseph Lora and dated December 2, 1975 was presented for discussion. Petitionee's Exhibit A. The amount of the contract was $43,000.00, but it was for a period of less than a year. The Board

wanted a full year's contract, including summer services, at a cost of $63,000.00. Mr. Lora assured the Board that he would give coverage from 7:00 A.M. until 12:00 Midnight except on weekends, and that he was willing to enter into a six month's contract. The Board wished to use his contract as a yardstick for later action in other buildings. Mention was made that the Board was no longer in the bus business and it should be out of the janitorial business. The Superintendent stated that he had left openings in some of the buildings so as to accommodate some of the custodians who would be terminated because of the new contract. Mr. Lora gave assurances to the Board that he would interview the terminated custodians first. The Board then voted to enter into a contract commencing February 1, 1976. No action was taken or reference made to the requests on the part of the employees for recognition, including the custodians.

18. As a consequence of the contract with Mr. Lora for janitorial services at the Senior High School, five of the six custodians were terminated by letter dated January 14, 1976. Petitioner's Exhibit 9. The employment was terminated effective January 30, 1976, and mention was made that Mr. Lora would be contacting these people to determine if they were interested in working for him. One of the six custodians was transferred to the Junior High School, in the same District.

19. The employment of the following custodians was terminated by the letter of January 14: Patrick Burke, Lawrence Chaffey, Bernard McDonald, Joel Raetz and Donald Hayes. Fred Smith was transferred to the Junior High School. Donald Hayes was employed by Mr. Lora.

20. All five employees are presently employed. The Board is unable to make a finding as to their income or their desire to be reinstated in

their former employment with the School District.

21. The petition for collective bargaining representation proposes a bargaining unit consisting of custodians and others, totaling 29 employees. Seventeen employees signed the recognition cards. It is not known by the Board as to the exact number of employees who would actually be in the proposed bargaining unit, but this number would seem to be approximately twenty-nine. Five of this number were affected by the discharge. There is no evidence as to why the custodial employees at the Senior High School were discharged rather than custodial employees of the District in general.

22. The employer was fully aware that the five discharged employees were involved in labor organizational activity.

23. The exhibits and the transcript are made a part of these Findings for purposes of review by the Supreme Court.

Conclusions of Law and Opinion.

21 V.S.A., §1726 reads in part as follows:

"(a) It shall be an unfair labor practice for an employer:

> (1) To interfere with, restrain or coerce employees in the exercise of their rights guaranteed by this chapter or by any other law, rule or regulation.
>
> * * *
>
> (3) By discrimination in regard to hiring or tenure of employment or by any term or condition of employment to encourage or discourage membership in any employee organization."

The question of employer motivation in these matters in important. Ohland v. Dubay, 133 Vt. 300. The leading cases under the National Labor Relations Act are National Labor Relations Board v. Great Dane Trailers, 388 U.S. 26, and National Labor Relations Board v. Fleetwood Trailer Co., Inc., 389 U.S. 375. Kheel Labor Law, Volume 18B, Sec.

12.02(2) discusses the motivation factors at considerable length. He states that when there is specific evidence of an employer's unlawful motivation, such evidence is often sufficient to establish a prima facie violation. When no substantial and legitimate business end can be demonstrated by the employer, the motivation for discharge is immaterial. When there is a substantial and legitimate business end to be served, and this seems to be the situation here, where a discussion as to the contracting out of janitorial services took place over a period of three years, then the bad motivation of the employer must be established affirmatively by the petitioner. When the issue is in doubt, then a balance ought to be struck by the trier of facts between the destruction of or infringement against employee rights, such as a discharge, and the legitimate business justification of the employer.

It is quite clear here that the termination of employment for five custodians, with approximately two weeks' notice, and in the middle of the school year, was "inherently destructive" of their rights. The question then becomes whether the employer can establish the controlling motivation of "substantial and legitimate" business ends. This is a realistic burden to place upon the employer, since proof of motivation is most accessible to it.

There does not appear to be any evidence supporting anti-union animus. However, the evidence clearly discloses that the Board was unhappy with the attitude of some of the custodians in the Senior High School, particularly Joel Raetz, and the School District itself was clearly aware of the long standing efforts of the employees, including the custodians, to organize. We must distinguish here between the Board and the

administrators, Mr. Sleeman and Mr. Pelkie. The minutes do not disclose that the administrators at any time informed the Board of the organizational efforts of the employees, especially the custodians, and it is, as far as the evidence discloses, apparent that the Board was unaware of these organizational activities. However, in view of the fact that the Board had made no decision to contract out the custodial services by the time the petitions were first filed and the cards signed, the Board feels that it was indeed an unfair labor practice to discharge the five employees during the negotiations. This finding and conclusion is further supported by the anti-union memorandum of Superintendent Sleeman dated August 25. Petitioner's Exhibit 7.

The Board further feels, however, that the unfair labor practice was unintentional on the part of the Board, that restoration to employment of those involved would completely satisfy the situation.

Order.

It is hereby ORDERED that the School Board offer re-employment to the five employees discharged, viz.: Patrick Burke, Lawrence Chaffey, Bernard McDonald, Joel Raetz and Donald Hayes. Such offer must be made in writing, sent Registered Mail, return receipt requested to such former employees at their last known addresses within thirty (30) days of the date hereof. If any such employee accepts the offer within fifteen (15) days of the date of receipt of such offer, he shall be reinstated at current levels of pay with all back wages and other benefits, less the gross amount

of any wages received in the period between his discharge and the date of such rehiring.

Dated at Rutland, Vermont this 11th day of March, 1977.

VERMONT LABOR RELATIONS BOARD

By _____
William G. Kemsley, Sr.

_____
H. James Wallace