

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:

LEONARD HALNON

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DOCKET NO. 88-22

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On April 21, 1988, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Leonard Halnon ("Grievant"). The grievance alleged that the State of Vermont, Department of Social and Rehabilitation Services ("Employer") violated Articles 18 and 22 of the collective bargaining contract between the State and VSEA for the Non-Management Unit, effective for the period July 1, 1986, to June 30, 1988 ("Contract") by changing Grievant's flextime work schedule in retaliation for his having engaged in a protected activity, (i.e. filing a classification grievance).

A hearing was held before Board members Charles H. McHugh, Chairman; William G. Kemsley, Sr.; and Louis A. Toepfer on June 23, 1988. Assistant Attorney General Michael Seibert represented the Employer. VSEA Staff Attorney Michael Zimmerman represented Grievant.

The parties filed Memoranda of Law on July 1, 1988.

FINDINGS OF FACT

1. Article 18 of the Contract, Grievance Procedures, provides in pertinent part:

SECTION 7.

The parties agree, subject to applicable law, that every employee may freely institute complaints and/or grievances without threats, reprisal, or harassment by the employer.

2. Article 22 of the Contract, Employee Work Week/Work Location/ Work Shift, provides in pertinent part:

1. ALTERNATE WORK SCHEDULES - Subject to the operating needs of the department or agency, an appointing authority, after consultation with the VSEA, may establish alternative work schedules in which starting and quitting times, as well as length of meal breaks, for individual employees may vary from pre-established standard work schedules. Alternative work schedules include job sharing, four-day workweek, alternative schedules with core time, and actual flextime.

3. Since 1979, Grievant has been employed as a permanent status Vocational Rehabilitation Counselor, (Pay Grade 20). Since November, 1984, he has worked in the Department's Middlebury District Office. A Vocational Rehabilitation Counselor performs counseling and casework duties of more than ordinary professional difficulty and responsibility involving vocational rehabilitation services to physically and mentally handicapped persons (Grievant's Exhibit 1).

4. In two annual performance evaluations covering the period August 1, 1984 - July 31, 1985 and August 1, 1985 - July 31, 1986, respectively, Grievant received overall ratings of "4" (i.e. "Frequently exceeds job requirements/standards") (Grievant's Exhibits 3,6).

5. Between early 1986 and early 1988, Grievant's immediate supervisor was Wendelin Patterson, a Casework Supervisor. Although Patterson supervised Grievant, she worked in the Vocational Rehabilitation Regional Office in Burlington.

6. At all times relevant, Richard Hutchins was Director for the Vocational Rehabilitation Regional office in Burlington. He served as the supervisor of Patterson. Hutchins reported to the Director of Vocational Rehabilitation.

7. From 1979 to December, 1987, Grievant worked a "flextime" schedule of 6:30 a.m. to 3:00 p.m., with one-half hour for lunch. Both supervisors, Patterson and Hutchins, have always worked from 7:45 a.m. to 4:30 p.m., which corresponds with the public office hours for all Agency of Human Services departments.

8. In July 1986, Hutchins established performance expectations for Patterson which provided that she increase supervisory responsibility in the Middlebury district office.

9. Between early 1986 and April 1987, Grievant and Hutchins met on an average of once per week. Approximately one-half of these meetings were in Burlington region staff meetings. The remaining meetings between Grievant and Patterson concerned discussing particular clients, joint meetings with service providers or other business related to the Middlebury district office.

10. On February 14, 1987, Grievant filed a classification review request, requesting that his position be assigned to a new class entitled Vocational Rehabilitation Program Services Manager, and that the pay grade be increased from Pay Grade 20 to Pay Grade 24. Grievant submitted the request to Patterson and Hutchins to be forwarded to the Department of Personnel.

11. Article 19 of the Contract, Classification Review and Classification Grievances, provides in pertinent part as follows with respect to supervisory review of classification review requests:

The employee's supervisor shall review the completed form within ten workdays and submit written comments as appropriate. The Request for Review form shall then be submitted to the employee's appointing authority, who shall review it for accuracy, comment as deemed appropriate, and forward the original to the Department of Personnel within five (5) workdays.

12. Patterson and Hutchins did not comply with the Contract in this respect and did not complete their review and commenting until April 17. The request was delayed by Patterson and Hutchins because neither of them were aware of the applicable time deadlines of the Contract (Grievant's Exhibits 4, 5; Joint Exhibit 1).

13. In their comments on Grievant's classification review request, Patterson and Hutchins took the position that Grievant's position should not be reclassified as requested. They indicated that Grievant seemed to be redefining the job to a level beyond that of its major responsibility of case management services which was contrary to the established organizational plan for the Burlington Region. They stated: "It seems that (Grievant) has minimized the importance of the duties and responsibilities of the regional supervisors while overstating his duties and responsibilities." (Joint Exhibit 1).

14. On April 20, 1987, Patterson and Hutchins met with Grievant. At the meeting, they told Grievant that his classification review request indicated that he was spending too much time on auxiliary services rather than his primary responsibility of case management services. Grievant had indicated that he spent 35% of his time on case management activities (i.e. counseling and rehabilitation duties with clients); neither Patterson nor Hutchins were aware prior to this that Grievant was spending just 35% of his time on case management activities. Patterson and Hutchins told Grievant that he should be spending 75-80% of his time on case management. They also told Grievant that in his classification review request he had drastically overstated budgetary figures for the Middlebury district office and had minimized the importance of the duties of his supervisors.

Hutchins and Patterson further informed Grievant that he should reduce his use of formal memoranda to communicate with his supervisors and verbally communicate more frequently. At the meeting, Hutchins apologized to Grievant about the delay in his classification review. He told Grievant that he was unaware of the timeliness requirements.

15. After the meeting was over, Grievant that day sent a memorandum to Patterson requesting written clarification of the supervisory role/function in the Middlebury district office and any envisioned changes in the Vocational Rehabilitation Counselor's job responsibilities (Grievant's Exhibit 5). Patterson did not respond to this request.

16. Subsequent to April 1987, Patterson began to visit the Middlebury district office somewhat more frequently. She more often attended meetings with Grievant involving community outreach and generally was more involved in this area. Also, subsequent to April 1987, Hutchins suggested to Patterson that she attend the meetings of Agency of Human Services managers whom worked in the building where the Middlebury district office was located. Since the Fall of 1984, Grievant had represented Hutchins at these meetings. Grievant was still allowed to go to these meetings, but if Patterson was in attendance, she would act as Hutchins' representative. Hutchins assigned Patterson to attend these directors' meetings and become more involved in Grievant's community outreach activities because such activities took away from Grievant's primary case management duties.

17. On May 19, 1987, Pat McCue, Rehabilitation Specialist for a private underwriting company, wrote a letter to Grievant concerning a vocational rehabilitation client. In this letter, McCue stated that

"it has been most difficult to contact you via telephone, as I always seem to reach the recording." McCue indicated that "it may be more feasible to continue to be in touch by the mail system as I feel that I can be assured of a reply to my inquiries." (Joint Exhibit 2). McCue sent a copy of this letter to Patterson.

18. Due to Grievant's flextime schedule, scheduling regional staff meetings in Burlington was more difficult. In one instance, it was suggested that the staff meet at 2:00 p.m., but Grievant protested that he did not want to work a 10-hour day and the meeting time was changed to 1:00 p.m. so that Grievant would not be required to work overtime.

19. During the period that Patterson supervised Grievant, from early 1986 to early 1988, she received 91 written memoranda from Grievant. 60 of these memoranda were sent after Grievant filed his request for classification review on February 14, 1987. Many of these memoranda required response by Patterson, which to some extent contributed to her more frequent contacts with Grievant after April 1987. At various times, Patterson attempted to no avail to convince Grievant to verbally communicate more frequently and submit fewer memoranda.

20. Prior to December 1987, Patterson received a complaint from a client at the Evergreen House, a rehabilitation home for psychiatric patients. The client complained about Grievant's lack of availability for appointments.

21. During the period Grievant was working a flextime schedule, he at times would call Hutchins or Patterson prior to the start of their workday and leave messages for them to call him. Patterson

spoke to Grievant to dissuade him from making these calls when Grievant knew they were not there.

22. Grievant's classification review request was denied by the Department of Personnel and, on August 26, 1987, he filed a classification grievance. His grievance was denied.

23. On December 2, 1987, Patterson send a memorandum to Vocational Rehabilitation Counselors in the Burlington region, including Grievant, concerning "supervisory review or approval" of the counselors' rehabilitation certifications and plans. In the memorandum, Patterson indicated that if a counselor needed to expedite a plan, the counselor and Patterson could discuss the plan by phone. (Grievant's Exhibit 7).

24. On December 4, 1987, Grievant sent Patterson a memorandum in response to her memorandum. Grievant indicated that Patterson's memorandum was confusing as he understood the policy to be that she would review, but not need to approve, certification and plans. With respect to Patterson's comments concerning phone discussion, Grievant stated: "Phone discussion, given that we are often not working with schedules that permit continuous phone accessibility, is cumbersome at best." (Grievant's Exhibit 8).

25. On December 10, 1987, Hutchins sent Grievant a memorandum which provided as follows:

Effective December 28, 1987 your work schedule will return to correspond with regular state office hours: 7:45-4:30. This two week notice should give you time to make the necessary changes in your work and personal schedules.

As you indicated in your December 4, 1987 memo, "phone discussion, given that we (you and Wendy) are often not working with schedules that permit continuous phone accessibility, is cumbersome at best". Obviously, accessibility by phone with your

supervisor will not always be possible. To enhance your accessibility I have, therefore, decided to return your work schedule to regular state office hours. This should increase your opportunity to discuss supervisory matters with Wendy. (Grievant's Exhibit 9).

26. On December 10, 1987, Grievant informed Hutchins by memorandum that the "work schedule change you suggest is totally irrelevant to the issue of communication" and that he was grieving the schedule change. In the memorandum Grievant stated: "my statement that you quoted from Dec. 4, 1987 memo is not a reference to work schedule hours, but rather to the established fact that our work schedules regularly include meetings where neither myself nor Supervisor Patterson is available for phone discussion." (Grievant's Exhibit 10).

27. On December 15, 1987, Grievant spoke with Hutchins by phone concerning the flextime schedule change. During the conversation, Hutchins told Grievant that Grievant's April 20, 1987, memorandum was the "stupidest thing I have ever seen." Hutchins' comment was in reference to the memorandum directly following a meeting where Grievant was instructed to write fewer formal memoranda, and the April 20 memorandum indicated that Grievant was going to continue to discuss issues in writing and not verbally.

28. Hutchins did not grant Grievant's request to rescind the work schedule change.

29. Hutchins viewed Grievant's December 4, 1987, memorandum as "the straw that broke the camel's back" with respect to Grievant's communication problems. Hutchins concluded that Grievant should be more accessible during regular working hours primarily to address communication problems indicated by the proliferation of formal

memoranda from Grievant and Grievant's failure to address problems with supervisors verbally, and secondarily to enhance Grievant's availability to clients and service providers.

30. Due to strained relations between Grievant and Patterson by late 1987, Hutchins offered Grievant the option of having another supervisor in the region be his supervisor. Grievant chose Mike Adams, who began supervising Grievant in early 1988. Hutchins told Grievant that he was comfortable with Grievant negotiating a flextime schedule with Adams.

OPINION

At issue is whether the revocation of Grievant's flextime work schedule was made due to operational needs or, as Grievant contends, as retaliation for his having engaged in the protected activity of filing a classification grievance.

In such matters, the Board employs the analysis set forth in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977). Once Grievant demonstrates his conduct was protected, he must then show the conduct was a motivating factor in the action taken against him (i.e. the schedule change). Then the burden shifts to the Employer to show by a preponderance of the evidence it would have reached the same decision even in the absence of the protected conduct. Grievance of Cronin, 6 VLRB 37, 56 (1983). Aff'd., Vermont Supreme Court, Docket No. 83-210, February 4, 1987. Grievance of Sypheer, 5 VLRB 102, 129 (1982).

The first step in the analysis is to determine whether Grievant was engaging in protected activity. Clearly, he was. Article 19 of the Contract grants employees the right to file classification review

requests and, if necessary, subsequent classification grievances. Article 18, Section 7, provides employees may freely institute grievances "without threats, reprisal or harassment by the employer." The State does not dispute that the filing of a classification review request also constitutes protected activity. Thus, Grievant's filing of a classification review request and a subsequent classification grievance constituted protected activity.

The second step in the analysis we employ here is Grievant must show his protected conduct was a motivating factor in the decision to change his work schedule. In Sypher, supra, at 131, we noted the guidelines we would follow in making such a determination:

Guidelines for determining whether protected activities engaged in by an employee were a motivating factor in the employer's decision ... include whether the employer knew of the employee's protected activities, whether there was a climate of coercion, whether the timing of the discharge was suspect, Ohland v. Dubay, 133 Vt. 300 (1975); whether the employer gave as a reason for his decision a protected activity, Mt. Healthy, supra; Givhan v. Western Line Consolidated School District, 439 US 410 (1979); Pickering v. Board of Education, supra; whether an employer interrogated an employee about protected activity, NLRB v. Fictures Manufacturing Corp., supra; whether the employer discriminated between employees engaged in protected activities and employees not so engaged, National Labor Relations Board v. Great Dane Trailers, Inc., 388 US 26 (1967); or whether the employer warned the employee not to engage in protected activity, Fry Roofing Co., 99 LRRM 1544 (1978).

Grievant contends that three of those elements exist here: 1) the undisputed fact that Grievant's supervisors knew of his classification request and grievance, 2) the timing of the revocation of his flextime schedule, and 3) probably most importantly, the existence of a climate of coercion starting with Grievant's submission of his classification review request.

Clearly, Grievant's supervisors, Patterson and Hutchins, knew shortly after Grievant filed his classification review request in February 1987, and shortly after Grievant filed his classification grievance in July 1987, that Grievant had taken those actions. Also, the schedule change was subsequent to both the request for review and the grievance, while occurring in the same year.

The existence of the elements of knowledge and timing make it possible that retaliation may have occurred but, without more, are insufficient to establish Grievant's protected conduct was a motivating factor in the schedule change. The key element is whether a climate of coercion existed. Grievant contends that the climate of coercion manifested itself in two ways - increased supervision of Grievant and a corresponding diminution of his duties - and culminated in the revocation of his long-standing flextime schedule.

We conclude by a preponderance of the evidence that Grievant has not substantiated his claim that a climate of coercion existed. It is apparent that the increased supervision of Grievant was not motivated by Grievant's act of filing a classification review request. The goal of increased supervision of Grievant actually pre-dated the filing of the classification review request by approximately seven months. It is true that increased supervision was more evident after he filed for classification review. However, it is apparent that was primarily caused by two legitimate factors: 1) Grievant at that point substantially increased his output of memoranda which required supervisory response; and 2) the content of Grievant's classification review request brought to light that Grievant perceived his job to be different than management; particularly as it concerned percentage of

time spent on case management. Grievant's supervisors saw a need to correct Grievant's misperceptions by increased supervision.

The fact that this increased supervision came about in part because of the content of Grievant's classification review request does not indicate retaliation against Grievant because he filed such a request. Article 19, Section 2 of the Contract, relating to classification review and classification grievances, provides:

Nothing herein shall constrain management's right to direct an employee to perform the duties he/she was hired to perform, and management's exercise of this right at any stage of the classification review or classification grievance process, or at the conclusion of the process, shall not be deemed as unlawful retaliation or a violation of any rights arising out of this Article or Agreement.

It is evident that Grievant's supervisors properly were correcting misperceptions on Grievant's part as to the nature of his job duties and directing him to perform the duties he was hired to perform.

We conclude likewise with respect to any perceived diminution of Grievant's duties. Again, it is apparent that Grievant's supervisors were correcting misperceptions on his part and directing him to perform the primary duties he was hired to perform.

We ultimately conclude by a preponderance of the evidence that the revocation of Grievant's flextime schedule was based on operational needs and was not motivated by Grievant's classification review/grievance activity. It is apparent that the change was made primarily to correct what Grievant's supervisors perceived to be a communication problem between Grievant and his immediate supervisor; that the change would make Grievant more accessible to his supervisors and enhance improved direct communication. Secondly, it is

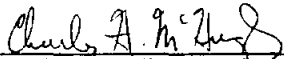
apparent that the change was made to improve Grievant's accessibility to clients and service providers. Whether the schedule change was wise is not for us to decide. We simply conclude that it is evident it was not motivated by his protected activity.

ORDER

Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED the Grievance of Leonard Halnon is DISMISSED.

Dated the 2nd day of September, 1988, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Charles H. McHugh, Chairman


William G. Kemsley, Sr.


Louis A. Toepfer