

VERMONT LABOR RELATIONS BOARD

HORN OF THE MOON WORKERS UNION)	
)	
v.)	DOCKET NOS. 88-75 and
)	89- 2
HORN OF THE MOON CAFE)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On December 22, 1988, the Horn of the Moon Workers Union ("Union") filed an unfair labor practice charge, and filed an amended charge on December 28, 1988, alleging that the Horn of the Moon Cafe ("Cafe") violated 21 VSA §1621(a)(1), (2), (3), (4) and (8) by discharging Crocker Herrick because of union activity and through other acts (Docket No. 88-75).

The Union filed a second unfair labor practice charge (Docket No. 89-2) on January 5, 1989, alleging that the Cafe violated 21 VSA §1621(a)(1) by firing David Frattalone because he refused to spy on employees involved in concerted activity and by postponing regular wage increases and/or bonuses to employees because of concerted activity.

The Labor Relations Board issued an unfair labor practice complaint in Docket No. 88-75 on January 6, 1989. The Board issued an unfair labor practice complaint in Docket No. 89-2 on January 20, 1989. The Board consolidated Docket Nos. 88-75 and 89-2 for purposes of hearing.

Hearings were held in the Board hearing room in Montpelier on February 9, 1989 and March 16, 1989, before Board Members Charles H. McHugh, Chairman; Catherine Frank and Louis Toepfer. Attorney John

Gain represented the Union. Attorney Alan Rome represented the Cafe.

The Cafe filed Proposed Findings of Fact and Conclusions of Law on March 29, 1989. The Union filed Proposed Findings of Fact and a Memorandum of Law on March 30, 1989.

FINDINGS OF FACT

1. Virginia Callan, with a partner, opened a natural foods restaurant in 1977 in Montpelier, Vermont, known as the Horn of the Moon Cafe. In 1979, Callan became a sole proprietor and moved the Cafe to its present Langdon Street location. The Cafe is exclusively a vegetarian restaurant. In the early years of the Cafe, profits were marginal. Callan worked long hours at the Cafe with little pay. At all times relevant, the number of employees at the Cafe ranged between 16 to 25 and the average work week of Cafe employees was 30 to 32 hours.

2. During the early 1980's, it was the custom of certain employees to go to the Cafe's basement to smoke marijuana at the close of their shift. On one such occasion, approximately during 1981, one of the employees accidentally tripped a burglar alarm and the Montpelier police came to the Cafe to investigate. After this incident, Callan indicated to employees that they should not smoke in the building.

3. After this incident, Cafe employees discontinued smoking marijuana in the building but some employees started smoking marijuana in the alley outside the Cafe. Marijuana use by employees at the Cafe from 1981 through Spring 1988 generally was limited to the evening shift and occurred when Callan was not at the Cafe. Marijuana use

most often took place before and after the dinner rush, and after 9:00 p.m. when the Cafe had closed. During this period, no one told Callan that employees were smoking marijuana at the Cafe and the evidence does not indicate that Callan was aware marijuana use was occurring.

4. In 1987, Callan published "The Horn of the Moon Cafe Cookbook", a vegetarian cookbook. The cookbook became very popular and received much media attention, including national publicity. One result of the cookbook was that business at the Cafe steadily increased.

5. In the Fall of 1987, an employee named Shari lost a bag of marijuana at the Cafe. Callan and a number of employees helped Shari look for the missing bag. The evidence does not indicate that Callan was aware that the bag contained marijuana.

6. On May 10, 1988, Cort Richardson, Callan's husband, discovered several employees, including John Flynn and night manager Crocker Herrick, drinking beer at the Cafe after hours. Richardson notified Callan of the incident. On May 11, 1988, Callan sent a memorandum to all Cafe night workers, including Herrick and Flynn. The memorandum provided in pertinent part as follows:

Last night Cort came into the Cafe and discovered a group of workers and a non-Cafe worker sitting around talking and drinking beer. I don't think I need to tell anyone that this was wrong, but I will since if it is occurring the staff is using poor judgment. What occurred is of deep concern to me for the following reasons: ...Second, it is illegal for employees to drink while working. Third, even if you were punched out (I hope you were) it is illegal to drink in a closed establishment. ...Sixth, of much concern to me beside all the other issues is judgment and responsibility and lack of it. I trust you all, and this event was wrong and has probably been occurring for some time. If just one person thinks something would concern me, thinks it's wrong, thinks that it might be putting the business at risk (and it was), the issue should be discussed with other staff and me. The crew

had some of the older workers (who I hope to set good examples and be more responsible) on last night.

(Employer's Exhibit A)

7. In 1987, Callan discharged seven employees at the Cafe. In 1987, Callan discharged Jamie Klaristenfeld because of poor performance and a marijuana smoking problem. In 1988, Callan discharged five employees prior to the summer. These discharges occurred prior to any concerted activity occurring among the employees.

8. The summer of 1988 was unusually busy at the Cafe and it was very hot. The workers had difficulty keeping up with the increased business. The workers complained to Callan in June about excessive heat in the kitchen and low staffing. Callan contacted air conditioning companies in June concerning installing air conditioning at the Cafe and was told that she would have to wait until the fall for installation. Callan communicated this to the staff. Callan also hired a bus person and an additional dishwasher in June to lighten the burden on existing staff.

9. Until the summer of 1988, Callan had always worked full-time at the restaurant. However, in the spring of 1988, Callan discovered that she would be receiving an adopted baby into her home as of July, 1988. Callan decided to take a leave of absence from the Cafe during the summer. Prior to July, Callan asked Andrea Mills to take over as daytime manager during the summer in her absence.

10. Mills had worked at the restaurant for many years. She agreed to assume the responsibilities of being the daytime manager from July through August, 1988, and was given a raise for those added responsibilities.

11. On July 18, 1988, Mills informed Callan that she no longer wished to perform the managing job in place of Callan. Mills told Callan that the job was too difficult for her and that it was straining her relationships with her friends at the Cafe. Mills asked to get her regular hours back. She apologized to Callan for the inconvenience this would cause her. Callan allowed Mills to return to her customary flexible work shift.

12. Prior to July, 1988, employees at the Cafe engaged in no concerted activity. In July of 1988, the workers at the Cafe held their first employees-only meeting. The employees discussed the issues which were troubling them at work and also discussed forming a union. Herrick was active in organizing the employee meetings and in exploring the possibility of forming a union.

13. On July 22, 1988, Mills, on behalf of Cafe employees, wrote a letter to Callan, expressing a "need for the Cafe to change and grow to accommodate the increased volume of business and the demand placed on workers in dealing with the increase" and indicating some of the concerns the employees had with working conditions at the Cafe (Employer's Exhibit B).

14. Callan wrote a letter to employees within a couple of days, responding to the July 22 letter. Therein, she recognized that there were "problems around the Cafe with working conditions and efficiency" and indicated a willingness to discuss issues raised in the July 22 letter. Also, Callan made the following statement in the letter:

When people drink on the job, break the law and steal from the Cafe, it does not give me a clear message from the staff. The price of a more professional relationship is that something like that occurring again will result in suspensions or firing (Employer's Exhibit B).

15. As a result of the concerns raised by employees, Callan met with employees at Hubbard Park in Montpelier several times between late July and mid-September, 1988. Callan acted defensively at the first meeting, but was not defensive at subsequent meetings. Herrick was one of the more vocal employees during these meetings in expressing employee concerns. As a result of concerns raised by employees, Callan contracted to have ceiling fans installed in the Cafe and to have a sink put in the front of the Cafe. Those improvements were completed by the fall at a cost of approximately \$5,000 to Callan. Callan also agreed to add extra staff.

16. During one of the summer staff meetings, the question of bonuses versus vacation/holiday pay arose. In the past Callan had given employees bonuses twice per year. Some of the staff suggested that vacation and holiday pay should be given. Callan explained to the staff that she only could afford either bonuses or vacation/holiday pay. The vacation and holiday pay payments would be more expensive for Callan but she told the staff that she was willing to provide vacation/holiday pay in lieu of bonuses if that was what the employees wanted. A hand vote was taken and the employees voted overwhelmingly for vacation and holiday pay for the staff instead of bonuses.

17. At a staff meeting on September 19, 1988, with Callan present, the early closing of the restaurant by night managers was discussed. Callan had been informed that the night managers, including Flynn and Herrick, had ordered the early closing of the restaurant before the official time of 9:00 p.m. Callan made it clear to staff on September 19 that she would not allow that to take place in the future.

18. During the summer and fall of 1988, Cafe employees discussed whether they should organize into a union. Some employees signed cards indicating they desired to be represented for collective bargaining purposes by the Horn of the Moon Workers Union. Herrick was active in organizing signatures on these cards. He told employees who signed cards that the cards would not be filed with the Labor Relations Board in support of a petition for collective bargaining representative unless employees were informed ahead of time. Callan told staff that it was their decision whether they wished to form a union and that she would go along with their decision.

19. Marijuana smoking at the Cafe by employees increased during the summer of 1988 when Callan was absent. Marijuana smoking took place during the day shift, before or after the dinner rush, and when the staff was cleaning up and preparing to close the restaurant. The workers would often step outside in the alley outside the kitchen and smoke marijuana. The evidence does not indicate that Callan was aware that employees were smoking marijuana while at the Cafe.

20. David Frattalone was hired as Cafe manager to replace Mills on August 7, 1988. He started smoking marijuana with other employees on the job shortly after he started.

21. In September 1988, Herrick and Neal Charnoff, a Cafe employee, were smoking marijuana in a car in the alley outside the Cafe. Callan walked by the car in which Herrick and Charnoff were seated. Callan spoke to Herrick and Charnoff and the evidence does not indicate that Callan was aware they were smoking marijuana.

22. On October 9, 1988, Cafe employees had a meeting, in Callan's absence, which 13 employees attended. Frattalone was in attendance. The employees asked Frattalone to be a liaison between the employees and Callan. At the meeting, employees discussed continuing staffing problems and some employees expressed dissatisfaction with some actions of Callan. The employees also talked about forming a union. The employees decided to ask Callan to appoint a mediator and asked Frattalone to relay that request to Callan (Union Exhibit 9).

23. As requested, Frattalone went to Callan on October 10 and told her he had been at the October 9 meeting. He told her about the employees' concerns and that the employees wanted to appoint a mediator. Callan indicated that she did not believe a mediator was needed. Callan also asked Frattalone to tell her what had occurred at the meeting. Callan did not order Frattalone to go to the next employees' meeting and report back to her on what had occurred.

24. By October 14, 1988, 18 Cafe employees signed a petition to Callan stating "(w)e... feel that an impartial mediator is necessary to have a fair and productive meeting". On October 14, Flynn and Herrick presented the petition to Callan. Frattalone was present. Herrick and Flynn had a short conversation with Callan and then left (Union Exhibit 6).

25. Earlier that day, two employees had informed Callan that Frattalone had smoked marijuana with other employees while managing the Cafe. As soon as Herrick and Flynn left, Callan turned to Frattalone and told him that it had been brought to her attention that he had been smoking marijuana with other employees while on duty.

Frattalone did not deny smoking marijuana. Callan informed him he was discharged. In deciding to dismiss Frattalone, Callan concluded that managers should be held to a higher standard on smoking marijuana than other employees, that they should be preventing it and not encouraging it.

26. Prior to October 14, Callan had received complaints from Cafe employees regarding Frattalone's performance as the Cafe manager; specifically about his lack of organization, bad attitude and inability to order supplies properly. Prior to October 14, Callan spoke to Frattalone about his work performance on several occasions.

27. Prior to October 14, 1988, no Cafe employees had ever told Callan about marijuana smoking by employees while they were on duty. Outside of her knowledge that Klaristenfeld had smoked marijuana while employed at the Cafe in 1987 and the 1981 incident of tripping the burglar alarm, the evidence does not indicate that Callan was aware prior to October 14 that Cafe employees were smoking marijuana while on duty.

28. On October 15, 1988, Joe Cross, a Cafe employee, spoke to Callan about the manner in which Frattalone had been discharged. During that conversation, Cross did not tell Callan that he and other employees had been smoking marijuana while on duty.

29. On October 17, 1988, Callan sent a memorandum to Cafe employees. Herrick received this memorandum. Therein, Callan agreed to submit her differences with the Cafe employees to mediation. She also stated as follows with respect to the dismissal of Frattalone:

I took this action after repeatedly speaking to him about poor job performance in managing the Cafe, and after receiving several complaints from workers about him. I also learned that at least one staff person had resigned recently

partly because Dave was not performing his managing duties and unfairly burdening others on their shifts.

But what drove me to act immediately was after I learned that Dave had been seen smoking pot while working with other staff members behind the Cafe. During my meeting with Dave on Friday, he admitted to smoking with staff on at least two occasions. It has always been the policy of the Cafe that doing illegal drugs while working is unacceptable. A manager is responsible for stopping such actions and setting an example, not joining in on very inappropriate behavior.

(Union Exhibit 8)

30. Callan made no attempt to determine which Cafe employees had been smoking marijuana with Frattalone.

31. After this memorandum was issued, some Cafe employees, including Herrick, continued to smoke marijuana at the Cafe while on duty.

32. On October 15, 1988, Flynn wrote a note to Herrick indicating that he was not working that day in protest over the manner in which Frattalone was fired. Flynn did not arrange for a replacement to work for him. Callan intercepted this note (Employer's Exhibit I).

33. On October 18, 1989, Callan dismissed Flynn, citing as reasons his absence of October 15, his involvement in closing the Cafe early and other performance issues.

34. Susan Terry, a mediator who teaches at Woodbury College, met with Callan and Richardson and the majority of Cafe employees on October 24. Terry asked if an election petition had been filed with the Labor Relations Board. She was informed that no petition had been filed. She stated that, once a petition was filed, her involvement as a mediator would end. Terry asked Callan and the group of Cafe employees each to select two agenda items to discuss at the meeting.

Callan selected the nature of the Cafe and the purpose of the Cafe to discuss. The group of employees selected staffing and Callan's management of the Cafe as the items to discuss. Herrick was one of the principal spokespersons for the employees' group during this meeting. The group of employees discussed organizing a union at the meeting. It was agreed at the meeting that, at least some of the time, a cashier was needed on a shift (Union Exhibits 1 and 2).

35. During October, there was much disagreement among employees concerning whether they wished to form a union. Also, there was some tension between Callan and some of the Cafe employees. Mills resigned during October due to the tension and divisive atmosphere which she perceived at the Cafe.

36. On November 10, 1988, Callan wrote Herrick a letter concerning a "few things (which) have been a problem with nights". She mentioned refried beans which had been burned, quiche and a tray of enchiladas which had been left out all night, and boxes not being crushed before going into the dumpster. Callan stated:

Please try to supervise the crew on these points. Some I know are your job (beans, quiche, enchiladas) as head cook, but also as manager make sure your staff is doing their job. I realize you have relatively new people on.

(Union Exhibit 3)

37. On November 16, 1988, Callan sent Herrick a warning letter concerning the back door to the Cafe being left unbolted and unlocked the night before. Callan informed Herrick that "(a)s the night manager, its your job to go over everything quickly before you leave", and stated "(t)his is a really serious mistake that obviously cannot happen again and greatly concerns me" (Union Exhibit 4).

38. The second meeting between Callan, the staff and Terry occurred on November 21, 1988. This meeting was not well attended. The staff members present were Herrick, Matthew O'Brien, Neal Charnoff and Jessica Hadley. Terry expressed some concern at the meeting pertaining to the low turnout. She suggested that a staff meeting be held at least one week before the next meeting with the mediator and that all employees be given advance notice of the meeting. Herrick and O'Brien agreed to arrange the meeting and provide notice to employees of the meeting. Also, Terry stated that a questionnaire should be prepared and distributed if a meeting was not held before the next mediation session.

39. The next mediation session was to take place on December 12, 1989. Herrick and O'Brien did not provide notice of or arrange for a staff meeting. On December 5, Callan sent out a questionnaire to the staff because no notice had been provided of a staff meeting. The questionnaire had a space for employees to fill out their names and contained questions pertaining to whether mediation was needed, whether they would participate in mediation and what times were best for employees to attend mediation sessions. The questionnaire also indicated that employee evaluations would be done later that month and that wage increases and "personal issues" could be discussed then (Union Exhibit 5).

40. Herrick contacted Cafe employees and told them not to fill out the questionnaire because it was not anonymous and because he did not think Callan should be doing the questionnaire. Herrick also expressed his disapproval to Callan (Union Exhibit 5).

41. On November 30, 1988, Callan told Herrick that she was not planning on dismissing him and that her November 10 and 16 letters to him were intended to get him to improve his performance.

42. On December 5, 1988, Jessica Hadley, a Cafe line cook, told Callan that she had smelled marijuana smoke on Herrick while he was on duty at the Cafe. Callan concluded that was insufficient evidence to confront Herrick with suspected drug use.

43. Klaristenfeld was reemployed at the Cafe in the fall of 1988. During the early part of December, 1988, a Cafe employee informed Callan that Klaristenfeld had been smoking marijuana with other employees while on duty. Klaristenfeld admitted he was smoking marijuana but that he did not want to incriminate other employees. Callan warned Klaristenfeld that if he was caught smoking marijuana again, he would be fired.

44. On December 8, 1988, Callan was informed by a Cafe customer that at some point previously the Montpelier police had been in the Cafe and frisked a few Cafe employees for drug possession. In fact, Cross had been frisked by the police in the Cafe in October, 1988, and the police had discovered no drugs. Flynn was the night manager that evening. Neither Cross nor Flynn informed Callan of the incident.

45. On December 12, 1988, Herrick filed a petition for election of collective bargaining representative, requesting an election among Cafe employees concerning whether they wished to be represented by the Horn of the Moon Workers Union. The petition was accompanied by cards signed by at least 30 percent of Cafe employees indicating that they wished to be represented for collective bargaining purposes by the Horn of the Moon Workers Union. Callan became aware of the petition

filing that day. The mediation session scheduled for that night was cancelled because Terry would not meet with the parties once an election petition was filed.

46. Prior to filing the election petition, Herrick did not inform some of the Cafe employees who had signed union authorization cards that he was going to file the election petition.

47. Some Cafe employees met on the evening of December 12 at the site of the scheduled mediation session. At the meeting, some employees angrily accused Herrick and O'Brien of sabotaging the mediation process and indicated they were upset that the election petition had been filed without their knowledge.

48. On December 16, 1988, Klaristenfeld, while on duty, went, without the landlord's permission, to a room on the third floor of the building in which the Cafe is housed. As Klaristenfeld was sitting in the room, Warren Kitzmiller, the landlord, came in and told him to leave because it was private property.

49. Within a day, Kitzmiller informed Callan of this incident and complained to her about Cafe employees coming into other areas of the building. Kitzmiller also told Callan that he had witnessed Cafe employees smoking marijuana outside the building, and that Callan had a marijuana problem on her hands which he wanted "cleaned up".

50. After this conversation, Callan was very concerned that she was in danger of being evicted by Kitzmiller and required to move the Cafe.

51. On December 17, 1988, Callan and Richardson waited for Klaristenfeld to arrive for work. When he arrived, Callan and Richardson drove Klaristenfeld to Richardson's office nearby.

Klaristenfeld told Callan that he knew why she was looking for him and that he was sorry. Klaristenfeld admitted that he had smoked marijuana previously in the room where Kitzmiller confronted him. Callan informed Klaristenfeld that he was fired for marijuana use. Klaristenfeld told Callan that he had smoked marijuana with Herrick on several occasions while they were on duty at the Cafe. Klaristenfeld wrote and signed a statement to that effect. While Callan and Richardson helped Klaristenfeld with the spelling of some words, Klaristenfeld was not coerced into making this statement.

52. On December 19, 1988, Charnoff indicated to Callan that Herrick had smoked marijuana while on duty at the Cafe.

53. On December 19, 1988, Callan asked Herrick if he had smoked marijuana while on duty as a manager at the Cafe. Herrick denied that he had been smoking marijuana while on duty. Callan informed Herrick that he was dismissed immediately. She gave a letter to Herrick that day which provided:

It has come to my attention that you have been bringing marijuana to work and using it on the premises including times while on duty, and managing the restaurant. This information comes from several sources and includes a written statement.

Given my clear policy on illegal drug use, I have no choice but to dismiss you, effective immediately, from the employ of the Horn of the Moon Cafe.

(Union Exhibit 7)

54. In immediately dismissing Frattalone and Herrick for smoking marijuana while on duty, while giving Klaristenfeld a second chance before dismissing him for smoking marijuana on duty, Callan held Frattalone and Herrick to a higher standard because she believed that they, as managers, should be preventing such drug use and not encouraging it by smoking marijuana themselves.

55. After Herrick was dismissed, Charnoff was promoted to Herrick's former position as night manager. In January, 1989, Charnoff told Callan that he had previously smoked marijuana while on duty at the Cafe but had stopped smoking while on duty.

OPINION

The essence of the Union's charges here are that Crocker Herrick was discharged from the Cafe because of his union organizing efforts and that David Frattalone was discharged for refusing to spy on employees who were engaged in union organizing activities.

Under the State Labor Relations Act, 21 VSA §1501 et seq ("SLRA"), employees have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choice, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. 21 VSA §1503. It is an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of these rights and to discharge employees in order to discourage membership in any labor organization. 21 VSA §1621(a)(1) and (3).

At the outset, we summarily dismiss the Union's claim that Frattalone was discharged for refusing to "spy" on employees who were engaged in union organizing activities. We have concluded that Cafe owner Virginia Callan did not require Frattalone to "spy" on employees. While Callan did question Frattalone about what went on at the October 9, 1988, employees' meeting, this occurred after Frattalone approached Callan and told her about the employees' concerns and their proposal for a mediator to resolve differences

between Callan and Cafe employees. Callan acted reasonably in seeking more information from the Cafe manager on employee concerns. She did not require him to attend any subsequent employees' meetings and report back to her. Thus, Frattalone was engaged in no activity protected by SLRA and there is no merit to the Union's claim.

Herrick clearly was engaged in activity protected by SLRA. He was a visibly active proponent of a union organizing effort at the Cafe. In determining whether Herrick was discharged for engaging in protected activity, we employ the analysis used by the US 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 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. Grievance of Sypher, 5 VLRB 102, 129 (1982). Mt. Healthy City School District Board of Education v. Doyle, 429 US 274 (1977). NLRB v. Transportation Management Corp., 462 US 393 (1983). Wright Line, 251 NLRB No. 150, 105 LRRM 1169 (1980).

The guidelines we follow in determining whether protected conduct was a motivating factor in an employer's decision to terminate an employee are: 1) whether the employer knew of the employee's protected activities, 2) whether there was a climate of coercion, 3) whether the timing of the discharge was suspect, 4) whether the employer gave as a reason for the decision a protected activity, 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, or 7) whether the employer warned the employee not to engage in protected activity. Grievance of Sypher, 5 VLRB 102, 131 (1982).

Many of these guidelines can be addressed summarily. Callan clearly knew of Herrick's protected activities, and did not give as a reason for the dismissal decision a protected activity. Callan did not warn Herrick not to engage in protected activity nor interrogate him about his protected activity.

Other guidelines require more extensive discussion. We conclude that a climate of coercion did not exist at the time of Herrick's dismissal. While it is evident that Callan at times acted defensively as a result of employees voicing concerns over working conditions at the Cafe, and Herrick was one of the principal spokespersons for employees, she took no actions compelling employees by pressure or threats to limit their concerted activities. In fact, some physical improvements, changes in benefits approved by employees and staffing increases resulted from employees' protected activities.

It is true that dissension among employees concerning whether they wanted to organize into a union existed, but Callan cannot be held accountable for this. We also conclude that no climate of coercion existed due to dismissals of John Flynn, a union supporter, Frattalone and Jamie Klaristenfeld within the previous two months. Flynn, Frattalone and Klaristenfeld were discharged for reasons unrelated to employees' concerted activities and it was not unusual for there to be a high number of dismissals at the Cafe in any given period.

On its face, the timing of Herrick's discharge was suspicious since it occurred just a week after he had filed an election petition

with the Board and during a period when Herrick was the most vocal proponent of the Cafe employees organizing into a union. However, the suspect timing of the dismissal is diminished considerably by Callan having discovered 11 days previous that Montpelier police had entered the Cafe and frisked employees for suspected drug possession and, most significantly, by Callan being told a few days previous by her landlord that Callan had a marijuana problem at the Cafe which he wanted "cleaned up". Callan was understandably concerned that she was in danger of being evicted and required to move the Cafe unless she firmly addressed any problems of employees' illegal drug use on Cafe premises.

Thus, when Callan was told on December 17 and December 19 by two Cafe employees that Herrick had smoked marijuana while on duty as a night shift manager, her immediate dismissal of Herrick on December 19 for smoking marijuana while on duty is less suspect. This is particularly so when Callan had provided Cafe employees with clear written notice that alcohol consumption or illegal drug use while on duty would not be tolerated.

We are persuaded that the timing of Herrick's dismissal was motivated by Callan's concern that Herrick, as a manager, was responsible for stopping the use of illegal drugs by employees while working, not joining in the use of illegal drugs. The timing of the dismissal was not motivated by Herrick's protected activities.

We further conclude that Callan did not discriminate between an employee engaged in protected activities and employees not so engaged when she immediately discharged Herrick for smoking marijuana, while not discharging Klaristenfeld until the second time she discovered he

was smoking marijuana on duty and, further, taking no action against Neil Charnoff when he informed her he had smoked marijuana on duty. We are persuaded by Callan's explanation that she held Herrick to a higher standard because he was a manager, and should be preventing such drug use and not encouraging it by smoking marijuana himself while on duty. Klaristenfeld and Charnoff were not managers when they were smoking marijuana on duty.

We conclude that smoking marijuana and inadequate performance, rather than the protected activities engaged in by Herrick, were the motivating factors in Callan's decision to dismiss him.

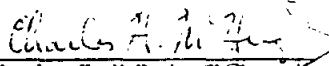
In the unfair labor practice charges filed with the Board, the Union raised additional claims of unfair labor practices related to wage increases and/or bonuses not being granted employees and the December 5, 1988, questionnaire provided to Cafe employees by Callan. However, these issues have not been briefed by the Union and we deem them waived. In any event, we conclude that none of these actions taken by the Employer under the circumstances constituted an unfair labor practice.

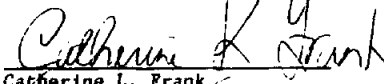
ORDER

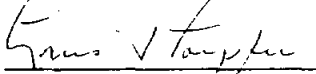
Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the unfair labor practice charges filed by the Horn of the Moon Workers Union in Docket Nos. 88-75 and 89-2 are DISMISSED.

Dated this 4th day of May, 1989, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Charles H. McHugh, Chairman


Catherine L. Frank


Louis A. Toepfer