VERMONT LABOR RELATIONS BOARD

VERMONT STATE COLLEGES STAFF FEDERATION, AFT LOCAL 4023, AFT-CIO	)	
v.	)	DOCKET NO. 89-48
VERMONT STATE COLLEGES	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On June 30, 1989, the Vermont State Colleges Staff Federation, AFT Local 4023, AFL-CIO ("Federation") filed an unfair labor practice charge, alleging that the Vermont State Colleges ("Colleges") violated 3 VSA §961(3) and (4) in not hiring Sara Bean for the position of Bursar in the Lyndon State College Business Office. The Federation alleged that the Colleges discriminated against Bean because she was the Federation Chapter President at Lyndon, because of her union involvement and because she brought employee complaints to management.

On September 21, 1989, the Labor Relations Board issued an unfair labor practice complaint. The case was scheduled to be heard on January 25, 1990. At the January 25 hearing, the Colleges made a motion to continue the case because A. Richard Boera had not appeared as a witness. The Board granted the continuance, and the hearing was rescheduled to April 5, 1990. The Board issued a subpoena for Boera's attendance at the hearing. The hearing was held on April 5 before Board members Charles McHugh, Chairman; Catherine Frank and Louis Toepfer. Attorney Nicholas DiGiovanni, Jr. of Morgan, Brown and Joy represented the Colleges. Vincent Sanacore, American Federation of Teachers representative, represented the Federation.

No briefs were filed by the parties.

FINDINGS OF FACT

1. Sara Bean was hired as Assistant Bursar of Lyndon State College effective February 26, 1979, and has remained in that position to the present (Federation Exhibit 1, Page 1).

2. As Assistant Bursar, Bean has assisted the Bursar in receiving cash and check payments on student accounts receivable, billing charges, processing adjustments, issuing refunds, receiving other income and properly posting to various fund accounts. Bean also has assisted the Bursar in registering new and returning students. Bean has maintained bookstore and student government accounts. Bean has been required to operate a computer in carrying out her functions. She also has been required to substitute for the Bursar during periods of vacation or illness (Federation Exhibit 1, Page 2; Federation Exhibit 2, Federation Exhibit 7).

3. Ruth Southouse was Bursar at all times relevant until May, 1989, when she retired. Beginning approximately in 1985, and continuing until her retirement, Southouse periodically was out of work for extended periods due to illness. Southouse's periods of absence sometimes were several weeks, and one time was approximately two months. Bean performed the Bursar's duties during Southouse's absences. On October 21, 1985, A. Richard Boera, Dean of Business Affairs, wrote a memorandum to Bean thanking her for her "capable back-up" and "double-duty coverage" during Southouse's absences (Federation Exhibit 6).

4. In her 11 years as Assistant Bursar, Bean has not received any poor performance evaluations or complaints about her work from her

supervisors. In the performance evaluations introduced into evidence, supervisors rated Bean's overall work performance as "excellent" or "superior" (Federation Exhibits 2 and 4).

5. In 1983, Bean applied to have her position reclassified from Pay Grade 5 to Pay Grade 6. Bean's request for reclassification was denied at that time, and subsequently denied on a second occasion when Bean requested reclassification. On November 30, 1987, as a result of Bean's third request for reclassification, her request for reclassification to Pay Grade 6 was approved. Pursuant to the collective bargaining agreement between the Colleges and the Federation, Bean did not receive a pay increase due to the reclassification (Federation Exhibits 5, 7 and 8).

6. Bean has been a member of the Federation since it was certified to represent employees in 1979, and always has been active in the Federation. Bean was Vice President of the College Chapter of the Federation one year, Chapter Treasurer for four years, and became Chapter President in January, 1989. During her time as Federation officer, Bean was involved in processing two grievances.

7. We do not find that a pattern existed at the College of not transferring or promoting Federation members at the College to fill position vacancies.

8. A. Richard Boera was Dean of Business Affairs at the College from 1971 until his retirement in January, 1989. Boera then came out of retirement temporarily from May, 1989, to August, 1989, to replace Robert Bean, Acting Dean of Business Affairs, who had a disabling heart attack.

9. Boera had no dealings with Sara Bean with respect to her Federation activities except with respect to setting the school calendar, which was a pleasant exchange.

10. In May, 1989, Southouse retired as Bursar. Boera was responsible for conducting the search for Southouse's replacement, and made the final hiring recommendation to the College President. The position announcement for the vacant Bursar position was posted May 26, 1989 (Federation Exhibit 9).

11. Bean applied for the Bursar position. When she first applied for the position by submitting a short letter to Boera, Boera informed her that he wanted a complete cover letter with a resume. Boera also told Bean that he hoped that, if Bean was not selected for the Bursar position, she would not take it out on the person who was hired. On June 7, 1989, Bean submitted to Boera a cover letter and resume for the Bursar vacancy (Federation Exhibit 10).

12. There were a dozen applicants for the Bursar position. Bean was the only College employee who applied to fill the vacancy. Boera interviewed six of the applicants, including Bean. Boera's interview with Bean was different from the other interviews to the extent that he did not discuss the Bursar position itself in as much detail with Bean, since Bean was familiar with the position. Boera asked Bean what she would do to improve the position. Boera reiterated that he hoped Bean would not be mean to the person hired as Bursar if Bean did not get the position.

13. Boera recommended to the College President that Judy Emerson be hired for the Bursar position, and Emerson was hired. Emerson had been Town Clerk and Treasurer for the Town of Burke for the previous

five years, and had been Assistant Town Clerk for 10 years prior to that. Emerson had experience using a personal computer for word processing and data base functions (Colleges Exhibit A).

14. Boera received supportive references on Emerson. In recommending that Emerson be hired, Boera concluded that her extensive experience as a Town Clerk indicated that she was very knowledgeable in a number of areas. Boera also concluded that Emerson was more qualified than Bean to serve the long-term interests of the College in an age where computers were increasingly important.

15. Bean found out that she had not been selected for the Bursar position when Boera personally told her. Boera told Bean that it was a judgment call, and he had concluded that Emerson was more qualified. Boera offered to give Bean $400 to "train" Emerson, so that Bean could orientate Emerson to the College's financial system and procedures. Bean ultimately accepted Boera's offer and did orientate Emerson over an approximate six-month period.

16. At the time Boera decided to not recommend that Bean be appointed Bursar, he was aware that Bean was Chapter President of the Federation at Lyndon.

OPINION

The Federation contends that the Colleges committed an unfair labor practice in violation of 3 VSA §961(3) and (4) in not appointing Sara Bean to fill the Bursar position at Lyndon State College. The Federation alleges that the Colleges discriminated against Bean because she was the Federation Chapter President at Lyndon, because of her involvement in the Federation, and because she brought employee complaints to management.

The pertinent provisions of the State Employees Labor Relations Act ("SELRA"), 3 VSA §901 et seq., provide in §961:

> It shall be an unfair labor practice for an employer:
>
> ... 3) By discrimination in regard to hire and tenure of employment or any term or condition of employment to encourage or discourage membership in any employee organization.
>
> 4) To discharge or otherwise discriminate against an employee because he has filed charges or complaints or given testimony under this chapter.

Bean clearly was engaged in activities protected by SELRA. As President, Vice President and Treasurer of the Lyndon State College Chapter of the Federation at various times, Bean was a visibly active member of the Federation.

In determining whether Bean was not appointed to the Bursar position 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. Horn of the Moon Workers Union v. Horn of the Moon Cafe, 12 VLRB 110 (1988). 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 take action

against 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 action 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).

In applying these guidelines to the circumstances of this case, we conclude that the Federation has not demonstrated by a preponderance of the evidence that Bean's protected conduct was a motivating factor in the decision of the Colleges to not appoint her to the Bursar position.

The agent of the Colleges primarily responsible for the decision to not appoint Bean as Bursar, A. Richard Boera, knew at the time that Bean was the Federation Chapter President at Lyndon State College. However, the Federation has not demonstrated by a preponderance of the evidence that this knowledge played any part in Boera's effective recommendation that Bean not be appointed Bursar. There is no evidence of a climate of coercion. The timing of the action was not suspect, even though Bean was Federation Chapter President, given the need to fill the position due to the retirement of the previous Bursar.

Boera did not give as a reason for the decision a protected activity, nor did he question Bean about any such protected activity. Boera also did not warn Bean at any time not to engage in protected activity.

We further conclude that the Federation did not demonstrate that the Colleges discriminated between employees engaged in protected activities and employees not so engaged. The Federation presented evidence purporting to indicate that a pattern existed of Federation members being discriminated against when opportunities arose to transfer or be promoted to vacant positions at the College. However, the evidence presented was insufficient for us to conclude such a pattern existed. The charges of the Federation are not supported by a preponderance of the evidence.

Under the circumstances, we conclude that Boera's judgment that Judy Emerson was more qualified than Bean, rather than the protected activities engaged in by Bean, was the motivating factor in the Colleges' decision to not appoint Bean to the Bursar position.

ORDER

Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the unfair labor practice charge filed by the Vermont State Colleges Staff Federation, AFT Local 4023, AFL-CIO, is DISMISSED.

Dated this 4th day of May, 1990, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh, Chairman

Catherine L. Frank

Louis A. Toepfer