

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:

BENJAMIN DAY

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DOCKET NO. 90-48

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On August 10, 1990, Benjamin Day, Jr., ("Grievant") by and through his attorney, J. Scott Cameron, filed a grievance against the State of Vermont, Agency of Natural Resources, Department of Fish and Wildlife ("Employer"). Specifically, the grievance alleges: 1) that the Employer violated State Rules and Regulations for Personnel Administration ("Personnel Rules") and Article 72 of the current Contract between the Employer and the Vermont State Employees Association ("VSEA"), effective for the period July 1, 1990 to June 30, 1992 ("Contract") by failing to provide Grievant with written notice 30 days prior to the effective date of his termination/position elimination, and by failing to honor any of its responsibilities to Grievant as provided under Article 72, when Grievant was notified on July 25, 1990, that he would be terminated on August 5, 1990; 2) that the Employer's decision to terminate Grievant was without just cause, in violation of Grievant's rights under the Contract, statute and the Personnel Rules; 3) that the Employer's reorganization was a pretext to eliminate Grievant's employment for an impermissible reason; and 4) that the Employer's decision to eliminate Grievant's position, rather than reallocate or reassign Grievant to the position of Operations Director, and to

otherwise deny him all rights pertaining to an employee in his position, violated Grievant's rights under the Contract, Personnel Rules and Vermont statutes, and/or constituted unlawful employment discrimination because of his age, political affiliation or advantage, or some other non-merit factor, in violation of the Article 5 of the Contract.

Grievant filed an Amended Grievance on December 31, 1990, at which time he additionally alleged that the Employer had improperly docked his accrued annual leave balance following Grievant's departure from the Department on August 5, 1990, and that it had improperly subjected Grievant to a reduction in force on November 21, 1990, due to discriminatory or other non-merit factors.

The Employer filed a response to the Motion to Amend on January 25, 1991, contending, in part that the Grievant's Motion to Amend relative to the November 21, 1990, notification of a reduction in force was, in fact, a separate grievance, and untimely filed, in that it should have been filed within 30 days of the Employer's notice of the reduction in force. Grievant responded on January 31, 1991. The parties presented oral arguments on Grievant's Motion to Amend before Board Members Charles H. McHugh, Chairman, Louis A. Toepfer, and Leslie G. Seaver on February 7, 1991. J. Scott Cameron, Esq. represented Grievant. Michael Seibert, Assistant Attorney General, represented the Employer. The Board granted Grievant's Motion to Amend.

Hearings on the merits of the grievance were heard on April 4, 5 and 15, 1991, and May 2, 6, 21, 24, and 31, 1991, before Board Members Charles H. McHugh, Chairman, Catherine L. Frank, and Leslie G. Seaver. Attorney Cameron represented Grievant. Attorney Seibert represented the Employer.

Grievant served a subpoena on Vermont State Representative John Murphy on April 9, 1991, to appear to testify on April 15, 1991. William P. Russell, Chief Legislative Counsel and attorney for Representative Murphy, responded to the subpoena and filed a Motion to Quash on April 15, 1991. The Board denied the motion and issued a Memorandum and Order on May 2, 1991. Pursuant to the order, the Board issued a Subpoena for Representative Murphy to appear and testify at the Board hearing scheduled for May 6, 1991. 14 VLRB 127.

By letter of May 6, 1991, Attorney Russell informed the Board that Representative Murphy did not intend to testify. Grievant filed a Motion to Enforce the Board's May 2, 1991, Order in Washington County Superior Court. A hearing was held on May 27, 1991, before Vermont Superior Court Judge Alan W. Cheever. Judge Cheever issued an Opinion and Order on May 29, 1991, and ordered that Representative Murphy may be subpoenaed to testify on May 31, 1991, to respond to five specific questions. The Board issued a subpoena on May 30, 1991, for Representative Murphy to testify on May 31, 1991. Representative Murphy appeared before the Board and testified on May 31, 1991, pursuant to the Board's subpoena. Attorney Gerald Tarrant, represented Representative Murphy at the May 31, 1991, hearing.

At the conclusion of the eight days of hearings, Grievant filed a Motion to Reopen Hearing on June 5, 1991, to have the opportunity to offer the testimony of a newspaper reporter who had spoken with Representative Murphy. The Employer filed State's Memorandum in Opposition to Grievant's Motion to Reopen on June 19, 1991. Grievant responded on June 26, 1991 with a reply brief. The Board denied the Grievant's Motion to Reopen on July 9, 1991.

Both parties filed briefs on June 28, 1991. On July 26, 1991, both parties filed reply briefs.

FINDINGS OF FACT

1. Grievant received his B.A. and M.S. in wildlife management from the University of Maine in 1957 and 1963, respectively. Prior to 1963, Grievant was employed by the Vermont Fish and Wildlife Department (then called the Fish and Game Service), the U.S. Fish and Wildlife Service and the Maine Department of Inland Fish and Game, and also served in the U.S. Army (Grievant's Exhibit 24).

2. Grievant began employment full time for the Employer in 1963. He was the Employer's first deer biologist and worked as the deer project leader from 1963 - 1966. Grievant held various positions with the Employer until August 1979, when he became Fish and Game Wildlife Management Director, later called Wildlife Management Director. Grievant remained in that position until August 5, 1990. During Grievant's 27 year tenure with the Employer, he consistently received "fully satisfactory" or "outstanding" performance evaluations, as well as letters of

commendation. Most of the overall performance ratings Grievant received were either "outstanding", "frequently exceeds job requirements/standards" or "consistently exceeds job requirements/standards" (Grievant's Exhibits 1 - 24).

3. In addition to Grievant's career with the Employer, he also has a concurrent career in the military. He was on active duty with the U.S. Army in 1958 - 60 and has served with the Vermont Army National Guard since 1964. He currently holds the rank of Brigadier General and is the Assistant Adjutant General to the Adjutant General of the State of Vermont. In May, 1991, Grievant became Assistant Division Commander of the 26th Infantry Division. Grievant received extensive management training in the military.

4. As Wildlife Management Director, Grievant carried out what he understood to be the mission of the Wildlife Division: 1) to manage all the game and non-game in Vermont, so that in perpetuity, those species will survive, and 2) also to be cognizant of the desires of the people of the State of Vermont with respect to the mission.

5. Grievant had management responsibility over more than 20 employees. He was responsible for hiring, evaluating, and disciplining employees. Grievant also was responsible for training and support activities. The Department is responsible for the management of many wildlife programs which came under Grievant's Division, including deer, bear, waterfowl, fur bearers, small game, non-game and endangered species.

6. Grievant was also responsible for interacting with other State, Federal, and foreign government departments and agencies, including the Vermont Agency of Environmental Conservation, the Vermont Agency of Transportation, the Vermont Department of Health, the University of Vermont, fish and wildlife departments from other states, as well as the U.S. and Canadian Fish and Wildlife Services. Grievant worked with many legislative and executive committees.

7. Additionally, Grievant was involved in a successful legislative effort to raise money for the preservation of wetlands and water fowl through a "duck stamp" program. Under this program, the State invites artists to submit water fowl art work. The winning effort is then reproduced on the State's duck stamp and is also sold in print form. The program continues to this day and on August 5, 1991, there was over \$1 million in the fund.

8. Grievant also was a motivating factor in a successful legislative effort to raise money for non-game species and their habitat, referred to as the "chickadee checkoff." Under this program taxpayers could check a box on their income tax form to contribute money to the Department for the study and care of all Vermont's endangered animals and plants. On August 5, 1990, there was over \$270,000 in this fund.

9. As Wildlife Management Director, Grievant responded to inquiries from town and city governments. He also frequently interacted with the public through speaking engagements at schools, fish and game clubs and other organizations.

10. Grievant was the Employer's first professional deer biologist. At the time Grievant came to Vermont, the legislature managed the deer herd and permitted only firearm hunting for mature, male deer ("bucks"). There was no firearm hunting season for female deer and immature deer, called antlerless deer.

11. Shortly thereafter, Grievant, with the assistance of other wildlife biologists in the Department, assessed the size and health of the Vermont deer herd. Grievant and the others found that there was an overpopulation of the Vermont deer herd, and that the deer were unhealthy and undersized. There was evidence that there was excessive browsing because Vermont's habitat could not support the herd. Grievant determined that the Vermont deer herd was the most poorly managed herd in the country. It was Grievant's professional opinion that the size of the deer herd should be reduced. He proposed that Vermont permit the lawful taking of antlerless deer by firearms. He supported issuing permits for shooting antlerless deer during the hunting season either statewide, or in designated areas ("zones"), and believed that there should be an ongoing study of the health and size of the herd.

12. Edward Keough was the Commissioner of Fish and Wildlife from 1966 - 1982. Keough supported the deer herd management program, including antlerless seasons, proposed by Grievant. The Legislature gave control of the deer herd management to the Department for four years. There were antlerless hunting seasons from 1966 through 1970. It was the goal of Grievant and the Department to reduce the deer herd population to a size that could be supported by the habitat for the long term.

13. A small, but very vocal, group of Vermont hunters did not support antlerless hunting. They wanted to return to "bucks only" hunting seasons because they assumed there would be a far greater number of deer than before antlerless hunting was permitted. They were adamantly opposed to the Department's antlerless hunting seasons. Many hunters and sports clubs put pressure on their legislators to take back control of the Vermont's deer herd and return to "bucks only" seasons. As a result, many legislators did not support antlerless hunting seasons. The Legislature took back control of deer herd management in 1970 and retained control throughout the 1970's. There were no antlerless seasons from 1970 through 1978.

14. By the late 1970's, there again was an overpopulation of the deer herd and a declining food supply because of excessive browsing. The deer mortality rate was appalling. Many thousands of deer were found dead in the spring of 1978. The deer population declined from 250,000 to 120,000 - 130,000. Because the deer were less healthy, they were also more susceptible to natural predators, e.g. bobcat, coyote, and domestic dogs. Also, beginning in 1975, there was a reduction in the number of deer killed during hunting season, and during 1978 the "buck kill" was the lowest in 26 years.

15. Grievant and Commissioner Keough campaigned to return control of the deer herd to the Department. Each conducted over 100 speaking engagements during 1978 - 1979 to inform the public of the benefits of controlling the deer herd population through antlerless hunting seasons. It was the Department's goal to

reduce the Vermont deer population to "carrying capacity," i.e. to a population that the browsing habitat could support, thought to be between 65,000 and 100,000 deer. The Department's goal would be accomplished in three phases: 1) initially reducing the deer population to slightly below carrying capacity, so the land could recover from years of excessive browsing; 2) holding the population down by selective antlerless deer seasons, either statewide or only in designated areas of the state, until there was evidence of recovery, and 3) cautiously rebuilding the herd and holding it at the environment's carrying capacity.

16. Due to Grievant and Commissioner Keough's successful campaigns for antlerless hunting during 1978 - 1979, and despite a vocal minority opposing antlerless hunting, there was an antlerless season in 1979. In 1980, the Legislature restored control of deer herd management to the Department. The Department was required by statute to provide biological and scientific data to a Fish and Wildlife Board. The Board would then make the final decision on an antlerless deer season based on this biological information. The Commissioner acts as Executive Secretary to the Board and is a nonvoting member.

17. Gary Moore became Commissioner of Fish and Wildlife in 1983. Moore did not support antlerless hunting seasons. He believed that more than biological data should be considered in the deer herd management programs. Moore was instrumental in changing the law to permit the Fish and Wildlife Board to base its decision not only on the biological and scientific data provided by the Department, but also on public input. In any

event, there continued to be antlerless seasons in 1983, 1984 and 1985, but Grievant and Moore were often at odds over the deer herd management issue.

18. By 1986, Grievant determined there was improvement in the Vermont deer herd, and in 1987, there was even more improvement. The antlerless seasons from 1979 through 1987, and the Department's three-phase program were also considered to be successful by professionals outside the Department, as well. The deer being taken by hunters were much bigger and had better antler development.

19. Norman Wright became Department Commissioner after Moore. He supported an antlerless season during the one year that he was Commissioner.

20. Steve Wright became Department Commissioner in 1987 and remained in that position until May, 1989. He philosophically believed in the biological need for an antlerless season, but did not support antlerless seasons because of political pressure. Commissioner Steve Wright did not allow Grievant to perform any legislative work. He told Grievant that he was a "lightning rod" and that he "drew fire" because of his well known public support for antlerless hunting seasons. Prior to this, Grievant had been involved in legislative work and had testified before many legislative committees. There was an antlerless hunting season in 1987.

21. Based on biological data indicating that the deer herd had improved, Grievant recommended that the Department issue a reduced number of antlerless hunting permits in 1988.

Commissioner Wright did not submit Grievant's recommendation to the Fish and Wildlife Board. There was not an antlerless hunting season that year.

22. Grievant's recommendation to Commissioner Wright in 1989 was also for a reduced number of antlerless permits because of the improvement in the deer herd. Wright did not submit Grievant's recommendation to the Fish and Wildlife Board. Grievant believed that it was his obligation to forward his recommendation to the Board if his Commissioner refused, and he did so. However, there was no antlerless season in 1989.

23. There have been many many personal attacks on Grievant due to his strong identification with the antlerless programs supported by the Department. The anger of certain hunters with respect to the antlerless program was directed at Grievant. During Grievant's 27 year tenure with the Employer, he has been subjected to the following actions: deer carcasses spread on his lawn, a raccoon stuffed in his mail box, human waste left on his lawn, a skunk left in his car, air let out of his tires, refusal to accept his State credit card for gas (purchases), refusal to cash a personal check, threatened with arrest by a warden, being informed at a public meeting that he was unfit to father children, harassing telephone calls, having his personal automobile vandalized, denigrating cartoons published, threatened with a gun and given a "formal declaration of war".

24. The areas of the State that antlerless hunting seasons, and Grievant, have been most publicly opposed included all of Bennington County, the Springfield area of Windsor County, and the Newport area of Orleans County.

25. In addition to harassment by the public, Grievant also has been the recipient of legislative attacks. One legislator publicly stated, "Ben Day should be required to wear a red hat every day of the year so that he could be shot on sight". Grievant's name was placed in legislative bills at least four times to eliminate antlerless deer seasons and Grievant's position as well.

26. Representative Timothy Van Zandt became Chair of the Fish and Wildlife Committee of the Vermont House of Representatives in 1989. Van Zandt had been a State Representative from the Springfield District since January, 1983, and was serving his fourth term in the Legislature. Van Zandt had previously been interested in fish and wildlife issues, although he had not been assigned to the Fish and Wildlife Committee. During previous legislative sessions, he had roomed with the former Chair of the Fish and Wildlife Committee, "Red" Hooper, and had become familiar with the Committee's concerns. The most consistent legislative concern was the Department's management of the Vermont deer herd through the issuance of antlerless hunting permits. As a State Representative from the Springfield District, Van Zandt did not support antlerless seasons. Van Zandt often was approached by constituents who had a constant concern about the Department's implementation of the antlerless deer seasons.

27. As Chair of the Fish and Wildlife Committee, Van Zandt publicly stated that he was opposed to antlerless hunting and would seek to end antlerless deer hunting seasons. Van Zandt

advised Department Commissioner Steve Wright that there would be negative political implications if he proposed antlerless seasons.

28. While Chair of the Fish and Wildlife Committee, Van Zandt initiated an investigation of the Department's position on deer herd management, i.e. how decisions were made and if the Department's methodology was accepted by peers. The investigation concluded that the Department's methods were "not off-base", but there should be more information sharing with the public.

29. A bill was introduced and passed during the 1989 legislative session which mandated more public participation in the deer herd management issue. Commissioner Steve Wright was supportive of the public process and conducted a limited number of meetings across the State. Grievant expressed support of increased public involvement.

30. Steve Wright resigned as Commissioner of Fish and Wildlife in May, 1989. Grievant applied for the position and received an interview, but was not the successful candidate. Governor Kunin selected Representative Van Zandt for the position of Commissioner in late Spring, 1989, and he began his tenure in early July, 1989. At this time, the Department had an annual budget of more than \$6 million.

31. At the time of Van Zandt's appointment, his educational experience included an Associate degree in Criminal Justice, dual degrees in sociology and psychology, and machinist training. His work experience included a year and a half as executive director

of a humane society, three and a half years with New England Ecological Systems which produced and raised earthworms (two of those years as assistant general manager), and, finally, approximately three years at Contel, working first in a sales/clerk position and later as a service technician. His managerial experience included hiring and supervising eight to 10 employees at the humane society and approximately 10 employees at the earthworm farm. He had no managerial or supervisory authority at Contel. His only course on organizational management was while studying for his Associate degree in criminal justice.

32. The decision by the Fish and Wildlife Board for the 1989 hunting season that there not be an antlerless deer season was made before Van Zandt became Commissioner.

33. From the time Van Zandt became Commissioner until August 5, 1990, the Department was organized into four distinct divisions: Information and Education, Fisheries Management, Wildlife Management, and Law Enforcement. Five employees reported directly to the Commissioner. Under this organization, Grievant, as Wildlife Management Director, and Angelo Incarpi, Fisheries Management Director, were the highest classified Department employees, Pay Grade 27. Roger Whitcomb was Fish and Wildlife Law Enforcement Director and John Hall was Fish and Wildlife Information and Education Director. All four Directors had line authority directly to the Commissioner. Each, except Hall, had an Assistant Director and had managerial responsibility for approximately 25 to 50 employees. Hall had an

Education Coordinator, who acted as his assistant, and supervisory authority over four other employees (State's Exhibit 1).

34. Prior to August 5, 1990, the Department had five district offices. Each office was staffed by one District Wildlife Manager (who was a Wildlife Biologist), one or two other Wildlife Biologists, Technicians and support staff. Four district offices also had a District Fish Manager, and Fish Biologists. The exception was Barre, which only had a wildlife staff (State's Exhibit 1).

35. Due to the complexity of their work, wildlife biologists are not generalists, but are specialists in their own areas of expertise. A wildlife biologist may spend years working on specific projects (e.g. deer, bear, moose). Fish biologists tend to be generalists.

36. Prior to the reorganization of the Department announced on July 25, 1990, the structure of the Department was very similar to the Fish and Wildlife Departments in other states.

37. Some district biologists also served as statewide project leaders. For example, Charles Willey was a District Wildlife Manager in the St. Johnsbury District, but was also a project leader for both moose and bear projects. Project leaders were designated leaders of projects relating to certain species (e.g. deer, bear, moose, fur bearers). They were responsible for gathering and analyzing biological data and information from all over the State. In the Wildlife Division, the Assistant Director supervised the wildlife project leaders.

38. The project leader system is also used in fish and wildlife departments in other states and Canada. The project system is considered a sound system biologically and gives a great sense of fulfillment to project leaders. Vermont was unique in that a project leader also had responsibilities in a district, as well as the responsibility of gathering and analyzing statewide information. Prior to 1985, when the Assistant Director positions were established, project leaders reported directly to the Division Director.

39. Commissioner Van Zandt supported the public participation process for deer herd management. He appointed Wildlife Resource Biologist Steven Parren to chair a public participation committee. Van Zandt asked members of the deer project to assist him in putting together a deer herd management plan. Van Zandt held meetings on deer herd management throughout the State. The Department put together information gathered at the first set of meetings, publicized the information, and conducted a second set of meetings, followed by a third set. As a result of the meetings, Van Zandt concluded that a majority of hunters in the State approved of the Department's deer herd management program.

40. During Steve Wright's tenure as Commissioner, Wright had considered creating a new position, Director of Operations, Pay Grade 29. Grievant had applied for this position, but Commissioner Wright decided not to fill the position. On or about June 30, 1989, after becoming aware that Van Zandt was considering establishing this position, Grievant wrote to

Commissioner Van Zandt and applied again for the position of Director of Operations. He also expressed concern whether that particular position was needed. Van Zandt announced he was not going to consider establishing or filling the position at that time (Grievant's Exhibit 24).

41. When Van Zandt first became Commissioner, he continued the practice of previous Commissioners of holding weekly staff meetings. These weekly staff meetings included the four Division Directors, Assistant Directors, Education Coordinator, Business Manager Joe Healy, Administrative Assistant Sandy Barton, and generally, but not regularly, the Hunter Safety Chief John Kupusta. At some point, Van Zandt decided that Assistant Directors should attend the weekly meetings only if the Director of their Division could not attend.

42. The Assistant Director positions were created in 1985. The Wildlife Division functioned as the link between the Department's main office in Waterbury and the field personnel. For example, Assistant Wildlife Director Larry Garland was in charge of the day-to-day activities of the wildlife field staff. Five District Wildlife Managers and wildlife project leaders, reported directly to him, and he was responsible for their annual performance evaluations. By eliminating the Assistant Directors as regular attendees from the weekly staff meetings, at least in the Wildlife Division, Van Zandt eliminated a link between himself and the field staff.

43. Upon review of the biological data, Grievant and the deer herd management team concluded that there should be an

antlerless season in 1990. Grievant and project leader Ronald Regan made a presentation to the Fish and Wildlife Board on January 30, 1990. In previous years, the Board had generally made their decision regarding antlerless seasons after the Legislature adjourned in April or May. That year, the Board decided at the January 30 meeting, and early in the legislative session, not to have an antlerless season.

44. During the spring, 1990, Van Zandt discussed Grievant's performance with Wildlife Research Analyst Steven Parren. Parren expressed his belief that the Divisions acted very independently and that this independence was caused by the Division Directors and Assistant Directors. During this same conversation, Van Zandt asked Parren how he got along with Grievant. He told Parren that he was trying to come up with some jobs for Grievant to get him more involved in the Department.

45. Van Zandt never expressed criticism to Grievant concerning his work or management style. Van Zandt did mention that he felt there were communication problems between the divisions, and Grievant agreed that this was a valid concern.

46. At all times relevant, Grievant was highly regarded by other Department employees as a highly-qualified wildlife biologist and was generally regarded as a valuable member of the Department. Commissioner Van Zandt had no doubts concerning Grievant's ability as a biologist, and believed he was a competent manager. Also, Grievant was highly regarded by professional peers on a national and international basis.

47. By late April or early May, 1990, Van Zandt decided that he needed to restructure the Department. He concluded that there were too many management layers in the Department which resulted in communication problems. He believed that each division in the Department acted very independently of other divisions, and there was a lack of concern among divisions as to issues in other divisions. He also wanted direct access to the field staff.

48. Van Zandt also was mindful of fiscal considerations when deciding to reorganize. During the 1990 legislative session, a bill was introduced specifically targeting the positions of Grievant and five other Department employees for elimination. The bill was later amended to delete any reference to specific positions being eliminated, and the Vermont General Assembly passed legislation requiring the Department to eliminate six positions and reduce the Department budget by \$112,500 by October 1, 1990 (State's Exhibit 49). In response to the legislative mandate and Department fiscal concerns, Department Business Manager Joseph Healy wrote Van Zandt a memorandum on June 25, 1990, that stated in part:

...I suggest the following preliminary steps for our F.Y. 1991 spending plan.

All eight positions now vacant or to be vacant be held in that status throughout the year.

Mandated pay increases costs for 1991 - est. of \$235,000 - be offset by part of the \$300,000 in new revenues we hope to realize from the January 1, 1991 license increases.

Each program operating expenditures be held to the 1990 level except for the Fisheries Division.

Because the Lamprey work and other mandated projects in the fisheries program must be carried out I would suggest that we use part of the new boating receipt funds to pay the state share of these essentially federally supported projects.

All other initiatives except those supported with Waterfowl Funds and/or federal fishery funds should be delayed or dropped all together (Grievant's Exhibit 130).

49. The Fish and Wildlife Department is one of three Departments within the Agency of Natural Resources. Van Zandt discussed his concerns regarding Department reorganization with Agency Secretary Jonathan Lash and Deputy Secretary Mollie Beattie in early May, 1990. He did not discuss his concerns with any of his employees at that time. Lash and Beattie were receptive to Van Zandt's ideas regarding reorganizing the Department

50. Beattie suggested that Van Zandt consider employing Allan Mackey, an outside consultant, to assist in the reorganization of the Department. Mackey is a self-employed management consultant. He has an M.B.A in organizational behavior and approximately 27 years of experience in organizational management. He had previously worked with Deputy Secretary Beattie, Secretary Lash and former Commissioner Steve Wright.

51. Van Zandt met with Mackey for approximately two hours on or about May 9, 1990. Van Zandt told Mackey generally that he felt there was a lack of communication in his Department, that he was interested in eliminating middle management positions, that he needed more contact with employees in the field, and that he had to eliminate six positions due to the recently-passed

legislation. Mackey told Van Zandt about a new wave of organizational thinking in the private sector called "flattened organizations" which eliminated the middle management layers. Mackey indicated that he saw no reason why such an approach would not work in the public sector, although he was aware of no situation where the approach actually had been used in the public sector. Mackey expressed his opinion to Van Zandt that the reorganization should be a directive change, not a participatory one. He was of the view that if jobs were going to change or be eliminated, it was appropriate not to involve people whose jobs might be affected.

52. The Department and Mackey entered into a contract for Mackey's services which specified:

A review of the current organizational structure and its effectiveness in achieving department objectives.

Assessment of the management structure and development of alternatives to that structure.

Design of a new structure that is consistent with the Agency philosophy and sound organizational principles.

Design of the communications and education strategy to support the reorganization (State's Exhibit 13).

53. Mackey met again with Van Zandt, on May 24, 1990, at an Agency staff meeting. The Agency meeting included Secretary Lash and Deputy Secretary Beattie. At this meeting, Mackey made a presentation on flattened organizational management. He applied the principle to Van Zandt's Department and showed a conceptual diagram, handwritten and on a single piece of paper, of how the process would work (State's Exhibit 14).

54. There also were general discussions during the May 24 meeting about the possibility of consolidating some agency-wide concerns with respect to state lands and enforcement. Consolidating enforcement had been a concern at the Agency for at least a year. The proposal discussed was to combine the duties of the Fish and Wildlife Wardens who were then under the direction of the Commissioner of Fish and Wildlife, with enforcement duties of other Agency personnel involved in enforcing Vermont's environmental laws. This would have the potential of strengthening the State's environmental laws. The consolidated Enforcement Division would be under the authority of the Deputy Secretary and wardens would no longer be under the Fish and Wildlife Commissioner's chain of command. Consolidating the Division with other Agency duties would require statutory changes in the next legislative session.

55. Following the meeting with the Agency staff on May 24, 1990, Van Zandt met again with Mackey regarding the reorganization. Van Zandt and Mackey decided that a department employee was needed to assist in the detail work and put "bones on the concept." Beattie and Lash had also advised Van Zandt to solicit the assistance of a Department employee because Van Zandt would not have the time to spend on all the details of a new organizational plan. Van Zandt approached Wildlife Research Analyst Steven Farren. He told him in general terms about the proposed reorganization, and asked for his assistance. Farren agreed to assist Van Zandt.

56. Parren has a B.A. in natural resource conservation and a M.S. in natural resource planning. He had started working for the Department in the Fish and Wildlife Division in June, 1987. Previous employment experience included working for the Federal government, the Vermont Department of Health and lobbying for the "chickadee check" off for the National Audubon Society. Parren was unhappy with his position in the Department. He felt that he was not conducting research, that he was merely manipulating information and acting as an "internal computer consultant" by bringing computer training to biologists.

57. Parren's role with respect to the proposed reorganization generally was to synthesize the information, draft job descriptions for new positions, draft various charts and graphics to show what the reorganized Department would look like, and to work with the Department of Personnel.

58. Although Parren started working for Van Zandt in early June, 1990, on the reorganization, Van Zandt did not inform Grievant or his assistant, Larry Garland, Parren's supervisors, of that fact until shortly before July 5.

59. Van Zandt developed a plan to reorganize the Department with the assistance of Mackey, who was only involved on a conceptual level, and Parren. Van Zandt involved no other Department employees in the planned reorganization.

60. The reorganization centered on eliminating the separate divisions of Wildlife Management and Fisheries Management as they existed, moving law enforcement under Agency control, and establishing fish and wildlife coordinators at the district

levels. The coordinators would report either directly to the Commissioner or to the Operations Director, which position would be newly-created as a result of the reorganization. Project leaders would also be eventually eliminated, replaced by "committees" or "teams", which would be run by consensus, and they, too would report to the Commissioner.

61. Van Zandt generally planned to create new positions through reallocation or reassignment of existing positions. In some situations, this would result in employees realizing a reduction in pay grade. In other situations, it would result in a promotion and upgrade in classification.

62. Van Zandt and Mackey saw the position of Operations Director as an important position in the reorganization. This person would work closely with Van Zandt and would have considerable authority in the new organization. Qualifications would include strong management, organizational and planning skills. Van Zandt did not think there was anyone in the Department with these skills and talents and he planned to go outside the Department for recruitment. Van Zandt was of the view that the person selected would not need technical skills in fisheries or wildlife biology.

63. Governor Kunin appointed a Commission on Fish and Wildlife Funding in the Fall of 1989, and requested that the Funding Commission submit two plans: a short-term plan to ensure that Department expenditures did not exceed income, and a long-term financial plan designed to provide dependable funding. The Funding Commission issued its short-term plan on January 17,

1990. It recommended a reduction in the Department's FY90 budget to \$7,140,000 from an estimated budget of \$7,401,791, and a reduction in the FY91 budget to \$7,552,000 from an estimated budget of \$7,580,290 (Grievant's Exhibit 44).

64. On June 25, 1990, the Funding Commission issued its long-term recommendations. The recommendations to the Department included: developing an Agency policy for the use of State vehicles, reducing the number of personnel in the Hunter Education Unit, defining a marketing plan of Vermont's fish and wildlife resources, coordinating promotional activities and programs with other State promotional agencies, computerizing license sales, developing programs (that are biologically supported) to use and encourage public participation, and introducing legislation that would increase the Department's revenues. Recommended legislative changes included: paying the taxes on wildlife management areas from the General Fund rather than from the Department's budget; establishing fees for use-permits; establishing application fees for any lottery permits (such as antlerless deer); establishing a permit fee for fishing derbies; reimbursement for environment assessment and law enforcement under Acts 250 and 200; establishing a committee to explore a Fish and Wildlife lottery; receiving a percentage of the property transfer tax; establishing a separate salmonid license and stamp/art program; reciprocating fishing licenses with New York on Lake Champlain; and, finally, taxing sporting goods (Grievant's Exhibit 44).

65. The Department reorganization subsequently implemented by Van Zandt reduced the employees in Hunter Education from six to three. In response to the Funding Commission's recommendations, the Department has explored marketing its resources and coordinating promotional efforts with other State agencies, and has computerized its license sales. Some of the legislative recommendations were introduced and passed the legislative process (e.g. application fees for lottery permits and establishing a lottery committee). Other recommendations did not survive the legislative process (e.g. paying taxes from the General Fund and establishing a permit fee for fishing derbies). All the Funding Commission's legislative recommendations were addressed either by introducing legislation or studying the feasibility of making legislative changes.

66. District Wildlife Biologist Charles Willey met with Van Zandt in June, 1990. He was unhappy with a performance evaluation he had received from Assistant Director Larry Garland. During this meeting, Van Zandt asked Willey what he thought about Grievant. The question was not relevant to their discussion. Van Zandt indicated that he thought Grievant was not interested in his job anymore. Willey told Van Zandt that much of Grievant's job had been siphoned away when the Assistant Director positions were created four years previously. Willey indicated that there was nothing more important to Grievant than deer, and he suggested that Day be given wildlife projects back.

67. Van Zandt contacted the Department of Personnel in late June or early July, 1990. Van Zandt and Parren met at the

Department of Personnel on July 7 and 9, 1990 with Human Resources Management Specialist Charly Dickerson, and Department of Personnel employees Mary Powell and Audrey Quakenbush. They discussed the reorganization, new positions and job descriptions. All newly created positions had to be classified and assigned a pay grade. Van Zandt also needed assistance on employee rights. By the time Van Zandt contacted the Personnel Department, he had already decided how the new organization would look and who would not be offered positions under the new plan. The only two existing employees who would not be offered new positions as a result of the reorganization would be Grievant and Bruce Dawson, Assistant Director of the Enforcement Division. Dickerson questioned Van Zandt regarding his motives to discover whether there were performance issues or discriminatory motives with respect to Grievant or Dawson. He concluded that no such issues or motives existed. Dickerson also informed Van Zandt that any employee, managerial or non-managerial, who was subject to a reduction in force as a result of the reorganization would have to be given 30 day's notice. Van Zandt told Dickerson that he would have no problem if Grievant exercised re-employment rights to occupy any position declined by a Department employee as a result of the reorganization.

68. The only managerial and supervisory employees who potentially would be subject to a reduction in force as a result of the reorganization were Dawson and Grievant. As a managerial employee, Pay Grade 27, Grievant would have automatic re-employment rights only to vacant positions Pay Grade 27 or

below for which he was qualified. The only likelihood of a vacant position that Grievant would have rights to in the Department would be a vacancy caused by an individual refusing an offer of transfer or reassignment under the new plan.

69. Van Zandt knew in June that the State had offered an early retirement plan to employees over the age of 55, with a minimum number years of service, if they opted for such early retirement before June 22, 1990. He was concerned that Grievant and Dawson, two of the employees whose positions he was intending to eliminate, were eligible to participate in this program, but would miss the June 22 deadline because they would not be aware of the reorganization until after that date. He contacted Administration Secretary Thomas Menson in June, 1990 regarding the possibility of extending the deadline (Grievant's Exhibit 106).

70. Parren drafted a memorandum for Van Zandt, dated July 20, 1990, which summarized the reorganization and referenced the early retirement option. It stated in pertinent part:

Two employees will be RIFed: Ben Day...who has grandfathered reemployment rights and Bruce Dawson...who has bumping and reemployment rights. Both men are near retirement age and may opt for early retirement if offered. Angelo Incerpi, Fisheries Division Director, and Rod Wentworth, Assistant Fisheries Director, will have their positions changed to Special Project Assistants on major, non-routine fisheries-related work. These transfers of managers will likely result in a lower pay grade (but no loss of salary) and a loss of managerial status. Larry Garland, Assistant Director of Wildlife will be transferred to the Essex Junction office as its coordinator, which will be a one grade demotion and remain a manager. John Hall, Information and Education Division Director of three (including himself), will be transferred to a [sic] Information Specialist position. This represents a likely demotion of three pay grades, but is a fairer appraisal of the services he provides. The incumbent is supervisory, not managerial, but is expected to accept this demotion with pay loss,

although he has bargaining unit rights. The RIFs represent our most likely trouble spots. One potential problem is if other incumbents refuse their transfers and positions are filled by RIFed employees, either ours or from other departments. Another is if we experience a vertical bumping scenario. We believe we can effectively deal with these issues and still achieve our major objectives (Grievant's Exhibit 60).

71. Van Zandt informed the Agency's Personnel Administrator, Margaret Sancibrian, in early July, 1990 of the changes he was about to make. Sancibrian attended one meeting at Personnel, but was not an active participant in the meeting. She was not asked to do anything regarding the changes that were about to take place. Parren had essentially done what would have normally been within her responsibilities. Sancibrian had no knowledge of Van Zandt's reorganization until that meeting and did not hear anything more about the reorganization until the day Van Zandt announced it to the department on July 25, 1990.

72. By the middle of July, 1990, the reorganization developed by Van Zandt included the following components:

- The Law Enforcement Division would merge with other Agency enforcement personnel and report to the Deputy Secretary (although the Commissioner would still retain statutory authority);

- Fisheries and Wildlife would merge. All four Division Directors and Assistant Director positions would be eliminated

- Information and Education and Hunter Safety would merge, but not have division status.

- New positions would be created by reallocating or reassigning existing positions. The new positions would most

likely be: Operations Director, Staff Assistant, District Coordinators (5), Special Project Assistants (2) and Hunter Safety Program Supervisor.

73. Van Zandt's intent was to not fill the Operations Director position at the time of the reorganization, but to recruit for the position from outside the Department. Parren's position would be transferred and upgraded to the Staff Assistant position. The five new District Coordinators positions would be offered to three District Wildlife Managers, a District Fish Biologist, and the Assistant Director of Wildlife. The two Special Project Assistants would be offered to the Director and Assistant Director of Fisheries. The Law Enforcement Director would be the only Director to remain in his position.

74. The Agency of Administration routinely extended certain Contract benefits to managers. On July 24, 1990, Charly Dickerson of the Department of Personnel sent a memorandum to all agency and department heads again extending certain benefits from the Contract to managers. Among the Contract provisions extended to managers were the reduction in force provisions of the Contract to the extent that managers have access to the mandatory re-employment provisions to vacant bargaining unit positions (Grievant's Exhibit 26), and the "No Discrimination or Harassment; and Affirmative Action" Article of the Contract, which provides in pertinent part as follows:

In order to achieve work relationships among employees, supervisors and managers at every level which are free of any form of discrimination, neither party shall discriminate against, intimidate, nor harass any employee because of race, color, religion,

creed, ancestry, sex, marital status, age, national origin, handicap, membership or non-membership in the VSEA, filing a complaint or grievance, or any other factor for which discrimination is prohibited by law.

75. Section 2.0382 of the Personnel Rules and Regulations, which at all times relevant applied to Grievant, provides as follows:

2.0382 LAYOFF is an involuntary separation from a position of an employee whose service record has been adequate or better either by reason of a reduction of force due to lack of work or lack of funds, or by reason of discontinuance of the position as previously established.

76. At the time Van Zandt planned his reorganization for the Department and made the announcement, it was known that both Secretary Lash and Deputy Secretary Beattie were leaving their positions. Lash was going to be leaving at the end of the summer and Beattie was leaving in August, 1990. It was also public knowledge that Governor Kunin was not going to seek reelection and that her term would expire in January, 1991. It was decided that Van Zandt would make the announcement before Lash and Beattie's departure so it would not appear that he was taking action on his own.

77. During the process of deciding to reorganize the Department, Van Zandt spoke to Representative John Murphy of Ludlow, a 10-term member of the General Assembly, concerning the reorganization. Representative Murphy expressed support for restructuring the Department. Representative Murphy spoke to Van Zandt about the elimination of positions in the Department. There was some discussion between Van Zandt and Representative Murphy with respect to the elimination of Grievant's position,

although it is unclear under the present state of the evidence specifically what was discussed. Representative Murphy, at all times relevant, has been a visible opponent of antlerless deer hunting, and Van Zandt was aware of his opposition.

78. During the process of deciding to reorganize the Department, Van Zandt also had an opportunity to talk with George McNeill, an influential member of the hunting community and an active member of Sports Alliance for Vermont Environment (SAVE) at a SAVE Director's meeting in Rutland. SAVE has over 4,000 members and is actively involved in supporting, writing, and monitoring legislation that impacts the Vermont environment and sports community. After the meeting Van Zandt told McNeill privately that there were going to be some changes in the Department, specifically in law enforcement. Van Zandt understood from this exchange that McNeill would be supportive of changes.

79. Governor Kunin had been apprised of the Department reorganization, which was to include the Agency plan of combining the Department's Law Enforcement Division with other Agency personnel. She decided that the announcement should be made on July 25, 1990, at an afternoon press conference. Van Zandt decided that he would announce the reorganization to Department employees earlier in the day.

80. Van Zandt, Beattie, and Lash compiled a list of individuals, including legislators and private citizens with an interest in the Department, who should be contacted prior to the announcement. The list was divided among the three of them.

George McNeill was on the list and Van Zandt offered to contact him.

81. Van Zandt called McNeill the morning of the announcement, July 25, 1990, shortly after 8:00 AM. Van Zandt told McNeil that he was about to announce a major reorganization of the Department. He provided an outline of the new organization: transfer of the wardens, elimination of directors, creation of coordinator positions. Van Zandt also said he was creating a new Director of Operations position that he was "putting out to bid." McNeill asked about Grievant. Van Zandt replied with words to the following effect

"He's gone. I got rid of him. It took four Commissioners to do it, and I did it".

Van Zandt appeared to McNeil to be excited and gleeful.

82. Van Zandt had scheduled a Department meeting for 9:00 a.m. on July 25, 1990. The meeting was late starting. Grievant was late arriving at the meeting because he was handling a telephone inquiry that had come in for the Commissioner. Van Zandt had started his presentation when Grievant arrived at the meeting. Van Zandt announced that he was reorganizing the Department. He indicated he was eliminating Director and Assistant Director positions. He also mentioned the Operations Director position and characterized it as a senior staff position, and one that he would fill from the outside. He also briefly explained the new Coordinator positions, and the broader role for Law Enforcement, which would now be placed under the Deputy Secretary. Van Zandt indicated that the implementation

date for the reorganization was to be August 5, 1990. Van Zandt said he would meet individually with the seven Directors and Assistant Directors affected by the reorganization later in the day. As Van Zandt was leaving the room, Grievant requested an immediate meeting with him.

83. Grievant met with Van Zandt later that morning in Van Zandt's office. Margaret Sancibrian was also in attendance. Van Zandt referred to the earlier meeting and the changes he was making. He also handed Grievant a copy of a new organizational chart. Grievant asked where he appeared on the chart. Van Zandt told him that he was not on the chart. Van Zandt told Grievant that he would not have a job. Grievant asked about the Staff Assistant position. Van Zandt told him it was going to be offered to another individual. Grievant asked him about the Operations Director position. Van Zandt responded that he intended to hire someone from outside the Department for that position. Grievant pressed about the Operations Director position. Van Zandt said he could apply, but indicated that he was seeking to hire someone from outside the Department. Grievant asked him about the Special Projects Assistant positions. Van Zandt indicated that he had other employees in mind for these positions. Grievant asked about the Wildlife Division. Van Zandt told him it did not exist anymore, and that his position as Director of Wildlife did not exist anymore. Grievant was shocked and upset. Grievant asked Van Zandt, "You mean after 27 years, I'm all done with the Department?" or words to that effect. Van Zandt told Grievant that he was "all done".

Grievant turned to Sancibrian and asked, "Can he do this to me?" Sancibrian told Grievant that she had just found out about the reorganization herself, but that she would look into what rights he had. She also suggested that he see a lawyer. Grievant mentioned that he wished he had known this prior to the June 22 deadline for the early retirement offering. Van Zandt reacted to this statement as if he was unaware of the early retirement offering. Sancibrian indicated that she would look into the early retirement offering. Grievant asked about all his projects. Van Zandt told him they were his (Van Zandt's) responsibility now. Van Zandt expressed no emotion or regret over the situation. He did not thank Grievant for his years of service to the Department. He did not discuss any other roles or positions in the Department that Grievant could, or would, be expected to perform. Grievant left the meeting believing that his employment was terminated August 5, 1990, the effective date of the reorganization. Van Zandt did not specifically say to Grievant that he was dismissed or laid off, and did not specifically tell him that his employment was terminated August 5, 1990 (Grievant's Exhibit 114).

84. Grievant left the meeting and spoke with Business Manager Joseph Healy and Larry Garland in John Hall's office. Grievant told them that he had been fired. They were surprised and shocked.

85. Garland met with Van Zandt and discovered that he was being offered the District Coordinator position in Essex Junction. Garland was in that position by the implementation date

of August 5, 1990. This move was a demotion in pay grade for Garland, from a Pay Grade 24 as Assistant Director to a Pay Grade 23 as District Coordinator.

86. Governor Kunin held a press conference later that day with Van Zandt to announce the reorganization.

87. Between July 25, 1990, and August 5, 1990, Grievant was in the office every work day wrapping up his work, cleaning out his desk and packing his belongings. Van Zandt's Administrative Assistant, Sandy Barton, helped Grievant find boxes. She was tearful and told him that she was very sorry.

88. On July 26, 1990, Sancibrian, who had left the July 25 meeting believing that Grievant would be out of work at some undetermined date in the future, but not as early as August 5, 1990, informed Grievant that he had reemployment rights. She also gave him a telephone number for the Department of Transportation because she had heard there might be a vacancy for which he would be qualified.

89. Van Zandt was in the Waterbury main office infrequently during the week following the July 25 announcement. The date of the announcement, July 25, was a Wednesday. He met with other Department employees on Thursday and left for New York on Friday. He returned to Vermont on Monday and met with employees in two district offices on Tuesday. He had an Agency staff meeting all morning on Wednesday, August 1, and was in his office that afternoon. Van Zandt did not observe that Grievant's office was full of boxes or that Grievant was packing up his belongings.

90. Grievant received many calls from throughout the United States and Canada from public and private citizens expressing regret and dismay over his situation.

91. In August, 1990, Warner Shedd was a freelance writer on conservation and sportsmen issues, and prior to that was New England Regional Director of the National Wildlife Federation, the nation's largest conservation foundation. Shedd called Secretary Lash shortly after the announcement of reorganization and asked about the reorganization in general and also about Grievant. At one point in the conversation, Lash indicated that Grievant did have his work in the National Guard, implying that Grievant would not be hurt financially.

92. Shedd spoke to Van Zandt a few days after his conversation with Lash. They talked about the reorganization and Van Zandt's belief that there was no place in the reorganized Department for Grievant. Shedd expressed skepticism because a place had been found for all other employees and because Grievant was so well respected, particularly for his success in deer herd management. Shedd was also concerned that the deer herd critics in the State, which he called the "lunatic fringe," would believe that they had succeeded in getting rid of Grievant. Van Zandt claimed his decision had nothing to do with deer herd management politics. Shedd suggested that Van Zandt make this clear to the public. Van Zandt made no public statement concerning the reasons for this action.

93. At no time between July 25, 1990 and August 5, 1990, did Van Zandt discuss what duties he expected Grievant to perform after August 5, 1990.

94. Barton told Van Zandt that Grievant thought he was fired. Van Zandt said that was "ridiculous". It is unclear specifically when this conversation occurred, but it was at some time near August 5, 1990. No one told Grievant before August 5, 1990, that he was mistaken in his belief that he was fired.

95. Business Manager Joseph Healy was Acting Commissioner during Van Zandt's absence from the Department after the reorganization announcement. Healy knew Grievant was going to be leaving for a pre-scheduled vacation in Ireland in August. He understood that Grievant thought he had been fired, but, as Acting Commissioner, he asked him to fill out an annual leave slip for the time that he planned to be away. Grievant saw no point in making out an annual leave slip because his trip to Ireland was two weeks after the time he thought he was terminated. He knew Healy was concerned about him, and he did not want to frustrate him, so he filled out the annual leave slip. However, Grievant never submitted the annual leave slip to the Department.

96. Grievant did not return to work the following week after leaving work on Friday, August 3, 1990. He was not contacted by Van Zandt or anyone else from the Department regarding his absence or departure from the Department. Although Grievant had not submitted an annual leave slip for his absence, the Department placed him on annual leave for this week.

97. Grievant filed a grievance on August 9, 1990, concerning his alleged termination of employment. This was Van Zandt's first notice that Grievant thought he was fired. At some

point after Grievant filed his grievance and before he left for Ireland, Grievant's attorney, Scott Cameron, told Grievant that Michael Seibert, Assistant Attorney General, had told Cameron that Grievant was not dismissed. Grievant told Cameron to tell Seibert to have someone in the Department contact Grievant.

98. Grievant left for Ireland on August 16, 1990, as planned, and returned on September 4, 1990. He continued to receive pay checks from the Department, and the Department charged his absence to his annual leave bank.

99. Before Grievant left for Ireland, he sent a copy of the organizational chart of the Department, as reorganized by Van Zandt, to the Wildlife Management Institute, a private national conservation organization. He asked for their views on the new organization. Laurence Jahn, President, responded to Grievant on August 13, 1990, stating, in part:

The Commissioner will be over burdened, with about 20 individuals reporting directly to him. A busy administrator simply will be swamped with excessive detail. Under usual administrative patterns, a Commissioner would have from 5 - 7 employees reporting directly to him or her. If the work of each employee is technical, legalistic, and large volume, it may be better to have 4 - 6 employees reporting to the Commissioner. Years of practical experience in many states and provinces emphasize the soundness of the number cited above.

The organization pattern is confusing. One interpretation is that the Fish and Wildlife Department is almost solely or entirely a line organization, with few if any staff positions. Certainly some staff positions seem needed in a Department the size of Vermont's (Grievant's Exhibit 131).

100. Grievant received a letter from the Retirement Division on or about August 9, 1990, extending the early retirement offer to him. The conditions were identical to the initial offering and provided:

...three years are added to your age, three years are added to your service credit, and the early retirement penalty is reduced to 2% per year for each year under 62 after your age has been inflated by three years. The requirement for eligibility remains that you be age 55 and have 15 years of credible service by 12/31/90 and before your retirement. With this offering the effective date of your retirement shall be October 1, 1990, unless waived by the appointing authority. In no circumstances may the date of retirement be later than March 1, 1991 (Grievant's Exhibit 143).

101. The deadline for participating in the offering was August 24, 1990, but Grievant did not think he would be employed when he turned 55 on December 28, 1990, so he did not believe he was eligible for the program.

102. The Deputy Commissioner of Personnel sent Grievant's attorney another letter on August 28, 1990, offering Grievant an additional opportunity to enroll in the program. He extended the deadline until two weeks after Grievant returned from Ireland (Grievant's Exhibit 41).

103. While Grievant was in Ireland, Van Zandt sent him a letter dated August 27, 1990. This letter stated in pertinent part:

This letter is to make it clear to you that you are expected to return to work at the Fish and Wildlife Department's Central Office in Waterbury as soon as you've completed your scheduled leave.

As a matter of setting the record straight, you have not been dismissed from employment, as you have suggested in your grievance. While it is true that I intend to eliminate the position of Wildlife Management Division Director at some point in the future in accordance with established procedures, and as a result of the Department's August 5, 1990 reorganization, you still have a job. You will, of course be given written notice of the effective date of your RIF and your employment rights in due course. I do not intend to initiate that RIF process until you have had a fair opportunity to explore and consider all of your options and alternatives.

Since you brought it up in your grievance, I want to clarify the status of the proposed Operations Director job. It is possible that our budget problems may delay or eliminate our ability to create and fill this position. However, as I tried to make clear on July 25, you will have every right to apply for the job if and when recruitment begins. It is my intent to use the open competitive recruitment process for this position, and as I attempted to make clear to you, any State employee, including yourself, would be considered if found eligible under the rules of the merit system. My current understanding is that you are considered to be on accrued leave for the time you have been absent since August 5, 1990, and that you will be returning from a vacation in Ireland shortly (State's Exhibit 39).

104. Van Zandt did not send this letter until August 27, 1990, because he had consulted with Assistant Attorney General Seibert after the grievance was filed on August 9, and it had taken several weeks to draft this letter.

105. Grievant, Van Zandt, and their attorneys met on September 11, 1990. The purpose of the meeting was to determine what duties Grievant should perform upon his return to work. Van Zandt made it clear to Grievant that his position was going to be eliminated at some point in the future. At this time, employees whose positions were affected by the reorganization had accepted, and were already working in, their new positions and Van Zandt had decided not to fill the Operations Director position. Grievant, Van Zandt, and their attorneys discussed the Operations Director position. Van Zandt told Grievant he may not be filling the Operation Director position because of financial concerns, but if he later decided to fill the position, Grievant was welcome to apply. They also discussed the non-game biologist position, Pay Grade 21, that was going to be vacated by Diane Pense, but Grievant understood from this meeting, and subsequent

conversations with Van Zandt, that it was likely that the position was going to be eliminated.

106. Grievant returned to work on September 13, 1990. Based on earlier discussions, Van Zandt sent Grievant a memorandum outlining his work hours and duties. After returning to work, Grievant worked on over 40 Department land acquisitions. He also assisted the wildlife staff by answering correspondence and performing biological work on projects and performing other duties on an ad hoc basis (Grievant's Exhibit 133).

107. In making out his time sheet for the pay period during which he returned to work, Grievant marked "time absent for administrative leave with pay" for the eight days he had not worked in that pay period preceding September 13. Van Zandt changed the time report and charged Grievant for annual leave. The Department docked Grievant's bank of annual leave for the 26 days he was not at work from August 6 to September 13. Grievant was making \$24.07/hour at the time, or \$5006.56 for the 26 days (Grievant's Exhibits 42, 43).

108. Grievant never appeared on any Department organization chart after July 25, 1990. He also did not appear in a "Field Guide to the Agency of Natural Resources" that was dated September, 1990. This Field Guide erroneously omitted many current Department employees (Grievant's Exhibits 45, 112, 114, 116, 117, 118, 119, 120, 123, 124, 125).

109. Van Zandt had filled the two Special Project Assistant positions created under the reorganization with the former Director and Assistant Director of the Fisheries Division, Angelo

Incerpi and Roderick Wentworth. The projects he had assigned Incerpi, a lamprey control project and a hatchery project, were coming to an end.

110. Fisheries employees in the district offices complained that Van Zandt had filled most of the District Coordinator positions with wildlife biologists. The employees expressed concerns about the District Coordinators evaluating fishery biologists for performance evaluations. There were also complaints that there were too many employees reporting to Van Zandt. Van Zandt also concluded that due to lack of funds, he would have to fill the Operations Director position with an existing Department employee. Ultimately, Van Zandt approached Incerpi about taking the Director of Operations job. Previously, Van Zandt had told Grievant that the position required management skills which outside talent would have to provide.

111. Incerpi agreed to take the position and assisted in rewriting the existing job description. The new description included a requirement that the person have considerable knowledge in the fish and wildlife area and fish hatchery operation (Grievant's Exhibit 65).

112. Van Zandt filled the Operations Director position on October 4, 1990, by allocating the Special Projects Assistant Position occupied by Incerpi upward to Fish and Wildlife Director of Operations. He did not give Grievant, or anyone else, an opportunity to apply for the position.

113. On October 16, 1990, Van Zandt sent a memorandum to all Department employees regarding the reorganization. He revised

the earlier chart, this time showing the Director of Operations directly under him. Van Zandt explained that Incerpi's role would be to "assist [him] with the planning, coordinating, and administration of all Department activities". He further stated that Parren would be coordinating and supervising the Non-game/Heritage programs, which had been a separate unit but under no director or supervisor under the reorganization. He also explained that Law Enforcement would continue to work through him to the Deputy Secretary, contrary to the original plan. Deputy Secretary Beattie had left the agency by this time, and William Briarly later replaced her as Deputy Secretary (Grievant's Exhibit 134).

114. In response to the six positions mandated by the Legislature to be eliminated, Van Zandt abolished those positions on October 23, 1990. All six positions were vacant at the time. The positions were wildlife biologist, wildlife technician, game warden, hunter safety warden, assistant director of law enforcement and educational specialist. Bruce Dawson, former Assistant Director of Law Enforcement, the employee other than Grievant potentially subject to lay off as a result of the reorganization, had moved into another position as District Warden Supervisor (Grievant's Exhibit 135).

115. Department employees, with their respective ages indicated, who were affected by the reorganization are:

Employees Who Moved Into Positions of a Lower Pay Grade
or Who Were Laid Off

<u>LAST NAME</u>	<u>AGE</u>	<u>POSITION/PAY GRADE</u> (prior to reorganization)	<u>POSITION/PAY GRADE</u> (post reorganization)
Dawson	56	Ass't Law Enforcement Director, Pay Grade 23	District Warden Supervisor
Wightman	54	Dist. Fish Mgr., Pay Grade 22	Dist. Fish Bio., Pay Grade 21
Day	54	Wildlife Mgt. Director, Pay Grade 27	<u>RIFed</u> on 1/4/91
Claussen	53	Dist. Fish Mgr., Pay Grade 22	Dist. Fish Bio., Pay Grade 21
Callum	51	Dist. Fish Mgr., Pay Grade 22	Dist. Fish Bio., Pay Grade 21
Anderson	50	Dist. Fish Mgr., Pay Grade 22	Dist. Fish Bio., Pay Grade 21
Garland	50	Ass't Wildlife Mgr., Pay Grade 24	F & W Coord., Pay Grade 23
Willey	50	Dist. Wildlife Mgr., Pay Grade 22	Dist. Wildlife Bio., Pay Grade 21
Meyers	48	Dist. Wildlife Mgr., Pay Grade 22	Dist. Wildlife Bio., Pay Grade 21
Hall	45	F & W Info. & Ed. Dir., Pay Grade 24	F&W Info. & Ed. Spec., Pay Grade 20
Cox	38	Dist. Fish Mgr., Pay Grade 22	Dist. Fish Bio., Pay Grade 21
Wentworth	37	Fish. Asst. Div. Dir., Pay Grade 24	F&W Impact Assess. Spec., Pay Grade 21

Employees Who Moved into Positions of a Higher Pay Grade

Incerpi	50	Fish Div. Dir., Pay Grade 27	Dir. of Operations Pay Grade 29
DiStefano	54	Dist. Wildlife Mgr., Pay Grade 22	F & W Coord., Pay Grade 23
Wiggins	40	Fish. Cult. Op. Chief, Pay Grade 23	Fish. Cult. Op. Chief, Pay Grade 25
Geraldi	37	Dist. Fish. Bio., Pay Grade 21	F & W Coord., Pay Grade 23

Employees Who Moved Into Positions of a Higher Pay Grade (cont).

Parren	36	Wildlife Res. Anal., Pay Grade 21	F & W Staff Ass't., Pay Grade 24
Regan	34	Dist. Wildlife Mgr., Pay Grade 22	F & W Coord., Pay Grade 23
Darling	33	Dist. Wildlife Mgr., Pay Grade 22	F & W Coord., Pay Grade 23

(Joint Exhibit 1, Grievant's Exhibit 147, State's Exhibit 1 and 33).

116. Van Zandt had not selected the new Fish and Wildlife Coordinator for the St. Johnsbury district when he held the information meeting to explain the reorganization in early August. He did not seek applications and did not require competitive examinations. At the time, Willey, age 50, was the District Wildlife Manager and Wightman, age 54, was the District Fish Manager, both Pay Grades 22. Gerald, age 37, worked under Wightman as a District Fish Biologist, but had served as Fisheries Assistant Director previously. Van Zandt offered the position to Gerald.

117. Grievant was qualified for the Director of Operations position, the Staff Assistant position, the District Coordinator positions and many other positions in the reorganized Department.

118. On November 21, 1990, Van Zandt sent Grievant a notice informing him that he would be laid off effective January 4, 1991, "as a result of budget reductions in the Department". At the time Grievant was informed of his lay off, Van Zandt estimated that the Department would have over a \$400,000 deficit for the fiscal year which ended June 30, 1991. Van Zandt did not consider laying off other employees at the time instead of, or in addition to, Grievant.

119. Federal monies for fisheries work increased in 1990. On November 29, 1990, Incerpi sent a memorandum to certain fish and wildlife employees that stated in part:

I'm sure that it is no surprise to you that for the next year or so we're going to be dealing with exceptionally tight budgets. This means that we're going to have to be innovative and frugal while trying to see that our management programs continue at an acceptable pace.

While most revenue sources are declining or staying level at best, the federal monies available for fisheries work is actually increasing. This means that while some of our wildlife programs may have to remain at a subsistence level, we may be able to increase our efforts in fisheries to take advantage of the Federal dollars. As a first step in reallocating our personnel resources, I am asking you to redirect all of your efforts towards fisheries programs (Grievant's Exhibit 138).

120. Van Zandt held a Department meeting on December 4, 1990 at Vermont College to address many issues. Incerpi had previously mentioned to staff that there might be as many as 15 employees laid off in the near future. Van Zandt announced at this meeting that these employees would not be laid off at that time. There were several reasons for this, including: successful negotiations with the wardens over a backpay dispute, saving \$70,000; unfilled vacancies, saving \$101,000; license sales running \$90,000 ahead of projected figures; logging operation netting from \$20,000 to \$30,000.

121. In addition, Van Zandt noted at this meeting that the Department would be able to use Federal monies for fishery activities. Grievant's work on land acquisition, which was a major part of his duties, could be eligible for these Federal monies, called "DJ" (Dingle Johnson) funds. Grievant asked Van Zandt twice at this Department meeting if his lay off could also

be averted by the use of Federal monies. Van Zandt told him that was a different situation and that he did not want to get into that at that time.

122. Grievant subsequently wrote Van Zandt a letter on December 6, 1990, asking again for the same consideration as the other 15 employees whose lay off had been averted, and further stated:

You... indicated at that meeting that you might be willing to consider allowing me to credit most of my time to DJ (WB). You stated that such an action was likely for several Department employees who would need to adjust their duties to take full advantage of DJ (WB) funding. As you are aware I wouldn't need to shift my emphasis at all since virtually all of my land acquisitions efforts will involve the DJ (WB) option. If you recall I made this same suggestion to you in September (Grievant's Exhibit 139).

123. Van Zandt did not respond to this letter, nor did he discuss this option with Grievant before Grievant was laid off. Van Zandt did not investigate this option concerning whether the duties performed by Grievant were eligible for Federal funds.

124. Grievant was laid off on January 4, 1991. By the time he was laid off, there were no available Department positions into which Grievant could move into by exercising reemployment rights. On February 14, 1991, the Agency of Natural Resources, which had been targeted to reduce 29 positions, eliminated 13 positions. Four of those positions were from the Fish and Wildlife Department; three were vacant and the fourth was Grievant's position. Grievant was the only Department employee subject to a lay off.

125. The reorganized Department structure was not modeled after any other fish and wildlife department in the country, and

there is no evidence that it is similar to any other fish and wildlife departments in the country.

126. Although it was recognized by consultant Allan Mackey, Van Zandt, Beattie and Lash prior to the reorganization that it would be crucial to expend significant efforts on training employees in their new positions and communicating with Department employees with respect to the reorganization, there was little follow-up in this regard by the Department. Mackey had no involvement with the reorganization from late June, 1990, to early September, 1990, at which point he met with Van Zandt concerning the Operations Director position. Mackey never submitted a written report on the reorganization and never made an assessment of the reorganization as required by his consultant's contract with the Department.

127. Subsequent to the reorganization, confusion existed, and continues to exist, with respect to responsibilities and duties of Department employees. Also, there has been decreased morale among Department professionals responsible for wildlife issues.

128. No attempt was made by the Department during the 1991 legislative session to change existing legislation to put the Law Enforcement Division under the authority of the Deputy Secretary, although the July 25, 1990, news release by the Governor announcing the reorganization had indicated that this was an accomplished fact. The Law Enforcement Division remains in the Department of Fish and Wildlife under the authority of the Commissioner of Wildlife.

129. Representative John Murphy told a newspaper reporter, on April 8, 1991, that Van Zandt had asked him at some point, "How do you take out people like Ben Day?" In the same conversation with the reporter, Murphy subsequently told the reporter that his comment concerning the question Van Zandt had asked him was a "mistake".

OPINION

1. TERMINATION OF GRIEVANT'S EMPLOYMENT

The central issue in this case is whether the decision to eliminate Grievant's position, not offer him any one of a number of positions in the reorganized Department, and lay him off, constitutes a violation of Grievant's rights under the VSEA-State Contract, as extended to classified managers (such as Grievant), the Personnel Rules and Regulations and the merit system statutes. More specifically, the heart of Grievant's claim is that the Employer's actions constituted discrimination because of age, politics or some other non-merit factor in violation of Article 5 of the Contract, the Personnel Rules and Regulations and 3 VSA §312, all done by the Employer in a fashion that made of Grievant the unique and sole target of all the employees of the Department.

When he filed his grievance and amended grievance, Grievant claimed to have been either dismissed or subject to a reduction in force. In briefs filed subsequent to the hearing, Grievant appears to have withdrawn his claim that he was dismissed, and claims he was subject to a reduction in force.

In any event, assuming that Grievant has not withdrawn this claim, and however misguided and clumsy the actions of the Employer appeared to be, the elements of dismissal were not present. First, an employee may only be dismissed for performance or disciplinary reasons. There is no evidence that Grievant's termination was motivated for disciplinary reasons. There is scant evidence that Grievant's performance motivated Van

Zandt's decision. Grievant consistently received very good evaluations and Van Zandt never spoke to him of performance deficiencies. Second, while Van Zandt told Grievant that he was "all done" at the July 25 meeting, a notice of dismissal was never sent to Grievant and Van Zandt did not tell anyone else that he had dismissed Grievant. If Van Zandt truly intended to discharge Grievant, it is likely that he would have followed it up with a letter of dismissal. Third, the Department's Personnel Administrator, who was present at the July 25 meeting, told Grievant on July 26 that he had reemployment rights. If Grievant had been dismissed, he would have no such rights.

Thus, we will analyze this case as a reduction in force case. The next issue to be decided is when the reduction in force decision actually was made. Grievant contends that the reduction in force implemented on January 4, 1991, was merely the implementation and culmination of a decision announced by Van Zandt on July 25, 1990.

There is sufficient evidence to support Grievant's claim. Van Zandt told Grievant on July 25 that he was "all done", that there was no place for him in the Department, and that Grievant's work was now his (Van Zandt's) responsibility. This made it clear that Grievant was no longer going to be working for the Department. The only remaining question was when, and how, his termination of employment actually would occur.

II. JURISDICTIONAL BASIS

In determining whether the layoff of Grievant can be upheld, we must examine the reduction in force provisions of the

Personnel Rules and Regulations which apply to Grievant¹, together with the "no discrimination" article of the Contract extended to managers, and the merit system statutes.

Section 2.032 of the Personnel Rules and Regulations, which governs the layoff of managers such as Grievant, defines layoff in pertinent part as follows:

2.0382 LAYOFF is an involuntary separation from a position of an employee whose service record has been adequate or better either by reason of a reduction of force due to lack of work or lack of funds, or by reason of discontinuance of the position as previously established.

Thus, since Grievant was laid off "by reason of reduction in force", the Employer generally was permitted to do so as long as the reduction in force was due to "lack of work or lack of funds". However, this right of management is limited by Article 5 of the Contract, which has been extended to managers, which provides in pertinent part that "neither party shall discriminate

¹ Article 72, Section 2, of the Contract provides that the "right to determine that a reduction in force is necessary and the time when it shall occur is the employer's prerogative, pursuant to the provisions of Article 2, Management Rights. Under Article 2, the "Employer may determine that a reduction in force is necessary when a lack of work situation exists or in conformance with this Article". "Lack of work" is defined in the Definition section of the Contract as "when 1) there is insufficient funds to permit the continuation of current staffing; or 2) there is not enough work to justify the continuation of current staffing". However, while other provisions of Article 72 have been extended to managers by the Secretary of Administration (see Grievant's Exhibit 26), Section 2 of the Article has not been extended to managers, nor has Article 2 of the Contract. Instead, Section 2.0382 of the Personnel Rules and Regulations, hereinafter cited, provide the basis for the layoff of managers such as Grievant.

against... any employee because of... age... or any other factor for which discrimination is prohibited by law" (emphasis added).

3 VSA §312, which is concerned with the State merit system, provides "other factor(s) for which discrimination is prohibited by law" within the coverage of Article 5 of the Contract. It is appropriate for us to determine whether a statute was violated in reviewing a grievance where the alleged statutory violation is referenced in contract provisions or provisions of rules and regulations. Bovnton v. Snelling, 147 Vt. 564, 565-566 (1987). The broad language of Article 5 embraces discrimination provisions set forth in the merit system statute, since such statute contains factors for which discrimination is prohibited.

3 VSA §312 provides in pertinent part as follows:

a) The terms "merit system" means the system developed to maintain an efficient career service in state government under public rules, which, among other provisions, includes... non-discrimination because of... politics; ... tenure, contingent on successful performance...

b) Merit system principles are:

...
4) Retaining employees on the basis of the adequacy of their performance, correcting inadequate performance...

5) Assuring fair treatment of applicants and employees in all aspects of personnel administration without regard to political affiliation and with proper regard for their constitutional rights as citizens; and

6) Assuring that employees are protected against coercion for partisan political purposes...

It is necessary to determine the scope of the protection provided by the merit system statute against discrimination for

political reasons. Protections are provided in three separate provisions of the statute:

1) The merit system includes a provision of "non-discrimination because of... politics." 3 VSA §312(a).

2) It is a merit system principle to "assur(e) fair treatment of... employees in all aspects of personnel administration without regard to political affiliation. 3 VSA §312(b)(4).

3) It is a merit system principle to "assur(e) that employees are protected against coercion for partisan political purposes. 3 VSA §312(b)(6).

There is no legislative history or past Vermont decisions to guide us as to the scope of protection afforded employees under these provisions. We thus turn for guidance to court decisions in other jurisdictions interpreting the same or similar terms.

In interpreting civil service regulations prohibiting "political discrimination" or discrimination "based on political reasons", Federal courts have concluded that "political" encompasses "non-partisan political" reasons. Peale v. United States, 325 F.Supp. 193, 195 (D.C. Ill., 1971). Holden v. Finch, 466 F.2d. 1311, 1315-1316 (D.C. Cir., 1971).

The New Hampshire Supreme Court, coming to a contrary view, has defined "political" more narrowly. In interpreting a statute which required reinstatement of an employee if the personnel board found that the action complained of was taken for "any political... reason", the Court concluded that the "political reasons referred to relate to politics in the narrow sense of partisan political activity". Nason v. New Hampshire Personnel Commission, 370 A.2d 634, 638, 117 N.H. 140 (1977). However, we do not find the New Hampshire decision persuasive on interpreting

the meaning of "politics" under the Vermont merit system statutes because the two cases the New Hampshire Court relied on in reaching its decision Hirschman v. Los Angeles County, 231 P.2d 140 (Cal. Dist. Ct. App. 1951) and Powell v. Unemployment Compensation Board of Review, 146 Pa. Super. 147, 22 A.2d 43 (1941); involved the interpretation of the phrase "political affiliation", not "political" or "politics". We conclude that the Federal precedent previously cited adopting a broader meaning of "political" is more persuasive.

Federal courts have interpreted discrimination based on "partisan political reasons" to mean discrimination based on "affiliation with any political party or candidate". Poorsina v. US Merit Systems Protection Board, 726 F.2d 507, 509 (9th Cir., 1984). Mastriano v. F.A.A., 714 F.2d 1152, 1155-1156 (Fed. Cir., 1983). Thus, the addition of the word "partisan" narrows the scope of activity properly considered "political" Poorsina, 726 F.2d at 509.

Since the Vermont merit system statute contains the broad word "politics" and the more narrow terms "partisan political purposes" and "political affiliation", we need to decide the scope of the protection against discrimination for political reasons. We conclude that the most appropriate reading of the statute is that it is designed primarily to protect employees against discrimination for partisan political reasons, but that it also prohibits non-partisan political discrimination by virtue of including the words "non-discrimination because of... politics".

This broader protection is supported not only by use of the more inclusive word "politics", but also by examination of the merit system statute as a whole. In providing for "tenure, contingent on successful performance", 3 VSA §312(a), the merit system is designed to provide classified employees protection against termination of employment based on non-meritorious reasons. Given this evident legislative intent to afford classified employees a high degree of protection, this reinforces our conclusion that the protection against discrimination for politics encompasses non-partisan political reasons.

Thus, we conclude that the Employer is prohibited by Article 5 of the Contract and 3 VSA §312 from discrimination against managers for non-partisan, as well as partisan, political reasons.

Here, the Employer recognizes that no lack of work existed, and offers the reorganization and lack of funds as the legitimate business reasons for Grievant's layoff. Grievant contends that the reorganization and lack of funds are just a pretext for the real motivation behind the layoff - age discrimination, discrimination for political reasons, and discrimination based on other non-merit factors, or any one or two of the above. We now examine these arguments in light of the Rules, statute and the Contract.

III. AGE DISCRIMINATION

We first consider whether the layoff of Grievant was due to age discrimination. We have previously adopted the analysis developed by the US Supreme Court in determining whether an

employee was discriminated against on account of the prohibited factors of sex; Grievance of Smith, 12 VLRB 44 (1983); Grievance of Rogers, 11 VLRB 101 (1988); and national origin. Gamez v. Brandon Training School, 12 VLRB 160 (1989). So too will we rely on Federal precedent to decide age discrimination cases.

The United States Supreme Court articulated the burdens of proof in disparate treatment cases, distinguishing between the burden of proof in a "mixed motive" case and a "pretext" case. Price Waterhouse v. Hopkins, 490 US 228 (1989). Price Waterhouse was a sex discrimination case, but its reasoning is equally applicable, and its rule has been extended, to age discrimination cases. Visser v. Packer Engineering Associates, Inc., 924 F2d 655, 658 (7th Cir. 1991). Burns v. Gladsden State Community College, 908 F2d 1512, 1517-18 (11th Cir. 1990)(per curiam). Grant v. Hazelett Strip-Casting Corp., 880 F2d 1564, 1568-69 (2nd Cir. 1989).

Grievant contends that this is a "pretext" case; that the legitimate business reason offered by the Employer for the layoff is just a pretext for the real reason of age discrimination (or discrimination for political reasons as discussed below). In pretext cases, the issue is whether illegal or legal motives, but not both, were the true motives behind the decision. Price Waterhouse, supra, Concurring Opinion of Justice White, at 260. NLRB v. Transportation Management Corp., 462 US 393, 400, n. 5 (1983). In pretext cases, the analysis used is that which is set forth in Texas Department of Community Affairs v. Burdine, 450 US 248 (1981).

We have previously employed the Burdine framework in disparate treatment cases. The complainant carries the initial burden of establishing a prima facie case. Grievance of Rogers and VSCFF, supra. McDonnell Douglas Corp. v. Green, 411 US 792 (1973). State of Vermont v. Whitingham School Board, 138 Vt. 15 (1979). Once the complainant establishes a prima facie case, the burden shifts to the employer to articulate some legitimate, non-discriminatory reason for the adverse action. Burdine, 450 US at 253. In meeting this burden, the employer is not required to prove the absence of discriminatory motive. Rogers, at 126. Board of Trustees of Keene State College v. Sweeney, 439 US 24 (1978). In putting forth its non-discriminatory purposes, the employer need not persuade the reviewing body that it was actually motivated by the proffered reasons. It is sufficient if the employer's evidence raises a genuine issue of fact as to whether it discriminated against the complainant. Rogers, at 126. Burdine, supra.

Should the employer carry its burden of production, the complainant must then have the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the employer were not its true reasons, but were a pretext for discrimination. Rogers, at 126. McDonnell Douglas, at 804. Burdine, at 253. The ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the complainant remains at all times with the complainant. Rogers, at 125-126. Burdine, at 253.

Thus, we first must determine whether Grievant has made out a prima facie case of age discrimination. In a case alleging disparate treatment, a prima facie case of discrimination when employment termination is involved generally consists of proving that 1) the employee belongs to a protected class, 2) that he or she was qualified for the position, 3) that despite such qualifications he or she was rejected, and 4) that after the rejection, a party not part of the protected class was hired or retained for the position. McDonnell Douglas Corp., *supra*, at 802. Smith, *supra*, 12 VLRB, at 53. The employee's burden of establishing a prima facie case is "not onerous". Burdine, 450 US at 253.

Federal courts have relied on and modified the McDonnell Douglas model for establishing a prima facie case in age discrimination cases. In doing so, they have recognized that the analysis is neither "rigid" nor "mechanized". The primary focus is always whether an employer treats an employee less favorably than other employees for an impermissible reason. Montana v. First Federal Savings and Loan Association of Rochester, 869 F2d 100, 104 (2nd Cir. 1989). Furnco Construction Corp. v. Waters, 438 US 567, 577 (1978). In layoff and reorganization cases involving age discrimination, it is not necessary to show that the person terminated was either replaced by a newly-hired or younger person. It is sufficient that the termination occurred in circumstances giving rise to an inference of discrimination. Montana, *supra*, at 105. Hagelthorn v. Kennecott Corp., 710 F2d 914 (2nd Cir. 1983). Stanoiev v. Ebasco Services, 643 F2d 76

(2nd Cir. 1981). Pena v. Brattleboro Retreat, 702 F2d 322 (2nd Cir. 1983).

Courts have held that comparative evidence - evidence that an employer treated an older employee less favorably than similarly-situated younger employees - raises an inference of discrimination sufficient to demonstrate a prima facie case of age discrimination. Holzman v. Jay-Mar Ruby, Inc., 916 F2d 1298, 1301 (7th Cir. 1990). Brown v. M & M Mars, 883 F2d 505, 511 (7th Cir. 1989). Overgard v. Cambridge Book Co., 858 F2d 371, 376 (7th Cir. 1988).

In applying that analysis to this case, we conclude that Grievant has made out a prima facie case of age discrimination. Grievant is a member of the protected class given his age of 54. Also, he was laid off from a job for which he was clearly qualified.

Further, the evidence indicates that employees not in the protected class of older employees were treated more favorably. An inference of discrimination has been raised here sufficient to demonstrate a prima facie case of discrimination given the comparative evidence here concerning the treatment of older employees versus younger employees as a result of the reorganization. Two of the three Division Directors whose positions were eliminated or reallocated to were 45 and 54 years of age. Two of the three Assistant Directors whose positions were eliminated or reallocated were 50 and 58. The average age of the employees who were either reduced in force, or whose positions were reallocated to a lower pay grade, was 49. In

contrast, the average age of the employees who received promotions, or whose positions were reallocated to a higher pay grade, was 40.

Grievant having established a prima facie case, the Employer is then required to articulate legitimate, non-discriminatory reasons for selecting Grievant for layoff, and legitimate reasons for not placing Grievant into any of the available positions for which a younger employee was selected. The reasons articulated by the Employer for the layoff are the reorganization and lack of funds, which are legitimate, non-discriminatory reasons for the layoff of an employee.

The reasons identified by the Employer vary for selecting substantially younger employees than Grievant in the available positions due to the reorganization. Grievant has identified four employees under the age of 40 who were promoted as a result of the reorganization into positions for which Grievant was qualified: Leonard Gerardi, age 37, from District Fish Biologist in St. Johnsbury, Pay Grade 21, to Fish and Wildlife Coordinator, St. Johnsbury, Pay Grade 23; Steven Parren, age 36, from Wildlife Resource Analyst, Pay Grade 21, to Staff Assistant, Pay Grade 24; Ronald Regan, age 34, from District Wildlife Manager in Barre, Pay Grade 22, to Fish and Wildlife Coordinator in Barre, Pay Grade 23; and Scott Darling, age 33, from District Wildlife Manager in Pittsford, Pay Grade 22, to Fish and Wildlife Coordinator in Pittsford, Pay Grade 23.

The Employer supports its selection of the three junior Fish and Wildlife Coordinators - Gerald, Regan and Darling - on the

bases that there were no vacancies in the district which could be filled with a coordinator, that the employees selected had supervisory experience, and immediately prior to their promotions the employees had been working in the district in which they were selected as coordinators. The Employer contends that this minimized the displacement and disruption to the workforce which could have undermined support for and effectiveness of the reorganization. These reasons articulated by the Employer constitute legitimate, non-discriminatory reasons for selecting the younger employees, rather than Grievant, for the Coordinator positions.

The reasons articulated by the Employer for selecting Parren for the Staff Assistant position are that he had worked with all the district offices, was well-educated in fish and wildlife issues, had computer expertise and, most importantly, had indicated that he was willing and able to be Van Zandt's primary assistant in the reorganization efforts. These reasons articulated by the Employer also constitute legitimate, non-discriminatory reasons for selecting Parren rather than Grievant for the Staff Assistant position.

The Employer having articulated non-discriminatory reasons for its actions, Grievant must prove by a preponderance of the evidence that the legitimate reasons offered by the Employer were not its true reasons, but were a pretext for age discrimination. Rogers, 11 VLRB at 126. McDonnell Douglas, 411 US at 804.

We conclude that Grievant has not presented sufficient evidence to demonstrate that the Employer's reasons were a

pretext for age discrimination. Although the statistical information in evidence indicating that older employees fared less well than younger employees as a result of the reorganization raises an inference of discrimination, this is not sufficient by itself to demonstrate that Grievant was the victim of age discrimination. We recognize that, in any reorganization which eliminates management layers, there may be a disproportionate number of senior employees whose jobs may be affected since it is more likely that senior employees are in those "management layer" positions being eliminated.

The legitimate, non-discriminatory reasons articulated by the Employer for selecting younger employees than Grievant for the Coordinator positions and Staff Assistant positions, taken together with the absence of other than statistical evidence on the treatment of older employees, leads us to conclude that Grievant has not sustained his burden of proving the articulated reasons constituted a pretext for age discrimination.

Grievant has relied on the offering of early retirement on three separate occasions as further proof of age discrimination. However, while, as discussed below, we do believe Van Zandt was intent on ridding himself of Grievant, we do not conclude early retirement offerings indicated age discrimination. We believe that the offerings of early retirement simply served as a potential means for Van Zandt to achieve his ultimate end; terminating Grievant's employment because of political reasons.

IV. Discrimination for Political Reasons

As previously discussed, Grievant was protected against discrimination for non-partisan, as well as partisan, political reasons pursuant to Article 5 of the Contract and 3 VSA §312. Grievant's contention that Commissioner Van Zandt made his employment decision regarding Grievant, based on Grievant's well-known support of deer herd management through antlerless hunting seasons which was unpopular among a segment of Vermont's hunters, constitutes an allegation of discrimination for non-partisan political reasons. In Vermont, deer herd management is a very political issue.

The analysis which we applied in determining whether age discrimination occurred generally may be applied in determining whether discrimination occurred for political reasons. We need make only those modifications consistent with the nature of the alleged discrimination.

Thus, we first must determine whether Grievant has made out a prima facie case of discrimination for political reasons. In order to make out a prima facie case, Grievant must demonstrate that he was involved in activities with political implications, that he was qualified for the position for which he was removed and the positions for which he was not selected, that he was treated less favorably than employees not involved or visibly identified with the activity involving political implications, and that the termination of Grievant's employment occurred in circumstances giving rise to an inference of discrimination.

In applying that analysis to this case, we conclude that Grievant has made out a prima facie case of discrimination based on political reasons.

There was ample evidence that Grievant's support for and association with antlerless hunting seasons resulted in his unpopularity with a vocal minority segment of Vermont's hunters. We need not recite the long list of insults inflicted on Grievant as a result of his support for antlerless hunting. Grievant's unpopularity was so well known and acknowledged within the Department that at least one commissioner curtailed Grievant's legislative activities during the legislative session because he was a "lightning rod" on deer herd management issues. Thus, Grievant was actively involved and identified in an issue with political implications, and Commissioner Van Zandt was well aware of this.

Grievant clearly was qualified for the position from which he was removed and for positions for which he was not selected as a result of the reorganization. He was a manager with 27 years of service in the Department, during which his performance was exemplary. He was well respected by professional colleagues not only in the Department and Vermont, but was held in high esteem on a national and international level.

Also, Grievant was treated less favorably than other employees not involved or visibly identified with the antlerless deer season issue. This is made obvious by the fact that he was the only employee whose employment was terminated due to the reorganization. Also, the way in which the timing of Grievant's

layoff was handled ensured that he could not move into any of the positions created by the reorganization, since he was offered none of these positions, and could not move into any of them as a result of reduction in force rights. These positions had all been filled by the time he was laid off. Further, the expressed concern of the Employer about giving Grievant time to explore his options when considered with what ultimately occurred, in connection with the timing of the reduction of force, is an empty gesture.

The final element in making out a prima facie case is that the termination occurred in circumstances giving rise to an inference of discrimination because of political reasons. In addition to the elements discussed above, which are relevant in contributing to a determination that there is an inference of discrimination, other circumstances exist here to raise a sufficient inference of discrimination.

One relevant factor is Van Zandt's stated opposition to antlerless hunting seasons. Although Van Zandt claimed not to be personally opposed to antlerless seasons, he admitted that as a legislator, and as chair of the Fish and Wildlife Committee, he publicly opposed antlerless hunting seasons. Since it was Van Zandt who made the decision to reorganize the Department and terminate Grievant's employment, this certainly is a relevant consideration.

We also look to the way Van Zandt treated Grievant on July 25, 1990, the day he announced the reorganization. He offered no regrets, no thanks, not even an explanation for Grievant's being

"all done" with the Department of Fish and Wildlife. He also did not discuss what Grievant's responsibilities would be after August 5, 1990, the effective date of the reorganization, and left Grievant mistakenly, but reasonably, believing that his employment was terminated August 5, 1990. This is certainly a strange way to treat a manager who had provided 27 years of exemplary service to the Department, and contributes to our conclusion that Grievant has raised a sufficient inference of discrimination.

This conclusion is further bolstered by the communication Van Zandt had with McNeil on the morning of July 25, 1990, the day he announced the reorganization. Van Zandt told McNeil that he "got rid" of Grievant; that "it took four commissioners to get rid of him, and I did". Why would Van Zandt make such a statement about an employee who has provided exemplary service? We can think of no appropriate reason under the circumstances for making such a comment. The fact that it was made to the president of a statewide group of sportsmen and sportswomen actively concerned with issues with which the Department is involved leads us to conclude, along with the other circumstances already mentioned, that there is a strong inference of discrimination herein against Grievant based on the political aspects of deer herd management.

Grievant having established a prima facie case, the Employer is then required to articulate legitimate, non-discriminatory reasons for selecting Grievant for layoff, and legitimate reasons for not placing Grievant into any of the available positions for

which another employee was selected. The reasons articulated by the Employer for the layoff are the reorganization and lack of funds, which are legitimate, non-discriminatory reasons for the layoff of an employee. Section 2.0382 of the Personnel Rules and Regulations certainly contemplates that managers may be legitimately separated from employment for such reasons by providing for reduction in force due to "lack of funds" and by providing for involuntary separation of an employee "by reason of discontinuance of the position as previously established".

Also, as earlier discussed in the section on age discrimination, the Employer has articulated legitimate, non-discriminatory reasons for selecting younger employees rather than Grievant, for some of the positions created by the Department reorganization. The Employer also articulated the legitimate, non-discriminatory reason for selecting Larry Garland for the Fish and Wildlife Coordinator position that he was well qualified to take over supervisory duties for one of the five offices he formerly supervised. The Employer also articulated the legitimate, non-discriminatory reason of selecting Angelo Incerpi for the Operations Director position that four of the five district office coordinators had wildlife backgrounds, and there was a concern that there needed to be a manager in central office with a fisheries background. Incerpi had a fisheries background, whereas Grievant's experience was in wildlife issues. In concluding that the Employer has articulated such legitimate, non-discriminatory reasons for its selection of employees other than Grievant, we emphasize that we are not concluding that the

Employer has persuaded us that it was actually motivated by the proffered reasons. It is sufficient if the Employer's evidence raises a genuine issue of fact as to whether it discriminated against Grievant.

The Employer having sustained its burden of production in articulating legitimate, non-discriminatory reasons for its actions, Grievant must prove by a preponderance of the evidence that the legitimate reasons offered by the Employer were not its true reasons, but were a pretext for discrimination for political reasons.

We consider the reasons articulated by the Employer for Grievant's layoff - i.e. reorganization and lack of funds - together. We would consider the reorganization issue separately, at least in part, if the Employer was contending that a lack of work situation existed due to the reorganization. This is because an alleged lack of work situation could indicate a legitimate reason for Grievant's layoff absent a lack of funds. However, the evidence indicated, and the Employer does not dispute, that there was no lack of work for Grievant subsequent to the reorganization. Thus, we consider the reorganization and lack of funds issues together.

At the outset of discussing the reorganization in conjunction with the lack of work issue, we comment on the process and soundness of the reorganization itself. Grievant concedes, and we concur, that the fact that the reorganization may have been poorly planned, communicated and implemented is not the focus of this grievance, although it is obvious that such

elements were present in this reorganization. We just note illustratively that the sole effect of consultant Mackey's bootstrap involvement was to give legitimacy to a decision that had already been made. The focus of the grievance centers on what motivated the decisions made by Van Zandt in connection with the reorganization, and specifically what motivated decisions which adversely impacted on Grievant's employment status.

There is evidence that the Department had serious fiscal problems. The Department reorganization followed a legislative mandate to eliminate six Department positions and to reduce the Department budget by \$112,000. Also, at the time Grievant was notified of his layoff, Van Zandt was anticipating a Department budget deficit of approximately \$400,000 for the current fiscal year which ended June 30, 1991.

However, we conclude that Grievant has demonstrated that discrimination based on political reasons motivated Grievant's layoff, not lack of funds. Van Zandt did not adequately explain why the Department was willing to continue the employment of 15 other employees, who were potentially targeted for layoff around the time Grievant was laid off. Van Zandt also did not adequately explain why he was unwilling to use Federal monies, so-called DJ Funds, to keep Grievant employed. This is particularly striking when much of Grievant's work after the reorganization involved land acquisition projects for which DJ Funds could be used, a fact which Grievant brought to Van Zandt's attention to seek to avert his lay off. Van Zandt never responded to Grievant's request to avert his layoff by use of DJ

monies. Van Zandt averted the lay off of 15 other Department employees by various funding alternatives, including use of DJ monies, but he failed to give Grievant the same consideration.

Van Zandt also cannot rely on the need to meet the legislative mandate to reduce six positions as necessitating Grievant's layoff. The six positions already had been eliminated more than a month prior to Grievant being notified of his layoff.

Thus, we conclude that the Employer's articulated reasons of reorganization and lack of funds for Grievant's ultimate termination of employment were not the real reasons for such action. Also, it is evident that there is an absence of any reasonable basis under the circumstances for the termination of Grievant's employment. We are struck by the fact that the only Department employee whose employment was involuntarily terminated as a result of the reorganization and budget reductions was Grievant, a politically unpopular employee with a vocal segment of the Department's constituency. It stretches credibility that Van Zandt could find no place in the Department for an internationally-recognized, 27-year manager of the Department with a superlative performance record, but could find employment for all other Department employees.

We conclude that Grievant has established by a preponderance of the evidence that Van Zandt was intent on ridding himself of Grievant due to discrimination based on Grievant's involvement and visible identification with the political issue of antlerless deer seasons. Under all the circumstances we have discussed in this opinion, we are persuaded that Van Zandt decided, for

political reasons, to terminate the employment of an employee who was closely identified with support of a deer herd management position which Van Zandt had publicly opposed, and thus ingratiate himself with the vocal segment of the Department's constituency who were opposed to antlerless deer seasons. Under all the circumstances, the reasonable conclusion to draw from Van Zandt's statement to George McNeil that he "got rid" of Grievant is that he "got rid" of him for the political reasons of deer herd management issues.

Absent discrimination for political reasons, it is evident that Grievant either would have been selected for another position created by the reorganization, or allowed to remain employed in his position which he occupied when laid off. However, Van Zandt was intent on ridding himself of Grievant, as he made clear to McNeil in their July 25 phone conversation. The Department reorganization, a mysterious transmogrification at best, and the lay off of Grievant served simply as a means to achieve his ultimate illegal end - terminating Grievant because of political reasons. This was completely contrary to the merit system established in Vermont by statute to ensure that treatment of classified employees is based on merit, and not based on discrimination due to political reasons.

We turn to determining what remedy to apply for this discriminatory action. Improperly terminated employees are entitled to be made "whole"; to make employees "whole" is to place them in the position they would have been in had they not

been improperly terminated. Grievance of Benoir, 8 VLRB 165, 168 (1985).

Under the circumstances, the most appropriate remedy to make Grievant whole in this case is to place him in the position which he occupied when he was laid off.

As a final note on the political discrimination issue, we express our frustration at the inability to have evidence fully presented on alleged discussions Representative John Murphy had with Van Zandt, and with a newspaper reporter, concerning the elimination of Grievant's position and the termination of Grievant's employment. Murphy's testimony on this issue potentially would have been of great benefit to ascertain the motivation behind Van Zandt's actions in this case.

Representative Murphy claimed that he had legislative immunity from testifying concerning such discussions. The distinction between the immunity of a legislator and his or her obligation, as any other citizen, to respond to the legitimate concerns of a judicial or quasi-judicial instrument of government can seem a bit scholastic. But for this Board, this distinction is very real. It is only a slight oversimplification to say that we adhere zealously to the dictates of the State constitution and the complete independence and autonomy of the legislature, even as we view the effort to obviate the true meaning of legislative immunity by the untoward action of a single legislator with a skeptical tolerance of these concepts bordering on contempt.

We still hold to our conclusion stated in a previous opinion in this matter that this alleged discussion did not constitute

protected legislative activity because it was not part of the due functioning of the legislative process. Grievance of Day, 14 VLRB 127 (May 22, 1991). In a subsequent action, in Washington Superior Court to enforce our order which provided that the Board would issue a subpoena requiring Representative Murphy to testify, Superior Court Judge Alan Cheever determined that the subpoena was properly issued but limited the questions which Representative Murphy could be asked (Docket No. S-303-91, WC., May 29, 1991). The subsequent testimony which we had from Representative Murphy, limited by his claim of legislative immunity, was of little probative value.

V. ANNUAL LEAVE CHARGE TO GRIEVANT

The final issue in this case is that Grievant seeks the restoration of 26 days of annual leave for the period August 6, 1990, to September 12, 1990. Grievant contends that his absence from work was caused, in the first instance, by Van Zandt's specific communication on July 25 that Grievant was "all done", and in the second instance, by a lack of communication that he was still employed.

Pursuant to Grievant's July 25, 1990, conversation with Van Zandt, we conclude Grievant reasonably believed that his employment was terminated effective August 5, 1990. The Employer did nothing to correct Grievant's belief until after he filed his grievance on August 9, 1990. After the grievance was filed, but before Grievant left for a planned vacation to Ireland on August 16, 1990, the Employer's attorney told Grievant's attorney that Grievant was mistaken in his belief that his employment was

terminated. Grievant's attorney relayed this information to Grievant. Based on the evidence, we believe Grievant should be entitled to restoration of annual leave days, but only for the period he was absent prior to leaving for Ireland (i.e., August 6, 1990, through August 15, 1990). We do not believe Grievant is entitled to restoration of annual leave after he learned his employment had not been terminated and during his subsequent trip to Ireland.

ORDER

Now therefore, based on the foregoing Findings of Fact and for the foregoing reasons, it is hereby ORDERED that the Grievance of Benjamin Day, Jr., is SUSTAINED, and:

1. Grievant shall be reinstated to the position which he occupied in the Vermont Department of Fish and Wildlife at the time of his layoff on January 4, 1991;

2. Grievant shall be awarded back pay and benefits from the date commencing from the date of his layoff until his reinstatement for all hours of his regularly-assigned work hours, minus any income (including unemployment compensation received and not paid back) received by Grievant in the interim;

3. The interest due Grievant on back pay shall be computed on gross pay and shall be at the rate of 12 percent per annum and shall run from the date each paycheck was due during the period commencing with Grievant's layoff, and ending on the date of his reinstatement; such interest for each paycheck date shall be computed from the amount of each paycheck minus unemployment compensation received by Grievant during the payroll period;

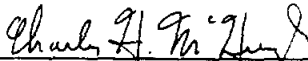
4. Eight days shall be added to Grievant's annual leave bank due to the eight days improperly deducted from his annual leave bank for his absence during the period August 6, 1990, through August 15, 1990; and

5. The parties shall submit to the Board by December 5, 1991, a proposed order indicating the

specific amount of back pay and other benefits due Grievant; and if they are unable to agree on such proposed order, shall notify the Board in writing that date of specific facts agreed to by the parties, specific areas of factual disagreement and a statement of issues which need to be decided by the Board.

Dated this 14th day of November, 1991, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Charles H. McHugh, Chairman


Catherine L. Frank


Leslie G. Seaver