

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 90-9
JOHN SANTORELLO)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On February 1, 1990, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of John Santorello ("Grievant"), alleging that the State of Vermont, Department of Agriculture ("Employer"), violated Articles 2, 5, and 71 of the collective bargaining agreement between the State of Vermont and VSEA for the non-management unit, effective from July 1, 1988 to June 30, 1990 ("Contract"). Specifically, the grievance alleges that Grievant's layoff did not meet the criteria for layoff as set forth in the Contract, and that it was taken in retaliation for his union activity.

On October 23, 1990, the Employer filed a Motion for Dismissal and/or for Summary Judgment based on the argument that the case was moot. On October 24, 1990, Grievant filed an Opposition to the Employer's Motion to Dismiss and/or for Summary Judgment. On October 30, 1990, VSEA filed a Supplemental Opposition and a Conditional Application to Intervene if the Board upheld the motion to dismiss. The Employer filed a Response to Grievant's "Oppositions" to the Motion to Dismiss and/or for Summary Judgment on November 8, 1990. The Board denied the Employer's motion to dismiss and/or for summary judgment prior to the evidentiary hearing herein, with the understanding that the Employer was free to renew the motion at any time, and VSEA withdrew its conditional request to intervene.

Hearings were held before Board members Charles H. McHugh, Chairman, Louis Toepfer, and Carroll Comstock on January 17, 1991, and February 8 and 28, 1991. Assistant Attorney General Michael Seibert represented the Employer. Michael Zimmerman, VSEA Staff Attorney, represented Grievant. Memoranda of Law were filed by both parties on March 14, 1991.

FINDINGS OF FACT

1. Article 5 of the Contract states in pertinent part:

NO DISCRIMINATION, INTIMIDATION OR HARASSMENT: In order to achieve work relationships among employees, supervisors and managers at every level which are free of any form of discrimination, intimidation or harassment, neither party shall discriminate against nor harass any employee because of...membership or non-membership in the VSEA, filing a complaint or grievance, or any other factor for which discrimination is prohibited by law (Grievant's Exhibit 1, p. 5).

...

2. Article 2, the Management Rights provision of the Contract, states in pertinent part:

...

4. The Employer may determine that a reduction in force is necessary when a lack of work situation exists or in conformance with this Article (Grievant's Exhibit 1, p. 2).

3. Article 71 of the Contract states in pertinent part:

...

The right to determine that a reduction in force is necessary and time when it shall occur is the employer's prerogative, pursuant to the provisions of Article 2, Management Rights (Grievant's Exhibit 1, p. 6).

4. The Contract defines lack of work and reduction in force as follows:

LACK OF WORK - 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.

REDUCTION IN FORCE - a reduction in the size of the work force due to a lack of work or otherwise pursuant to management rights (Grievant's Exhibit 1, p. 1).

5. Grievant started work for the Employer in 1980 as an Egg Inspector and was upgraded five months later to the position of Agricultural Inspector. Grievant was subjected to a reduction in force in 1981 and accepted the position of Dairy Laboratory Technician. Grievant remained in the Employer's dairy lab during all relevant time periods. While in the dairy lab, Grievant's title changed from Technician to Agricultural Laboratory Analyst, and finally to Microbiologist A. As a Microbiologist A, Grievant performed professional analytical laboratory work for the Department. Grievant tested and analyzed milk and milk products. In addition to the dairy lab, the Employer's laboratories include those that test for pesticide and meat, feed and fertilizer, and serology/livestock (Grievant's Exhibit 3, p. 1-2; Grievant's Exhibit 4).

6. Grievant worked under Agriculture Commissioners George Dunsmore, Paul Stone, and, most recently, Ronald Allbee. Richard Burrell served as Deputy Commissioner under Dunsmore and William Paine served as Deputy Commissioner under Stone and Allbee.

7. During all relevant time periods, Grievant was actively involved with VSEA. He was a Shop Steward from 1983 until his layoff, and in this capacity assisted other employees in filing grievances against the Employer. From about 1984 until his

layoff, he was a VSEA Council member. Grievant was a member of the non-management bargaining team and was involved in negotiating the 1988-90 Contract. Grievant also served on a negotiations team on impact bargaining during 1988-89 preceding a relocation of the Employer's laboratories from Montpelier to Waterbury. Grievant always received approval for his absences from work on VSEA activities.

8. Robert Mullen supervised the Employer's laboratories and was Grievant's supervisor in the dairy lab from 1981 until 1985. Mullen rated Grievant an overall "3" ("Consistently meet job requirements/standards") twice on his performance evaluations. He rated Grievant an overall "4" ("Frequently exceed job requirements/standards") on three evaluations (Grievant's Exhibit 6, p. 3-14).

9. In 1984, Commissioner Dunsmore reorganized the Department. Among the changes was the combining of three divisions: Plant Industry, Laboratories, and Standards. Philip Benedict became Director of these merged divisions, and became Mullen's supervisor. Prior to the merger of the divisions, Mullen reported directly to the Commissioner or his Deputy.

10. During 1984, Grievant, then a Dairy Laboratory Technician, and the other lab technicians felt they were not properly viewed as professionals. In order to improve their image within the Department and with the public, they started wearing lab coats and name tags. They also privately ordered and purchased their own business cards. The business cards included an imprint of the State seal.

11. Grievant was verbally disciplined because he had privately purchased the business cards without prior approval and because they included the State seal. Grievant grieved the issue and, as a result of the grievance, was permitted to use the State seal.

12. During the summer of 1984, Benedict called a staff meeting of the merged divisions on the State House lawn. Much concern was expressed at the meeting by the laboratory technicians over a lack of professional respect. Benedict made a comment during this meeting to the effect that, "those who stay with me will go far; those who buck me, or go with the Union, will not go anywhere." Due to the Grievant's active involvement with VSEA as a Shop Steward, as a member of the VSEA Council, and as a grievant, he felt targeted because of this remark. No grievance was filed as a result of this comment, but at least one Department employee, Victoria Jamison, reported the comment to VSEA.

13. Also during the summer of 1984, at a Department meeting, Deputy Commissioner Burrell believed that Grievant made a comment that the meeting was "a waste of time." He wrote Grievant a memorandum on July 16, 1984, which stated in pertinent part:

Although Phil [Benedict] and Bob Mullen do not recall the incident, the Commissioner very clearly recalls my telling him of my concerns about your attitude at the meeting. It is not my intent to take punitive action against you, John; I am merely trying to be constructively critical and help you overcome what appears to be a problem (Grievant's Exhibit 5, p. 1).

14. The annual performance evaluation Grievant received from Mullen, with comments from Burrell, on or about July 16, 1984, was an overall "3", but he received an individual rating of "2" in the category of "Personal Relationships," as well as negative narrative comments from Burrell concerning Grievant's attitude of resentment towards superiors. Grievant grieved this evaluation. Commissioner Dunsmore resolved the grievance by deleting the "2" rating, as well as the narrative comments (Grievant's Exhibit 5, p. 1-4; Grievant's Exhibit 6, p. 9-12).

15. Subsequently, Deputy Commissioner Burrell directed Benedict to write a memorandum for Grievant's personnel file regarding his negative attitude. Benedict asked Mullen, Grievant's immediate supervisor, to write the memorandum. Mullen was not comfortable with the memorandum and only wrote a first draft; he did not send or sign it. Benedict rewrote, signed, and sent the memorandum on August 10, 1984. It stated, in part, "Negative attitudes have interfered with work or meetings, such as my meeting in the conference room where your temper was lost." Benedict was in error with respect to his comment about Grievant losing his temper. It was John Jaworski, not Grievant, who lost his temper (Grievant's Exhibit 5, p. 5-6).

16. Mullen left employment with the Department in February, 1985. John Jaworski, a Chemist with the Employer since 1982, became Grievant's immediate supervisor in May, 1985. He remained Grievant's immediate supervisor until Grievant was laid off in August, 1989. Jaworski was in charge of the Employer's laboratories. He reported directly to Benedict.

17. Grievant received all overall "4's" on his annual performance evaluations under Jaworski's supervision. Benedict was also a signatory to these performance evaluations. Grievant also received a \$150 merit bonus in 1988. Grievant received no disciplinary actions under Jaworski (Grievant's Exhibit 4, page 7; Grievant's Exhibit 6, p. 16-31).`

18. At times there was tension between Grievant and Jaworski. During a difference of opinion on laboratory policy in July, 1986, the two men got into a shouting match, which resulted in physical touching. Memoranda were later exchanged in which Jaworski claimed that Grievant had threatened him with physical violence and Grievant claimed that Jaworski had used excessive force on him. Another time, Grievant overheard Jaworski make a negative comment about Grievant's "union card" stating, "don't leave home without it" (Grievant's Exhibit 5, p. 7-8).

19. In 1987, Grievant and another Microbiologist A in the dairy lab submitted a request to have their positions reviewed for reclassification.

20. William Rose of the Department of Personnel performed a desk audit on Grievant's position, one of the first steps in a reclassification review. The results of the review were not immediately forthcoming. After the desk audit, Grievant discussed the outcome of the review with Rose. Grievant believed from this conversation that his position was going to be upgraded.

21. During Grievant's review, Benedict and Jaworski decided that the classification review should be expanded to all lab

positions. Benedict talked with Rose and learned that there was a chance that Grievant's position was going to be upgraded. He discussed his and Jaworski's concerns regarding all lab positions and asked Rose if he would expand the review to the entire lab.

22. Rose received approval from his supervisor to expand the review. The expanded review by the Department of Personnel took several months. The review resulted in a few upgrades. The Microbiologist A positions, which included that of Grievant, were not upgraded.

23. Grievant and the other Microbiologist A's working in the serology and dairy labs collectively grieved the Personnel Department's decision. A panel was convened pursuant to the Contract and reviewed the classification grievance. The grievance was denied on December 29, 1988 (Grievant's Exhibit 13).

24. On January 3, 1989, Grievant and one of the other Microbiologist A's, Victoria Jamison, filed a second Classification Review Request on a form provided to them by their Personnel Officer. Grievant and Jamison subsequently inquired about the status of the review request. They discovered the review had not been timely processed under the Contract because their supervisor, Jaworski, had failed to provide them with an additional required form. Grievant and Jamison complained to Jaworski and he told them to "grieve it." They did. This resulted in a memorandum from Commissioner Allbee to all department supervisors instructing them to comply with the Contract. The review was completed by Spring, 1989, but

Grievant's and Jamison's reclassification request again was denied (Grievant's Exhibit 5, p. 16-18).

25. In the summer of 1987, Grievant attended, with approval from Jaworski, a three-day VSEA Steward training session in Maine. During the training session, there was a temporary lab staffing shortage on a particular day. Jaworski was on vacation and Benedict discovered that Grievant was on VSEA duties. Benedict unsuccessfully attempted to contact Jaworski and also attempted to find Grievant. A representative of the Employer contacted VSEA to request his return to work because of the Department emergency.

26. Grievant was unable to return to Vermont from Maine because he did not have his own transportation. Once it was discovered that Grievant had car-pooled to Maine, there was no further attempt to have him come back from Maine. Grievant wrote a memorandum to Commissioner Allbee upon his return to Vermont apologizing for his inability to return to Vermont for the department "emergency." Grievant also grieved the Employer's action. Deputy Commissioner Paine, while serving as a Hearing Officer on the grievance, admitted that there had been no emergency (Grievant's Exhibit 5, p. 11).

27. There was fluctuation in workloads in the Employer's laboratories. It is also the nature of laboratory work that there is frequent "downtime" while waiting for a test to run, a substance to heat, or a substance to cool. To a person untrained in laboratory testing, "downtime" gives the appearance of an employee being idle.

28. Some Department employees commented on the apparent lack of work in the lab, caused at times by a true lack of work and at other times by the appearance of a lack of work during "downtime". The complaints went to Benedict, as well as to the Department Commissioner.

29. In response to at least one of the complaints regarding a lack of work, Jaworski and Benedict held a staff meeting on February 19, 1987, and suggested that employees assist other employees in the department during a lack of work or during extended downtime. It was suggested that they could stuff or label envelopes. Grievant responded to the suggestion by mopping the floor on February 22, 1987, during a slow time in the lab.

30. Benedict wrote Grievant a memorandum criticizing his selection of work, stating that "mopping the ...floor...consume[s] time but contribute[s] little towards meeting department goals and objectives " and is the "responsibility of the Buildings Division." Benedict suggested that Grievant "concentrate on activities that the department will find more productive." Grievant disagreed with Benedict's interpretation of meeting department goals and objectives and wrote a memorandum accordingly (Grievant's Exhibit 5, p. 9-10).

31. As a Shop Steward, Grievant frequently raised worker safety issues with VSEA and the Employer. Until the summer of 1989, the Employer's laboratories were in an old building in Montpelier. The building was not properly ventilated, nor was the space adequate for the work performed.

32. In September, 1988, Gail Rushford, VSEA Field Representative, requested that the Employer comply with the health and safety provisions of the Contract. Commissioner Allbee responded in a September 16, 1988, letter that the Employer had already started examining health and safety issues. Allbee stated, in pertinent part:

As you are no doubt aware, budgetary considerations and the long lead time required delay, to some degree, the department's response. However, the department looks upon such matters with such seriousness that at one point the possibility of a RIF to provide funds [to improve worker safety] was considered (Grievant's Exhibit 5, p. 12-15).

33. During Commissioner Allbee's tenure, which began in December, 1986, there were tentative plans for the Employer's laboratories to perform additional tests, including environmental testing. These additional programs would have provided the laboratories with additional funds, as well as additional work. By January or February, 1989, the Department discovered it would not be getting the new testing programs. Prior to this discovery, Jaworski had assured Grievant that there would be no layoffs in the Department laboratories.

34. The laboratory workload declined during the 1980's due primarily to decreased numbers of samples and improvements in work efficiency as a result of automation and mechanization. In addition, there were fewer farms shipping milk each year. The required number of samples for Brucellosis testing in the state declined. Disposable test tubes replaced those that had to be hand-washed. A "split sample" program was moved to the state of Maine because the pool of samples in Vermont and New Hampshire participating in this federal program was shrinking (Grievant's Exhibit 16).

35. On his own initiative, Jaworski started looking at the laboratories' workload in early 1989 to determine the number of samples and to prepare for possible budget cuts. Jaworski analyzed data from fiscal year 1980 to fiscal year 1989. The analysis revealed that the workload had decreased significantly in both the dairy and serology labs, and that in the dairy lab it had decreased at a greater rate after fiscal year 1987 (Grievant's Exhibit 16, p. 3-4).

36. Due to the inadequate laboratory facilities in Montpelier, the Employer planned to move its laboratories to new facilities in Waterbury in 1989. Grievant was involved on the VSEA negotiating team on impact bargaining over the move. Benedict and Jaworski were on the Employer's negotiating team during these impact negotiations. The negotiations started in July, 1988 and continued for over a year. Many issues were negotiated, including health and safety issues, parking spaces, administrative space outside of the labs, a lunch room, showers, picnic tables, and the telephone number. The negotiations were considered difficult by members on both sides (Grievant's Exhibit 11, p. 1-5).

37. During the Spring of 1989, Commissioner Allbee and Deputy Commissioner Paine shared continuing concerns over the lab workload and staffing, as well as concerns over the forthcoming move of the laboratories to Waterbury away from the Department's main offices. Paine suggested to Allbee that a team of employees from the Department of Agriculture in New York study the Employer's laboratories and make suggestions and recommendations.

Paine knew the New York Commissioner and had visited the New York labs, which are also physically separated from other agriculture offices by several miles. Allbee approved the study.

38. Paine arranged for the study. A New York Deputy Commissioner in charge of laboratories and another employee from the department came to Vermont on June 7 and 8, 1989. Paine met with the the team briefly when they arrived. Benedict also met with the New York team conducting the study. Benedict indicated to them that Jaworski had looked at sample loads and staffing levels and had determined that they might be overstaffed. He did not indicate which positions might be overstaffed. Jaworski did not give the team any instructions, but did give them a copy of the data he had previously gathered.

39. The New York team observed the operation of the laboratories and talked with various lab personnel. They met only briefly and did not meet or talk substantively with Grievant. After the New York team returned to New York, they wrote a report based on their observations and discussions. This report, dated June 19, 1989, concluded in part:

...as lab personnel indicated to us, the workload in serology is not always sufficient to keep two microbiologists busy and the dairy testing section of three microbiologists is more than adequate for the present workload. It would seem to make sense to combine these two sections and staff them with four analysts instead of the presently employed five analysts or increase the workload in these areas (Grievant's Exhibit 14).

40. On July 28, 1989, Secretary of Administration Thomas Menson sent a memorandum to Commissioner Allbee notifying him of expenditure restrictions for fiscal Year 1990, as well as changes

in state benefits that would financially impact the Department. Specifically, Menson directed that General Fund expenditures be curtailed by 2%, representing a \$65,901 reduction in the Employer's fiscal year 1990 budget, plus an additional \$12,031 reduction due to a retirement fund transfer. Fiscal year 1990 ran from July 1, 1989 to June 30, 1990. Menson further directed Allbee to notify the Office of Budget and Management by August 4, 1990 where the budget was going to be reduced and to describe the impact this reduction would have on department programs (Grievant's Exhibit 15).

41. Commissioner Allbee met with his division directors, including Benedict, regarding the Administration's request. He asked them to come back with recommendations that would affect the Department's operation least severely.

42. The Employer's laboratories are funded both by General Funds and by charging the industry for specific services. Any rescission would require that the money be taken from the programs funded by the General Fund.

43. Benedict directed Jaworski to review the General Fund programs in his laboratories. Jaworski already had the data analysis that he had gathered previously and he wrote a report to Benedict on or about July 31, 1989. Although Jaworski later determined that there were errors in this data analysis, the number of samples coming into the laboratories had declined. The errors were minor and would not have affected his conclusions. Jaworski stated in his report to Benedict in pertinent part:

I have reviewed the laboratory's general funded programs, Dairy and Livestock laboratory programs to determine present and future staffing needs...

Since the sample load in the Dairy Laboratory has been decreasing, I have had to try and find other work to keep one analyst busy at least one day a week...From personal observations, the amount of sample coming into the (Livestock) laboratory has been decreasing. The amount of unproductive time has been increasing. There is not sufficient work available in the laboratory to keep 5 microbiologists busy between the 2 programs...

Since there is an excess amount of personnel presently, I suggest we cut 1 microbiologist position, rather than cut the present operating budget. With a cut of 1 Microbiologist A position, the microbiology staff could be cross-utilized and the present level of testing would remain intact (Grievant's Exhibit 16).

44. Benedict wrote a memorandum to Allbee on August 1, 1989, which stated in pertinent part:

Two percent of the budget for the Plant Industry, Laboratory and Consumer Assurance Division is \$21,438. After considering all of the options and because of the lack of a sufficient amount of operating monies, I have decided to cut this budget in personal services. Therefore, I propose to reduce the number of Microbiologists A by one.

We have recently had an outside management review conducted which recommended, with reorganization in the lab, we could adequately function with three Microbiologists A and one Microbiologist B...This savings is projected at approximately \$18,000, contingent upon us notifying the Personnel Department this week so we can initiate the 40-day notification process required during RIF (Grievant's Exhibit 34).

45. Commissioner Allbee had not been involved actively with the New York study, but had read its report and recommendation. Allbee was satisfied with Benedict's recommendation and did not actively explore other options.

46. Allbee asked Benedict which Microbiologist A would likely be subjected to the reduction in force. Benedict advised

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Allbee that it would likely be Grievant. Allbee agreed to the reduction in force because of the lack of work and the lack of funds. His decision to lay off a Microbiologist A was due to the New York Study, the internal laboratory workload report done by Jaworski, and the recommendation by Benedict and Jaworski.

47. In consultation with Business Manager/Personnel Officer Elsie LaFlamme, Allbee determined that the Department could save additional money by deferred hiring practices and reducing out of state travel by 10% and such notification was made to Secretary of Administration Menson by August 4, 1989 (Grievant's Exhibit 15, p. 4).

48. On August 1, 1989, Allbee wrote a letter to Personnel Commissioner David Moers. Allbee explained that there had been an outside audit of the laboratory section by the New York State Department of Agriculture, which had reviewed staffing levels, reporting procedures, and supervision. He did not mention Jaworski or Benedict's memoranda or analysis. The letter stated in pertinent part:

They concluded that our current workload was sufficient to employ one Microbiologist B and three (we now have four) Microbiologist A's. This analysis was based on the fact that our sample load in both dairy and microbiology and serology has declined during the last 10 years. The other contributing factor has been the degree of automation which has increased efficiency of our employees in the dairy microbiology section...

After reviewing the workload for the Laboratory I have concluded that ridding a Microbiologist A will not hinder the operation of programs.

Allbee, further, mentioned the reduction in the General Fund budget and requested instructions on the reduction in force and

the identification of the person in the Department who would be affected by the reduction in force (Grievant's Exhibit 17).

49. Thomas Ball, Director of Employee Relations of the Department of Personnel, responded for Moers on August 15, 1989, with reduction in force instructions. He identified Grievant as the least senior person identified for layoff (Grievant's Exhibit 18).

50. Allbee notified Grievant on August 28, 1989, by letter that he was being laid off. The letter provided in pertinent part:

In accordance with the [Contract], this is to officially notify you that your position as Microbiologist A...will be subject to reduction in force because of a lack of work created by a reduction in serological and dairy samples and automation.

It is being implemented at this time due to fiscal recision [sic] considerations. This layoff will become effective at the close of business on September 29, 1989.

As an employee with permanent status you have reduction in force (RIF) rights...(Grievant's Exhibit 22).

51. No other Department employees were laid off at the time of Grievant's layoff.

52. Grievant was determined to be eligible for the position of Administrative Assistant A at the Office of Geographical Information, and he accepted a position there under his reduction in force rights. Grievant notified Allbee on September 5, 1989 that he would be employed at the Office of Geographical Information, effective October 2, 1989. This office is organizationally separate within State government from the Department of Agriculture (Grievant's Exhibit 24).

53. Prior to August 28, 1989, Grievant had understood that the Department was creating a new position, Assistant Land Use Planner. He had discussed this position with Amy Jestes, Agriculture Land Use Planner. Commissioner Allbee had given Jestes sole authority to recruit and hire for her Assistant. He did not have direct input into the decision, nor did Benedict or Jaworski have any input into Jestes' recruiting and hiring decision. Jestes requested a list of eligible candidates from the Department of Personnel. She received the list near the time Grievant was informed of his reduction in force and Grievant was listed as an eligible candidate. Grievant declined to be interviewed for the Assistant Land Use Planner position because he had already accepted another job by the time he received his notice of eligibility and due to what he perceived to be Department discrimination against him due to his VSEA activities (Grievant's Exhibit 25).

54. Grievant will not accept any positions with the Employer as long as Benedict and Jaworski are in his chain of command.

55. There is no evidence that the Department has contracted out work previously performed by Grievant, or that any temporary employee has been requested to perform work of a similar nature to that previously performed by Grievant.

OPINION

At the outset, we address the Employer's motions, renewed in the post-hearing brief of the Employer, that this case should be dismissed as moot since it lacks an "actual controversy" sufficient to confer jurisdiction on the Board.

The Employer bases its motions on Grievant's requests for relief. Grievant requests that this Board find that the Employer violated the Contract by subjecting him to a reduction in force in retaliation for his union activity, and that we issue an order that the Employer cease and desist from such activity.

Since Grievant is no longer with the Department of Agriculture, which is where the alleged illegal activity took place, the Employer argues that there is no longer a threat of the Employer retaliating against Grievant. In addition, because the Grievant has not requested reinstatement to his former position, the Employer contends that this grievance is moot. The Employer argues this case is moot, citing Vermont Supreme Court decisions; Grievance of Boocock, 150 Vt. 422 (1988), and Grievance of Moriarty, ___ Vt. ___ (Advance Opinion, March 1, 1991); in which the Court determined that no justiciable controversy existed. In those cases, the involved employees had separated from employment with the employer with whom they had grievances.

Because Grievant at the time of his grievance was employed in another branch of State government, we do not find this grievance to be moot. He is still subject to the pressures and procedures which gave rise to this grievance against the State as

his employer. This distinguishes this case from Boocock, where the grievant had left State employment at the time his grievance was to be heard by the Board, and from Moriarty, where the grievant had resigned from State employment at the time of his appeal.

Allegations of retaliation against an employee because of union activity are very serious. In a situation where an employee alleges anti-union animus and still works for the same general employer throughout the proceedings, we believe it is within our authority to proceed to hear the merits of the case to decide, at a minimum, whether there are grounds to issue a cease and desist order.

Grievant contends that the Employer laid him off because of his VSEA activities. Grievant withdrew his additional claim that the contractual criteria for layoff were not met, except as it may bear on his claim of anti-union animus. We understand this to mean that Grievant does not question that there was a lack of work or a lack of funds at the time of his layoff, but that the Employer was motivated by anti-union animus to get rid of Grievant and seized the opportunity to lay him off.

Grievant contends that this is a mixed-motive disparate treatment case, based on the use of both permissible and impermissible criteria by the Employer when it laid off Grievant on August 28, 1989.

Grievant and the Employer both cite us to the United States Supreme Court decision, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), as precedent to control our analysis in this case.

Therein, the Court, in a Title VII sex discrimination case, not involving alleged union discrimination, distinguished between the burden of proof in a "mixed-motive" case and a "pretext" case.

We conclude that the parties' reliance on Price Waterhouse is misplaced in this case where it is alleged that Grievant was discriminated against for engaging in the protected conduct of union activities. No decision in any federal jurisdiction, including National Labor Relations Board decisions, issued since the Price Waterhouse decision have used that analysis in a union discrimination case. YMCA of the Pikes Peak Region v. NLRB, 914 F2d 1442 (10th Cir., 1990). NLRB v. U.S. Postal Service, 906 F2d 482 (10th Cir., 1990). NLRB v. General Wood Preservative Co., 905 F2d 803 (4th Cir., 1990). NLRB v. Wizard Method, Inc., 897 F2d 1233 (2nd Cir., 1990). York Products, Inc. dba Mastercraft Casket Co. v. NLRB, 880 F2d (8th Cir., 1989). The Troxel Co. and Furniture Workers Division, Local 282, International Union of Electronic, Electrical, Salaried, Machine & Furniture Workers, AFL-CIO, 301 NLRB No. 38 (1991). Pepsi Cola Bottling Co. and Teamsters Local 549, 301 NLRB No. 117 (1991). Eddyleon Chocolate Co. and United Food and Commercial Workers, Local 72, AFL-CIO, 301 NLRB No. 125 (1991). Thus, we will not employ the Price Waterhouse analysis in this case.

In determining whether an employee was dismissed for engaging in union activities, the Board employs the analysis used by the U.S. Supreme Court and the National Labor Relations Board in such cases. Once an employee demonstrates protected conduct, he or she must show the conduct was a motivating factor in the

decision to take action against the employee. Then, the burden shifts to the employer to show by a preponderance of the evidence that it would have taken the same action even in the absence of the protected conduct. International Brotherhood of Teamsters, 13 VLRB 372 (1990). Horn of the Moon Workers Union v. Horn of the Moon Cafe, 12 VLRB 110 (1988). Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977). NLRB v. Transportation Management Corp., 462 U.S. 393 (1983). Wright Line, 251 NLRB No. 150 (1980).

The factors the Board considers in determining whether protected conduct was a motivating factor in an employer's decision to take action against an employee are: 1) whether the employer knew of the employee's protected activities, 2) whether there was a climate of coercion, 3) whether the timing of the discharge was suspect, 4) whether the employer gave as a reason for the decision a protected activity, 5) whether the employer interrogated the employee about the protected activity, 6) whether the employer discriminated between employees engaged in protected activities and employees not so engaged, or 7) whether the employer warned the employee not to engage in protected activity. Teamsters, supra, at 383-384. Horn of the Moon, supra, at 126-127.

Grievant submits that the following factors are relevant here: 1) that the Employer knew of Grievant's protected activities; 2) that there was a climate of coercion at the workplace; 3) that the Employer discriminated between employees engaged in protected activities and those not so engaged; and 4)

that the Employer warned employees not to engage in protected activities.

In applying these factors to this case, we conclude that Grievant has not demonstrated, by either direct or circumstantial evidence, that his union activity was a motivating factor in the Employer's decision to lay him off.

We agree the Employer knew about Grievant's active participation in VSEA. This fact merely establishes Grievant's threshold requirement that he did engage in union activity and that the Employer knew it.

In determining whether there was a climate of coercion and whether the Employer warned employees not to engage in union activities, as Grievant contends, we are most troubled by the 1984 State House lawn comment of his division director, Phil Benedict, to the effect that "those who stay with me will go far; those who buck me, or go with the Union, will not go anywhere." This statement clearly demonstrated anti-union animus on the part of Benedict. We are also troubled by the flippant remarks of Grievant's immediate supervisor, John Jaworski, regarding Grievant's union activities, including the "don't leave home without it" remark concerning Grievant's "union card", and the 1989 "grieve it" remark when Grievant and another employee exercised their contractual right to have their positions reviewed.

The significance of these statements must be weighed against the timing of Grievant's subsequent layoff and the conduct

Benedict and Jaworski directed towards Grievant during his approximately five year tenure under their command.

In that regard, it is of particular relevance that Grievant received exemplary performance evaluations, which were generated by Jaworski and approved by Benedict, as well as a merit bonus award, also generated by Jaworski. Additionally, Grievant was never subjected to disciplinary action after Jaworski and Benedict became his supervisors.

In consideration of all the circumstances, we conclude that Benedict's 1984 remark, as well as Jaworski's statements, are insufficient to indicate that anti-union animus was a motivating factor in Grievant's 1989 layoff. The 1984 State House lawn comment by Benedict was too remote in time to demonstrate that it played any part in a layoff decision made more than five years later. Jaworski's remarks, while perhaps indicative of some anti-union animus on his part, are too isolated and insufficient to demonstrate that they played any part in the layoff decision. This is particularly so given Jaworski's consistent recognition of Grievant's exemplary performance.

Also, upon review of all the other incidents cited by Grievant to indicate that a climate of coercion existed in the workplace, we conclude that none of them are coercive or point to anti-union animus. Clearly, there was some tension between Grievant and his supervisors, and it was clear that Grievant was displeased with some of his supervisor's directives and actions. Grievant was a vigorous and very visible advocate of worker rights. As such, he had disagreements with management. However,

we conclude that Grievant has not demonstrated that management's actions in any of these other instances provided evidence of a coercive climate or discriminatory treatment due to his union activities.

Grievant further contends that the Employer discriminated between employees engaged in protected activities and those not so engaged. He cites the example of Benedict's request to expand the department classification review only after he heard that Grievant and another VSEA employee were possibly going to be upgraded. We conclude that Benedict did not request the expanded review because of Grievant's union activities. We are persuaded that he wished to have all positions classified to ensure that all employees were treated equitably.

In sum, the totality of the circumstances does not support a finding that protected union activity was a substantial or a motivating factor in the Employer's decision to lay off Grievant. Grievant has not sustained his burden of proving that his layoff was motivated by any reasons other than the legitimate, non-discriminatory reasons cited by the Employer: lack of work as indicated by the internal study by Jaworski and study by the New York team, and lack of funds due to the funding rescission announced in late July, 1989, which precipitated the layoff.

It is true that Grievant was the only employee laid off during this period, but this does not indicate discrimination between him as a union activist and employees not so engaged. We are persuaded that a true lack of work situation existed in the laboratory. This is bolstered by the fact that no evidence exists

indicating that the Department contracted out work previously performed by Grievant, or that any temporary employee has been requested to perform work of a similar nature to that previously performed by Grievant.

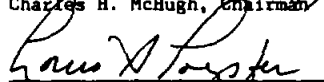
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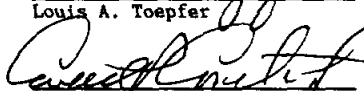
Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is HEREBY ORDERED that the grievance of John Santorello, Docket No. 90-9, is DISMISSED.

Dated this 10th day of July, 1991, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Charles H. McHugh, Chairman


Louis A. Toepfer


Carroll P. Comstock