

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
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BENJAMIN DAY, JR.)	DOCKET NO. 90-48

MEMORANDUM AND ORDER

At issue is whether the Vermont Labor Relations Board should grant the Motion to Quash the Subpoena served on Representative John Murphy to testify in this matter. The motion was filed on April 15, 1991, by William Russell, Chief Legislative Counsel, who is serving as Counsel to Representative Murphy. The motion was filed at the time Representative Murphy had been subpoenaed by Attorney J. Scott Cameron, on behalf of Grievant Benjamin Day, Jr., to appear before the Board to testify at a hearing in this matter. A brief in support of the motion was filed on April 17, 1991. Grievant filed a brief in opposition to the motion on April 19, 1991. Representative Murphy filed a reply to Grievant's brief on April 23, 1991.

Grievant subpoenaed Representative Murphy to testify concerning alleged comments he made in a telephone conversation with a newspaper reporter concerning a discussion which he had with Timothy Van Zandt, Fish & Wildlife Commissioner, with respect to eliminating Grievant's position and terminating the employment of Grievant, an employee of the Department of Fish & Wildlife.

The facts relevant for the consideration of this motion by the Board are as follows:

1. Representative Murphy has been a member of the Vermont House of Representatives since 1969.

2. Timothy Van Zandt served as a member of the Vermont House of Representatives from January, 1983, until his resignation on June 30, 1989. Van Zandt served as Chairman of the House Fish and Wildlife Committee from January, 1989, until his June 30, 1989, resignation. Van Zandt resigned from the House to accept an appointment by Governor Madeleine Kunin as Commissioner of Fish and Wildlife.

3. On October 24, 1989, Governor Kunin issued Executive Order No. 80 establishing the Governor's Commission on Fish and Wildlife Funding "for the purpose of analyzing and recommending future financing options for the department." Governor Kunin appointed Representative Murphy as a member of the Commission. There were sixteen members appointed to the Commission to serve through June 30, 1990. Four of the Commission members, including Representative Murphy, were members of the Vermont General Assembly. Commissioner Van Zandt was not appointed as a member of the Commission. 3 VSA App. Ch. 7.

4. The Commission on Fish and Wildlife Funding met nine times. All meetings occurred during the period November 15, 1989, through May 17, 1990. On June 25, 1990, the Commission issued its final report, entitled "Funding the Vermont Fish & Wildlife Department in the 1990's." The report contained no recommendations with respect to the elimination of positions within the Department other than a recommendation that the number of employees in the Hunter Education Unit be decreased (Grievant's Exhibit 44).

5. On April 9, 1991, a newspaper article entitled "Murphy Had Some Advice for Van Zandt" was published by the Rutland Daily

Herald. The article was written by Reporter Nancy Wright of the Vermont Press Bureau. This newspaper article has been admitted by the Board for the sole purpose of considering this motion, and not for the truth or falsity of information contained in the article. In the article, the following quote is attributed to Representative Murphy:

"We were talking about the reorganization and he (Van Zandt) asked me: 'How do you take out people like Ben Day?' I said: 'You never go after personalities. You've got to take out his position. You've got to eliminate the position. '"

In the article, Wright reported that Representative Murphy initially said that the conversation with Van Zandt had occurred during a meeting of the Governor's Commission on Fish and Wildlife Funding. Wright reported in the article that Murphy later retracted his version of the conversation, saying Van Zandt had never posed any such question to him. Wright also reported in the article that Representative Murphy said that Van Zandt had made no such statements during a meeting of the Commission and that the conversation had never occurred at all (Grievant's Exhibit 145).

6. At the April 15 hearing in this matter, Commissioner Van Zandt testified that he initiated consideration of the reorganization of the Fish and Wildlife Department after he became Commissioner and actively began to plan the reorganization approximately in early May, 1990, and that the reorganization was announced on July 25, 1990. This testimony is not rebutted at this point in the case, and we presume it to be true for purposes of deciding this motion.

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Representative Murphy has moved to quash the subpoena on the grounds that he has immunity as a legislator under Chapter 1, Article 14, of the Vermont Constitution, and also has at common law a legislative immunity of approximately the same scope. Representative Murphy contends that he has absolute immunity for actions and statements done or made as part of his legitimate legislative activities. He contends that the subpoena was issued to question him about his statements and actions as a legislator regarding the organization of the Fish and Wildlife Department, which are within the sphere of legitimate legislative activities.

Grievant contends that the alleged comments made by Representative Murphy in a telephone conversation with a newspaper reporter about which Grievant intends to question him involve matters beyond the scope of his legitimate legislative duties and are not protected by legislative immunity. Thus, Grievant contends that Representative Murphy is subject to subpoena and must answer questions relating to discussions he had with Commissioner Van Zandt concerning the elimination of Grievant's position and the tenure of Grievant's employment with the Fish and Wildlife Department.

We must determine whether Representative Murphy has legislative immunity from testifying in this matter concerning alleged comments made by him in a telephone conversation with a newspaper reporter concerning a discussion he had with Commissioner Van Zandt with respect to eliminating Grievant's position and terminating the employment of Grievant. Chapter 1, Article 14, of the Vermont Constitution, entitled "Immunity for words spoken in Legislative debate," states as follows:

The freedom of deliberation, speech, and debate, in the Legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever.

12 VSA §3577(a) also addresses legislative immunity, in providing in pertinent part:

(M)embers of the general assembly . . . in all cases except treason, felony and breach of the peace, shall be privileged from arrest and imprisonment during their necessary attendance on and in going to and returning from the general assembly.

There have been no reported decisions interpreting these provisions of the Vermont Constitution and Statutes to guide us in deciding whether Representative Murphy is entitled to legislative immunity. However, much precedent exists concerning Article 1, Section 6, of the United States Constitution, which states as follows in pertinent part:

Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other place.

The Vermont Supreme Court consistently has approved resort to federal precedent in construing Vermont statutory and constitutional provisions which are similar to provisions of federal statutes or the U.S. Constitution. Grievance of Morrissey, 149 Vt. 1 (1987). In re Local 1201, AFSCME and Rutland Department of Public Works, 143 Vt. 512 (1983). Burlington Firefighters Association v. City of Burlington, 142 Vt. 433, 435-436 (1983). Although the language of Article 1, Section 14 of the Vermont Constitution and 12 VSA §3577(a) is different than

Article 1, Section 6, of the U.S. Constitution, we conclude that the provisions are sufficiently similar so that the essential protections are the same. Thus, we look to precedent in construing the so-called Speech or Debate clause of the U.S. Constitution for guidance in determining the scope of legislative immunity under the Vermont Constitution and Statutes.

The purpose of the Speech or Debate Clause of the U.S. Constitution is to insure that the legislative function the Constitution allocates to Congress may be performed independently. Eastland v. United States Servicemen's Fund, 421 U.S. 491, 502 (1975). The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators. United States v. Brewster, 408 U.S. 501, 507 (1972). The clause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders. United States v. Johnson, 383 U.S. 169, 178 (1966).

The central role of the Clause is to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary. Johnson, supra, at 181. That role is not the sole function of the Clause, however, as it provides protection against civil as well as criminal actions, and against actions brought by private individuals as well as those initiated by the Executive Branch. Eastland v. United States Servicemen's Fund, supra, at 502-503. Legislators acting within the sphere of

legitimate legislative activity are protected not only from the consequences of litigation's results but also from the burden of defending themselves. Dombrowski v. Eastland, 387 U.S. 82, 85 (1967). Legislators entitled to protection of the Speech or Debate Clause are protected from criminal or civil liability and from questioning elsewhere than in Congress. Gravel v. United States, 408 U.S. 606, 608 (1972).

The U.S. Supreme Court has read the Speech or Debate Clause broadly to effectuate its purposes, Johnson, supra, at 180, and have included within its reach anything generally done in a session of the Chamber by one of its members in relation to the business before it. Kilbourn v. Thompson, 103 U.S. 168, 204 (1881). The Court's consistent approach has been that to confine the protection of the Speech or Debate Clause to words spoken in speech or debate would be unacceptably narrow, and has held that committee meetings, committee reports, resolutions, and the act of voting are equally covered. Gravel, supra, at 617, 624. The privilege protects members from inquiry into legislative acts or the motivation for actual performance of legislative acts. Johnson, supra, at 185. The Court has given the Clause a practical rather than a strictly literal reading, and has not limited the protection to utterances made within the four walls of either Chamber. Hutchinson v. Proxmire, 443 U.S. 111, 124-125 (1979). Kilbourn, supra.

However, in going beyond a strictly literal reading of the Clause, the Court has not departed from the objective of protecting only legislative activities. Proxmire, supra, at 125.

The Court has not protected all conduct relating to the legislative process, but limits the Speech or Debate Clause to an act which was clearly a part of the due functioning of the legislative process. Brewster, supra, at 515-516. That Senators or Representatives generally perform certain acts in their official capacity as Senators or Representatives does not necessarily make all such acts legislative in nature. Gravel, supra, at 625. The Gravel court stated, at 625:

Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. As the Court of Appeals put it, the courts have extended the privilege to matters beyond pure speech or debate in either House, but "only when necessary to prevent indirect impairment of such deliberations." (citation omitted).

The Speech or Debate Clause does not reach conduct which attempts to influence the conduct of the Executive Branch of the Government that is not part of the due functioning of the legislative process. Brewster, supra, at 513-516. Proxmire, supra, at 121, n. 10. Johnson, supra, at 172. Members of Congress are constantly in touch with the Executive Branch of the Government - they may cajole and exhort with respect to the administration of a federal statute - but such conduct, though generally done, is not protected legislative activity. Gravel, supra, at 625.

In applying this precedent to the matter before us, we conclude that Representative Murphy does not have legislative

immunity from testifying concerning alleged comments made by him in a telephone conversation with a newspaper reporter concerning a discussion he had with Commissioner Van Zandt with respect to eliminating Grievant's position and terminating his employment. We so conclude because the alleged discussions which Representative Murphy had with Van Zandt did not constitute legislative activities as defined by the U.S. Supreme Court.

For purposes of deciding this motion, there is a presumption, subject to rebuttal, of using the statements in the newspaper article to establish the necessary factual basis to decide the motion. This in no way indicates that we have made any judgment with respect to the truth or falsity of information contained in the article. In addition, we also can rely on the statements of counsel at the April 11 hearing in this matter to define the scope of the proposed examination of Representative Murphy.

Also, we note that, based on the statements attributed to Representative Murphy in the newspaper article, the alleged discussion he had with Van Zandt would not have occurred during the period Van Zandt was a legislator, but would have occurred when Van Zandt was Commissioner of Fish and Wildlife. Representative Murphy is quoted as stating that the alleged conversation with Van Zandt occurred when they were "talking about the reorganization." Any discussion concerning the reorganization would not have occurred when Van Zandt was a legislator since Van Zandt has indicated that he did not initiate consideration of the reorganization until after he resigned as a

legislator and became Commissioner. Further, a statement is attributed to Representative Murphy in the article that he initially said that the conversation with Van Zandt had occurred during a meeting of the Governor's Commission on Fish and Wildlife Funding. This also results in the conclusion that the conversation would have taken place after Van Zandt became Commissioner since all meetings of the Commission took place during the time he was Commissioner.

This alleged discussion did not constitute protected legislative activity because it was not part of the due functioning of the legislative process. Brewster, supra, at 515-516. The alleged discussions were not an integral part of the deliberative and communicative processes by which legislators participate in legislative proceedings. Gravel, supra, at 625.

Instead, the alleged actions of Representative Murphy during the discussion constituted conduct which attempted to influence the conduct of the executive branch that was not part of the due functioning of the legislative process, and thus does not result in legislative immunity. Brewster, supra, at 513-516. Johnson, supra, at 172. Proxmire, supra, at 121, n. 10. Representative Murphy was allegedly engaged in a discussion with Commissioner Van Zandt which involved an internal personnel matter of the Department of Fish and Wildlife which was not part of the legislative process.

That the alleged discussion may have occurred during a meeting of the Commission on Fish and Wildlife Funding does not affect our conclusion. The Commission was created by an Executive

Order of the Governor, not by an action of the Vermont General Assembly, and thus was a creation of, and answerable to, the Executive Branch. The fact that there were legislators appointed to the Commission does not make participation on the Commission a legislative activity, particularly when only twenty five percent of Commission members were legislators. Membership on, and the work of, the Commission were not part of the due functioning of the legislative process.

Representative Murphy contends that it is relevant to this matter that he is Chair of the House Committee on General and Military Affairs, and as such has a broad and continuing legislative responsibility to oversee the executive branch of government. He also contends it is relevant that he is a member of the Joint Legislative Committee on Administrative Rules, which has authority to review, and approve or object to, all rules proposed by any executive agency to ensure that they are in accord with statutory authority and legislative intent. We disagree that these legislative responsibilities of Representative Murphy have any relevance to this matter since there is no indication that such responsibilities were at all involved in the alleged discussion which Representative Murphy had with Commissioner Van Zandt concerning the elimination of Grievant's position and the tenure of Grievant's employment. Under the circumstances, we could do nothing but speculate as to any connection between these legislative responsibilities and the grievance before us. It would be inappropriate in the context of deciding this motion to so speculate, and thus we conclude

that these legislative responsibilities have no applicability to this proceeding.

Even assuming arguendo that the alleged discussion with Van Zandt constituted legislative activity on the part of Representative Murphy, he has waived any privilege of legislative immunity through publicly revealing the contents of the discussion to a newspaper reporter.

The legislative immunity shield does not extend beyond what is necessary to preserve the integrity of the legislative process. Brewster, supra, at 517. Although legislative activity engaged in by a legislator is entitled to the protection of legislative immunity when it is part of the due functioning of the legislative process, the legislator loses that immunity by engaging in public transmittal of the activity outside of the due functioning of the legislative process. Proxmire, supra, at 123-133. This is because such public transmittal of the activity is not an essential part of the legislative process and is not part of that deliberative process by which legislators participate in legislative proceedings. Id.

Representative Murphy, through his alleged statements to a newspaper reporter concerning his discussion with Van Zandt, essentially engaged in public transmittal of this discussion outside of the due functioning of the legislative process. Thus, he waived any entitlement to the protection of legislative immunity.

In sum, we deny the motion filed by Representative Murphy to quash the subpoena served on him and conclude that he is required

to testify in this matter concerning his alleged discussion with Van Zandt. Thus, pursuant to 3 VSA §809(h) and Section 12.8 of the Board Rules of Practice, we will issue a subpoena requiring Representative Murphy to testify in this matter. In accordance with 12 VSA §3577(a), the scheduled date of his testimony will be the next hearing before the Board in this matter on a date which the Vermont General Assembly is not in session.

However, in requiring Representative Murphy to testify, we hold that he may be questioned only on matters relevant to deciding the grievance before us, and that he may not be required to testify concerning any legislative activities with respect to which he is entitled to the protection of legislative immunity.

Now therefore, based on the foregoing reasons, it is HEREBY ORDERED:

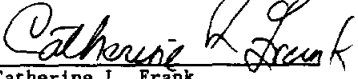
1. The Motion to Quash the Subpoena served on Representative John Murphy is DENIED;
2. The Vermont Labor Relations Board shall issue a subpoena requiring Representative John Murphy to testify in this matter on May 6, 1991, at 9:00 a.m., in the Labor Relations Board hearing room, concerning alleged comments he made in a conversation with a newspaper reporter concerning a discussion which he had with Timothy Van Zandt, Fish and Wildlife Commissioner, with respect to eliminating the position held by Benjamin Day, Jr., an employee of the Fish and Wildlife Department and the grievant in this matter, and terminating the employment of Grievant. Representative Murphy shall be questioned only on matters relevant to deciding the grievance before the Vermont Labor Relations Board and shall not be required to testify concerning any legislative activities with respect to which he is entitled to the protection of legislative immunity.
3. In the event the Vermont General Assembly is in session on May 6, 1991, the subpoena requiring Representative Murphy to testify shall be continued to the next scheduled hearing of the Board in this matter

on a date which the Vermont General Assembly is not in session.

Dated this 24 day of May, 1991, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Charles H. McHugh, Chairman


Catherine L. Frank


Leslie G. Seaver