VERMONT LABOR RELATIONS BOARD

APPEAL OF:	)	
	)	DOCKET NO. 94-12
STEVEN LEONARD	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On March 4, 1994, the Vermont State Employees' Association ("VSEA") filed an appeal with the Labor Relations Board, on behalf of Steven Leonard ("Appellant"), pursuant to 3 V.S.A. §1102(c). The appeal arose from a decision by the Attorney General not to defend Appellant in a civil action filed in Bennington Superior Court by Colin Morse against Appellant and the State of Vermont. The Attorney General based the decision not to defend Appellant on the grounds that the alleged acts of Appellant did not occur within the scope of his official duties as an employee of the State Department of Corrections.

A hearing was held on June 23, 1994, before Labor Relations Board Members Charles McHugh, Chairman; Louis Toepfer and Leslie Seaver in the Board hearing room in Montpelier. Jonathan Sokolow, VSEA Legal Counsel, represented Appellant. Assistant Attorney General Donal Hartman, Jr., represented the Attorney General. The Attorney General filed a Memorandum of Law prior to the hearing. The parties filed post-hearing briefs; Appellant filed a brief on July 8, 1994, and the Attorney General filed a brief on July 11, 1994. The Attorney General filed a Supplemental Citation of Authority and Memorandum of Law on October 13, 1994; the Board has not considered this submission as it was filed well after the deadline for submission of briefs and relied on information which was available at the time of the original submission of briefs.

FINDINGS OF FACT

1. Appellant was employed by the State Department of Corrections for 23 years. During much of that time, Appellant was a Probation and Parole Officer. He was a Casework Supervisor for the last two to four years of his employment, assigned to the Bennington district office. He resigned from that position in July, 1993. As a casework supervisor, Appellant's primary responsibility was to supervise probation and parole officers who, in turn, are responsible for supervising offenders. In addition, Appellant handled administrative duties.

2. In early 1993, Colin Morse had criminal charges pending against him of marijuana possession and violating relief from abuse orders. The relief from abuse order violations stemmed from Morse's alleged conduct toward his girlfriend, Phyllis Raymond. Morse had a prior criminal record spanning approximately 10 years, and at the time was on probation. Morse was supervised on probation by Probation and Parole Officer Chris Perrotta. Appellant was Perrotta's supervisor.

3. Appellant had served as Morse's probation and parole officer in approximately 1988. Morse was not on probation during 1989 and part of 1990. From 1990 through early 1993, Morse was on probation. In 1990, Jay Johnstone, assigned to the Rutland district office, was Morse's probation and parole officer. At some point subsequently, Morse came under the supervision of the Bennington district office, and Perrotta became Morse's probation and parole officer.

4. In early 1993, Morse told Vermont State Police Detective Sergeant Paul Barci that Appellant had helped keep him

out of jail, and otherwise helped him in being treated leniently for criminal charges against him, in return for Morse performing sexual favors for Appellant. Morse told Barci that the last time he had engaged in sexual conduct with Appellant was October of 1992, at which time Morse was on probation. At the time Morse made his allegations against Appellant, Morse indicated to Barci that he was seeking to gain favorable consideration with respect to the charges then pending against him.

5. Barci conducted an investigation into Morse's allegations against Appellant. Barci obtained court authorization to tape-record four telephone conversations initiated by Morse to Appellant. Calls were placed to either Appellant's office or his home. Morse gave his consent to these recordings; Appellant was not made aware that these conversations were being recorded. The recordings were made on January 22 and 30, and February 22 and 27, 1993. The recorded conversations between Morse and Appellant indicate that they had sexual contact on one occasion, and possibly on a second occasion. Among the references made in the conversations included Appellant's past request for photographs of Morse and the discomfort Morse felt during the second occasion of possible sexual contact. During the conversations, Appellant referred to the sexual contact as being between consenting adults. The conversations also reflect persistent attempts by Morse to obtain Appellant's assistance on the current charges against Morse so that Morse would not go to jail. Appellant generally indicated to Morse that he could not be of assistance with respect to the current charges against him (State's Exhibits 1-4).

6. On March 18, 1993, Barci interviewed Appellant with regard to Morse's allegations. Appellant indicated to Barci that he had sexual contact with Morse in Appellant's home after Appellant had moved into his new home in 1990. Appellant denied having a sexual relationship with Morse while Morse was on probation.

7. Barci interviewed Phyllis Raymond with regard to her charges that Morse had abused her. Raymond told Barci that she believed that Morse had fabricated his allegations against Appellant. Raymond indicated to Barci that she based this belief in part on statements Morse had made to her.

8. At the conclusion of Barci's investigation, attorneys in the Attorney General's Office concluded that there was insufficient evidence to file criminal charges against Appellant. As a result, Appellant was not prosecuted.

9. On July 1, 1993, Hans Johnson, Area Manager for the Southwest Region of the Department of Corrections, interviewed Appellant with respect to Morse's allegations. Appellant admitted to Johnson that he had one sexual encounter with Morse, in Appellant's home, at a time when Morse was not on probation. Appellant also told Johnson of a second incident, when Morse was on probation, in which Morse was masturbating in a bedroom in Appellant's home. Appellant told Johnson that when he came into the bedroom on this occasion when Morse was masturbating, Morse left and there was no sexual contact. Appellant told Johnson that he always welcomed probationers into his home. Johnson asked Appellant whether he sought to take photographs of Morse.

Appellant admitted to Johnson that he wanted to take nude photographs of Morse.

10. Appellant resigned from employment effective July 13, 1993 (Appellant's Exhibit 6).

11. On December 14, 1993, Morse filed a civil action against Appellant and the State of Vermont in Bennington Superior Court. Morse alleged that Appellant, while "acting within the scope of his employment as a Supervisor in the Bennington Probation and Parole Office", and "using his position of control and authority over plaintiff, repeatedly sexually abused plaintiff, causing plaintiff indignity, disgrace, humiliation and mortification, and damaging plaintiff by affronting his person and personality". Morse further alleged that Appellant intentionally, and negligently, inflicted emotional distress on Morse, and that the Department of Corrections had negligently supervised Appellant (Appellant's Exhibit 1).

12. In his answer to the action filed by Morse, Appellant denied the allegations made by Morse. Appellant filed a counterclaim against Morse, alleging that Morse made false statements about Appellant to law enforcement authorities, knowing that such statements were false, in an effort to obtain favorable treatment from those law enforcement authorities (Appellant's Exhibit 2).

13. By letter dated February 2, 1994, Assistant Attorney General Daniel Maguire informed Appellant that the Attorney General's Office declined to represent him in the civil action filed by Morse because "the alleged conduct on (Appellant's) part occurred outside the scope of his official duties as an employee with the Department of Corrections" (Appellant's Exhibit 4).

OPINION

At issue is whether the State is obligated to provide legal representation to Appellant, who was named as a defendant in a civil action brought by Colin Morse. The State is required to provide legal representation at state expense to defend an action on behalf of an employee "(i)n any civil action against a state employee for alleged damage, injury, loss or deprivation of rights arising from an act or omission to act in the performance of the employee's official duties". 3 V.S.A. §1101(a).

In such cases, the Attorney General bears the burden of proving that the denial of representation was appropriate. Appeal of McCue, 17 VLRB 151, 156 (1994). As we indicated in McCue, and reaffirm in this case contrary to the State's position, Vermont law on scope of employment cases is not appropriate to apply in determining whether the State is obligated to provide legal representation to a state employee pursuant to 3 V.S.A. 1101-1102. Id. at 156-58. The use of the words, "an act or omission to act in the performance of the employee's official duties", means that the General Assembly intended to require the State to represent employees in a broader category of cases than those where the issue is whether the State is vicariously liable for an employee's acts or omissions as in scope of employment cases. Id.

The Attorney General contends that the acts complained of by Morse in his civil action - i.e., alleged sexual abuse of Morse by Appellant - did not occur in the performance of Appellant's official duties. The Attorney General contends that the sexual

conduct between Morse and Appellant reflected a private relationship in which Appellant was acting to further his own interests, not those of the State of Vermont, rather than constituting conduct occurring within the performance of Appellant's official duties. The Attorney General further contends that Appellant engaged in improper conduct outside his official duties by having a sexual relationship with an offender under his supervision.

Appellant responds that the State's argument ignores the fact that Morse's civil complaint alleges that Appellant engaged in activities during work hours with respect to influencing the treatment of Morse as an offender which were improper; that Appellant allegedly performed his official duties improperly and for the express purpose of creating a quid pro quo for sexual favors which he wanted from Morse. Appellant concludes that, assuming arguendo that he had engaged in the activities during work hours alleged by Morse, these clearly would be within his official duties and Appellant would be entitled to representation by the State.

Appellant also contends that there is substantial evidence for the Board to conclude that Morse has fabricated his charges against Appellant, and that this fabrication would not, and could not, have taken place but for the fact that Appellant was a state employee performing official duties in the Probation and Parole Unit. Appellant asks the Board to recognize that the State's position in this case raises the disturbing possibility that State employees will be subject to blackmail and extortion and

left to their own resources to defend whatever frivolous, false and malicious charges are brought by individuals. Appellant further contends that the State's argument is based on the incorrect premise that Appellant was engaging in an improper relationship with Morse since Appellant denies engaging in sexual conduct with Morse while Morse was a probationer and there is no evidence that Appellant took any improper action to influence Morse's status as a probationer.

In deciding this matter, we need to focus on the alleged acts of Appellant complained of by Morse in his civil action. This is because the obligation of the State to defend a state employee comes into play as a result of "alleged damage, injury, loss or deprivation of rights, arising from an act or omission to act in the performance of the employee's official duties" pursuant to 3 V.S.A. §1101(a). Here, the "damage, injury, loss or deprivation of rights" alleged by Morse in his civil action arose from the alleged sexual abuse engaged in by Appellant.

Any sexual abuse which Appellant could have perpetrated upon Morse had to have arisen out of the sexual conduct engaged in between Appellant and Morse. We note that we have not made any determination whether any sexual conduct engaged in between Appellant and Morse occurred while Morse was an active probationer. We do not believe such a determination is necessary to resolve this matter.

The evidence indicates that any sexual conduct engaged in between Appellant and Morse occurred in the home of Appellant, and in circumstances outside of Appellant's working hours. Under

these circumstances, there is no presumption that the State will defend Appellant. We interpret the provisions of 3 V.S.A. §1101-1102 to create a presumption that the State will defend a state employee in a civil action arising from an alleged act or omission of the employee in a workplace during the work hours of the employee. McCue, 17 VLRB at 158-59. The State has the burden of rebutting that presumption. Id. Here, any sexual conduct occurring between Appellant and Morse in Appellant's home in circumstances outside of Appellant's working hours were not acts in a workplace during the work hours of an employee.

We recognize that Morse is apparently contending in the civil action that Appellant engaged in activities during work hours with respect to influencing the treatment of Morse as an offender which were improper; that Appellant allegedly performed his official duties improperly for the purpose of creating a quid pro quo for sexual favors which he wanted from Morse. However, any activities which Appellant could have engaged in during work hours with respect to influencing the treatment of Morse as an offender would have been to assist Morse in being favorably treated in connection with criminal acts which he committed. Morse was not complaining of these alleged work activities of Appellant which would have been favorable to Morse; the basis of his complaint was on the alleged sexual abuse perpetrated by Appellant. Since our focus in deciding whether the State should represent an employee is on the alleged act of the employee complained of in the civil action, this is one of those instances where no presumption has been created that the State is obligated to defend a state employee in a civil action.

The lack of a presumption that the State will defend Appellant does not end the inquiry. The State has apparently interpreted our McCue decision to create a narrow "workplace - work hours" test in determining the State's obligation to defend a state employee. In fact, we have not created such a narrow legal standard. We look to whether the alleged act or omission of a state employee, complained of in a civil action, occurred in a workplace during the work hours of the employee to decide whether a presumption has been created that the State will defend the employee. However, our ultimate decision whether the employee's act or omission occurred "in the performance of the employee's official duties" requires examination of circumstances beyond simply whether acts or omissions occurred in a work place during work hours.

In this case, we decide under the circumstances that Morse's civil action did not arise from an alleged act of Appellant in the performance of his official duties. This case is readily distinguishable from our decision in McCue, supra. There, we concluded that crude, offensive and inappropriate comments which the employee made about an individual, employed in an organization to which the employee had been assigned, occurred in the performance of the employee's official duties. This was because the employees' comments occurred in the workplace during working hours in the midst of, and in conjunction with, the employee engaging in other acts within his official duties. 17 VLRB at 159-160. The Board concluded that the close connection which existed between the employee's comments and his carrying

out of official duties was sufficient to trigger the State's obligation to provide legal representation for the employee in a civil action brought by the individual about whom the comments were made. Id.

Here, the alleged acts of sexual abuse by Appellant about which Morse complained in his civil action did not occur in a workplace during work hours under the circumstances, and did not occur in the midst of, and in conjunction with, Appellant engaging in other acts within his official duties. Instead, the sexual conduct engaged in by Appellant in his home occurred under circumstances outside of working hours, and far removed from acts of Appellant in the performance of his official duties.

We are mindful of, and sensitive to, Appellant's claim that Morse's charges against him were fabricated, and that such charges could not have been made against Appellant unless he was a state employee working with probationers. Nonetheless, although the State is required to represent state employees in a broad category of cases; McCue, 17 VLRB 158; the reach of statutory coverage for state employees does not extend to a situation like the one before us involving sexual conduct occurring in the privacy of the employee's home, in circumstances outside of work hours, and far removed from the acts of the employee in the performance of official duties. Thus, even if Appellant's employment provided the opportunity for any sexual conduct which he had with Morse, this does not translate under the circumstances into the State being required to represent him in Morse's civil action.

In sum, we conclude that the Attorney General properly declined to provide legal representation for Appellant in the civil action filed by Morse. The alleged acts of Appellant complained of by Morse did not occur in the performance of Appellant's official duties.

ORDER

NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the Appeal of Steven Leonard is DISMISSED.

Dated this 17th day of October, 1994, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh, Chairman

/s/ Louis A. Toepfer
Louis A. Toepfer

Leslie G. Seaver