

VERMONT LABOR RELATIONS BOARD

UNITED PAPERWORKERS)	
INTERNATIONAL UNION)	
)	
v.)	DOCKET NO. 97-37
)	
WINDHAM SOLID WASTE)	
MANAGEMENT DISTRICT)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On June 18, 1997, the United Paperworkers International Union ("Union") filed an unfair labor practice charge with the Vermont Labor Relations Board, alleging that the Windham Solid Waste Management District ("District") committed an unfair labor practice change in violation of 21 V.S.A. Section 1726 by its failure to hire Gary Gagne. Specifically, the Union alleged that the District failed to hire Gagne because he previously had been active in the Union.

On November 25, 1997, the Labor Relations Board issued an unfair labor practice complaint. On April 16, 1998, a hearing was held before Board Members Richard W. Park, Acting Chairperson; Leslie G. Seaver and John J. Zampieri. Union International Representative Ronald Pickering represented the Union. Attorney Gordon Quinn represented the District. The Union and the District filed post-hearing briefs on April 23 and May 5, 1998, respectively.

FINDINGS OF FACT

1. The District owns and operates a recycling facility which serves the Windham County area. It contracted out the operation of its recycling facility to Resources Recycling Technologies in 1994. Subsequent to entering into this

agreement, Waste Management, Inc. ("WMI") purchased Resources Recycling Technologies. WMI then created a subsidiary, RRT-Recycle America. WMI and RRT-Recycle America are separate legal entities. RRT-Recycle America (hereinafter called "RRT") carried out the obligations of the contract with the District. The contract was scheduled to expire in June 1997.

2. The District hired DSM Environmental Services, Inc., in early 1996 to study and evaluate the operation of the recycling facility and make recommendations to the District Board of Supervisors. In April 1996, George Murray, Vice President of DSM Environmental Services, began evaluating the District's operation, including its contract with RRT (District Exhibits 1, 2).

3. Gary Gagne started working for RRT in October 1994 and held various positions, including line worker, line leader, bailer operator and plant foreman. Gagne was the plant foreman in April 1996 when the facility was left open and unattended on a Friday afternoon. The plant manager at the time, Wendy Wilson, could not locate Gagne because he was unavailable by telephone. Wilson later demoted Gagne because he left the plant unsecured. Prior to this event, Gagne had received "above average" or "excellent" performance evaluations (Union Exhibits 2, 3).

4. During 1996, the Union engaged in organizing activity and filed a Petition for Election of Collective Bargaining Representative with the National Labor Relations Board ("NLRB") to represent certain employees employed by RRT. Gagne was involved in these organizing activities (Union Exhibit 1).

5. Subsequent to filing the petition, the Union filed an unfair labor

practice charge with the NLRB alleging that RRT had engaged in unlawful activities (Union Exhibit 1).

6. The terms of the contract between the District and RRT allowed the parties to reopen negotiations during the Summer 1996. Murray was actively involved in these negotiations and ultimately determined that the contract between the District and RRT was a one-sided agreement, favoring RRT. He concluded that it was not cost effective for the District to contract out the operation of its recycling facility with RRT.

7. Murray suggested various alternatives to the District Board of Supervisors for the efficient operation of its recycling facility. One alternative he recommended was for the District to operate the recycling facility with its own employees. Various meetings and discussions among Murray, RRT and the Board of Supervisors ensued in late 1996 and January 1997.

8. The District Board of Supervisors held two public meetings on January 9 and 23, 1997, to discuss Murray's recommendations. On January 23, 1997, the Board voted to enter into a buy-out agreement with RRT for the remainder of its contract terms and to operate the facility with its own employees starting on February 1, 1997. The District also agreed to hire at least five employees who worked for RRT. At the time there were 11 RRT employees working in the recycling facility.

9. At some point in 1996, RRT promoted Gagne again to the position of plant foreman. Wilson was no longer an employee of RRT. Gagne reported directly to RRT Division Vice President Larry Berg in New Hampshire. There was a general lack of information from Berg and the New Hampshire RRT office to

Gagne. He and other RRT employees were apprehensive about their future and attended the District Board of Supervisor meetings in January 1997 to better understand their future employment opportunities (District Exhibits 1, 2).

10. In late December 1996 or early January 1997, Linda's White Gloves Cleaning Service, a cleaning service which cleaned the recycling facility, left a note for District employee Kathleen Harris complaining about the "usual mess" in which the facility bathroom was left when they came in to clean. The cleaning company offered a two week notice and suggested that the District hire another cleaning company. On January 2, 1997, Harris gave Gagne a copy of this note and reminded Gagne by memorandum that he had agreed to monitor the break rooms and restrooms. She sent Murray a copy of this memorandum (District Exhibit 6).

11. Murray walked through the recycling facility about three times each week from the time he started evaluating the recycling facility in April 1996 until just before the District took over the operations of the facility on February 1, 1997. He was in the facility less often during January 1997 because he was spending more time on administrative matters. Murray did not believe that Gagne managed his employees well. For example, one time he observed Gagne working and his employees standing around watching him. He also observed the general uncleanliness of the facility and problems caused by equipment failures which left excess materials sitting on the facility floor. The uncleanliness and other problems became worse as the buy-out contract period with RRT drew to a close at the end of January 1997.

12. Joe Kowalski was a District driver who brought recyclable materials to the recycling facility for processing prior to February 1, 1997. While working as

a District driver, Kowalski interacted with Gagne and the RRT employees on a daily basis.

13. During a conversation between Kowalski and Gagne in which they were discussing the operation of the plant, Kowalski asked Gagne what the company had done wrong to cause employees to want to unionize. They discussed some of the problems Gagne had with the company, including the company being unresponsive when Gagne tried to get information from RRT supervisors in New Hampshire.

14. Kowalski approached various RRT employees in January after it became apparent that the District was going to buy out the RRT contract and asked them if they were considering taking a job with the District when the District took over the contract. RRT employee Brian Rourke believed from his conversation with Kowalski that Kowalski was offering him a job with the District. Kowalski also spoke to Duane Mech, Sharon Cook, Stuart Raymond, and William Hathaway. Kowalski spoke to many RRT employees about working for the District after January 31, but not everyone.

15. Kowalski and Rourke had a discussion about the Union. Rourke indicated that Gagne was in the "union camp".

16. Word got back to Berg that Kowalski was offering jobs to RRT employees and Berg called Murray and told him to tell Kowalski to stop making job offers. Murray relayed this information to Kowalski.

17. Murray met with the RRT employees in January 1997 and gave them employment applications so that they could apply for positions with the District after their employment with RRT ended on January 31, 1997. Gagne submitted an

application on or about January 29, 1997 (District Exhibit 3).

18. Ten of the eleven employees working for RRT, including nine of the employees the Union claimed to represent, submitted applications in January 1997 for positions in the recycling facility with the District. Murray reviewed all the applications, scheduled interviews with all the applicants, interviewed candidates and selected the employees for hire. He did not involve anyone else, including Kowalski, in this decision making process.

19. Murray hired Rourke, Mech, Cook, Hathaway and Raymond. All of these individuals received \$200 as a result of a settlement agreement between the Union and RRT approved by the NLRB, referenced in Finding of Fact No. 24. He did not hire Seth Pichette, Carlos Harris, Harold Johnson, Shabazz Khalif or Gary Gagne. All of these individuals also received \$200 as a result of this settlement agreement. Murray initially did not hire Phil Baker, who was not included in the settlement agreement. However, Murray later hired Baker.

20. Murray hired Rourke, Mech, Cook, Hathaway and Raymond because they were enthusiastic in their interviews with him and because they possessed the necessary skills to perform their jobs.

21. Murray did not hire Pichette because he was a relatively new worker at RRT, did not have much experience, and he did not demonstrate much enthusiasm during the interview. Murray did not hire Harris because he did not show up for the interview. Johnson did not submit an application. Khalif did not show up for his first scheduled interview. Murray scheduled another interview with Khalif. Khalif showed up for the second interview, but Murray concluded that Khalif displayed little

enthusiasm for the job.

22. Murray did not hire Gagne because he showed a lack of enthusiasm during the interview. Murray also held Gagne responsible for the deterioration in cleanliness and productivity in the recycling facility during the final weeks of RRT's contractual obligation with the District. As set forth in Finding of Fact No. 11, Murray also had the opportunity to observe Gagne over many months and did not believe that he managed his time or the time of the employees under him efficiently (District Exhibit 6).

23. After the District took over the contract, Kowalski became the recycling coordinator for the recycling facility.

24. In January 1998, the NLRB approved a settlement agreement between the Union and RRT which required that RRT pay ten RRT employees \$200 each. The settlement agreement also requested that RRT recognize the union as the representative of "(a)ll employees, including line sorters, line leaders, and maintenance employees employed" by RRT at its Brattleboro facility. The settlement agreement also stated in pertinent part:

[RRT has] recognized the Union as of January 31, 1997, for the purpose of collective bargaining with regard to wages, hours and conditions of employment at our Brattleboro, Vermont facility, which we no longer operate ... (Union Exhibit 1).

OPINION

The Union alleges that the District failed to hire Gary Gagne because of his union activities. As a remedy, the Union requests that the Labor Relations Board order the District to hire Gagne with full back pay and benefits and recognize the Union as the bargaining representative of the employees of the recycling facility.

In determining whether the District failed to hire Gagne due to his union activities, the Board employs the analysis used by the U.S. Supreme Court and National Labor Relations Board in cases where it is alleged that action was taken against an employee for engaging in union activities. Once an employee demonstrates protected conduct, he or she must show the conduct was a motivating factor in the decision to take action against the employee. Then, the burden shifts to the employer to show by a preponderance of the evidence it would have taken the same action even in the absence of the protected conduct. Horn of the Moon Workers Union v. Horn of the Moon Cafe, 12 VLRB 110 (1988). 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 N.L.R.B. No. 150 (1980).

The Mt. Healthy Court reasoned that this allocation of burdens ensures that an employee is:

placed in no worse a position than if (the employee) had not engaged in the (protected) conduct . . . But that same (employee) ought not to be able, by engaging in such conduct, to prevent (the) employer from assessing his performance record and reaching a decision . . . on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision. Id. at 285-86.

At the heart of any employment action allegedly linked with anti-union discrimination is the question of employer motivation. Ohland v. Dubay, 133 Vt. 300, 302 (1975). The guidelines the Board follows in determining whether the protected conduct of engaging in union activities was a motivating factor in an employer's decision to take action against an employee are: 1) whether the employer knew of the employee's protected activities, 2) whether there was a climate of coercion, 3) whether the timing of the action was suspect, 4) whether the employer gave as a reason for the decision a protected activity, 5) whether the employer interrogated the employee about protected activity, 6) whether the employer discriminated between employees engaged in protected activities and employees not so engaged, and 7) whether the employer warned the employee not to engage in protected activity. Id. at 302-303. Horn of the Moon, 12 VLRB at 126-127.

Applying these standards to this case, we first determine whether Gagne was engaging in protected conduct. Gagne was engaged in such conduct in that he was involved in union organizing activities with the District's predecessor, RRT, during 1996. The second step of the Mt. Healthy analysis requires the Union to show that the District's decision to not hire Gagne was motivated by his protected conduct. We conclude that the Union has not met its burden with respect to this step of the analysis.

The Union failed to produce sufficient evidence to show that the individual responsible for making the hiring decision for the District, George Murray, knew that Gagne was involved in the 1996 union organizing efforts. Although another District employee, Joe Kowalski, asked Gagne why employees had organized into a union

and knew that Gagne was in the "union camp", there was no evidence that Kowalski was involved in the District's hiring decisions or that he told Murray of his conversation with Gagne.

Also, there is no evidence presented by the Union that there was a climate of coercion at the time Murray made his hiring decision in January 1997. There was no evidence that Murray ever gave Gagne's union activity as a reason for not hiring him, that he warned employees not to engage in union activity, or that he interrogated Gagne or any other employee about union activity. Further, there was a lack of evidence presented by the Union showing that the Murray discriminated between employees engaged in protected activities and employees not so engaged. The Union did not present evidence distinguishing the five bargaining unit employees hired, and the five bargaining unit employees not hired, with respect to their union activity or lack of union activity.

In addition, the District presented legitimate and nondiscriminatory reasons for its hiring decisions, including not hiring Gagne. Murray had the opportunity to observe Gagne over many months and did not believe that he managed his time or his employees' time efficiently. He also held Gagne responsible for the deterioration in cleanliness and productivity in the recycling facility in late 1996 and early 1997 during the final weeks of RRT's contractual obligation with the District.

Thus, we conclude that the Union has failed to meet its burden in showing that Gagne's union activity was a motivating factor in the District's decision not to hire him. Accordingly, we do not need to proceed to the third step of the Mt. Healthy analysis, requiring the District to show by a preponderance of the evidence that it

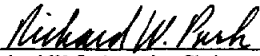
would have taken the same action even in the absence of the protected conduct. The Union having failed to establish that the District committed an unfair labor practice, we cannot grant the Union's requested remedy that Labor Relations Board order the District to hire Gagne with full back pay and benefits and recognize the Union as the bargaining representative of the employees of the recycling facility.


ORDER

NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the unfair labor practice charge filed by the United Paperworkers International Union against the Windham Solid Waste Management District is DISMISSED.

Dated this 11th day of June, 1998, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Richard W. Park, Acting Chairperson


Leslie G. Seaver


John J. Campieri