VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 97-39
JEFFREY ROBINS	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On July 1, 1997, Jeffrey Robins ("Grievant"), an Environmental Engineer employed by the Vermont Department of Environmental Conservation, Agency of Natural Resources ("Employer"), filed a grievance against the Employer. Grievant alleged that the Employer violated Articles 5 and 71 of the collective bargaining agreement between the State of Vermont and the Vermont State Employees' Association, effective for the period July 1, 1996 to June 30, 1997 ("Contract"), and interfered with his constitutional right to freedom of speech, by ordering Grievant to sign a certification document which Grievant believed contained untrue statements.

A hearing was held on December 4, 1997, before Labor Relations Board Members Catherine Frank, Chairperson; Carroll Comstock and John Zampieri in the Board hearing room in Montpelier. Grievant represented himself. Assistant Attorney General David Herlihy represented the Employer. The Employer and Grievant filed post-hearing briefs on December 18, 1997.

FINDINGS OF FACT

1. The Contract provides in pertinent part as follows:

ARTICLE 2
MANAGEMENT RIGHTS

1. Subject to law, rules and regulations . . . and subject to terms set forth in this Agreement, nothing in this Agreement shall be construed to interfere

with the right of the Employer to carry out the statutory mandate and goals of the agency, to restrict the State in its reserved and retained lawful and customary management rights, powers and prerogatives, including the right to utilize personnel, methods and means in the most appropriate manner possible . . .

ARTICLE 5
NO DISCRIMINATION OR HARASSMENT

Section 1. 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, neither party shall discriminate against, intimidate nor harass any employee because of race, color, handicap, membership or non-membership in the VSEA, filing a complaint or grievance, or any other factor for which discrimination is prohibited by law.

. . .

ARTICLE 71
WHISTLEBLOWER

1. A "Whistleblower" is defined as a person covered by this Agreement who makes public allegations of inefficiency or impropriety in government. No provision of this Agreement shall be deemed to interfere with such an employee in the exercise of his or her constitutional rights of free speech, and such person shall not be discriminated against in his employment with regard thereto.

. . .

3. Employees who possess information about inefficiency or impropriety in State government are urged to bring that information to the attention of appropriate government officials prior to making public allegations.

2. At all times relevant, Grievant was employed as an Environmental Engineer C in the Residuals Section of the Waste Water Management Division of the Department of Environmental Conservation. Grievant performed professional engineering work involving the preparation, development and/or implementation of solid waste management plans, studies and programs. Grievant's primary job function was to review and make recommendations on permits for disposal of

residual matter gathered in waste water treatment. An Environmental Engineer C is not required to be a licensed professional engineer in Vermont (Grievant's Exhibits 120-121).

3. Grievant is a licensed professional engineer in Vermont. Grievant has a Ph.D in Civil Engineering (Environmental), and has various practical and teaching engineering experience (Grievant's Exhibits 211-212, 241-246).

4. Marilyn Davis is the Director of the Waste Water Management Division. She has been performing professional engineering work for the Department of Environmental Conservation for 31 years. The Waste Water Management Division consists of five sections. The Division employs 47 persons, approximately 25 of whom are involved in the technical review of permits. One of the sections is the Residuals Section; this is where Grievant worked at all times relevant. Catherine Jamieson is the Section Chief of the Residuals Section.

5. In reviewing and making recommendations on permits for disposal of residual matter gathered in waste water treatment, permit reviewers such as Grievant reviewed applications to determine whether they complied with technical standards established by the Employer. As Division Director, Davis had the authority to interpret those standards. At all times relevant, the permit reviewer was responsible for signing a "certification" document if permit applications complied with technical standards established by the Employer, and providing it to Jamieson and Davis for issuance of a permit on behalf of the Secretary of the Agency of Natural Resources.

6. The majority of the permit applications acted on by the Residuals Section concern residual sludge that is removed from waste water that contains domestic waste, or human sewage waste. A minority of the permit applications received by the Residuals Section concern industrial waste water treatment sludge that does not contain domestic waste. The Employer has established standards to address potential health hazards presented by disposing of the sludge.

7. In July and August of 1996, Grievant was in the final stages of completing his review and preparing the certification documents on a permit application for sludge from Ben and Jerry's ice cream plant. The sludge consisted of waste ice cream and manufacturing by-products. Ben and Jerry's filed an application for a permit to spread the waste on fields in the Mad River Valley as a fertilizer.

8. In early August, 1996, Grievant informed Jamieson that he did not wish to sign the draft of the Ben and Jerry's certification document because the wording of the signature page and his signature implied that he agreed that the application and project complied with technical standards warranting issuance of a certification, and he did not agree technical standards had been met warranting certification. Grievant offered to sign alternately worded signature pages indicating that the Department or his supervisor concluded that the application complied with technical standards, and did not imply that Grievant recommended that the certification be issued (Grievant's Exhibits 4 - 6).

9. Grievant raised concerns that Ben and Jerry's had not demonstrated that the sludge was not pathogenic, had not substantiated its claim that the waste would be stabilized, and had not sufficiently restricted access to the site where the

waste would be disposed. Grievant, Jamieson and Davis discussed these concerns of Grievant during August and September of 1996. Grievant maintained the position that he would violate the ethical standards of a professional engineer if he signed the certification document (Grievant's Exhibits 11-19).

10. In September, 1996, Jamieson requested that William Bress, the State Toxicologist employed by the Vermont Department of Health, provide an opinion on the Ben and Jerry's application concerning restricting access to the site of the sludge disposal. In an October 25, 1996, memorandum responding to Jamieson's request, Bress stated: "My opinion is that if the material to be applied is incorporated into the soil within 48 hours, no public health threat will be posed at the site." (Grievant's Exhibits 24 - 26).

11. On November 18, 1996, Davis sent a memorandum to Robins which provided:

> I have reviewed the information from you and Cathy regarding the Ben & Jerry's draft certification. Based on the response from the Health Department and our Department's guiding principle to minimize intrusion into people's lives by using the minimum necessary regulation to protect public health and the environment, I have considered the above conflicting issues and determine the Department's position to be:
>
> 1. It is not necessary to treat these wastes with a process to reduce pathogens since they are not of domestic origin and the Health Department concurs in this position.
>
> 2. The wastes must be incorporated within 48 hours. This permit condition should be sufficient to control odors and allows DEC to require a shorter time period if odors become a problem. We will not change this condition at this time.
>
> 3. The natural site access restrictions and location are sufficient to control access for the type of waste being applied.

You are the person in the program responsible for signing the certification and providing it to the program supervisor and the Director for issuance on behalf of the Secretary. The standard certification signature block reads:

> The Department staff has reviewed the above project and application and finds it to conform with current technical standards. It is recommended that the foregoing findings be made and the Solid Waste Management Facility Certification be issued.

You advised us at the time of preparation of the draft certification that you felt the project did not conform to the technical standards, as you noted. Please consider the application against the above interpretation of those standards. You feel that you cannot "recommend" that we make the findings contrary to your interpretations and therefore you cannot sign the document. I am willing to remove the second sentence from that certification block.

You further contend that signing the document will violate your ethical standards as a professional engineer. I wish to point out that your signature on this document is not required to, and should not, include your professional engineering credentials. This position does not require other than a technical background and other permit reviewers are not P.E.s. The signature block as amended only states the application is in conformance with the Department's technical standards.

Please revise the signature block as attached and sign the draft certification and start it through the process. (Grievant's Exhibits 28-30)

12. On November 21, 1996, Robins sent a memorandum to Davis which provided in pertinent part:

> . . .
>
> In response to your 11/18/96 memo, your items 1,2 and 3 are case specific interpretations of compliance with the Vermont Solid Waste Rules for this project. I do not agree with your interpretations. In my opinion, the proposed project and the application materials do not propose a management plan which conforms with the technical standards of the Vermont Solid Waste Rules and I do not recommend the certification be issued in its current form . . . The latest memo from W. Bress does not change my opinion . . . Having said that I realize you get to make the final decisions for the Department. As I have said in the past I am willing to sign a document which includes an accurate description of the my role in this project. I appreciate that you made an offer to change the wording but it still implies I think the project conforms to the technical standards. I propose a couple signature blocks below that I am willing to sign(:)

. . .

The Department finds the project and application materials comply with the technical standards. The Department recommends the foregoing findings be made and the Solid Waste Facility certification be issued.

OR

The Department staff has reviewed the above project and application to assess the technical content. Final decisions on conformance with program technical standards were made by the Environmental Engineering Supervisor and/or the Division Director. The Department finds the project and application materials comply with the technical standards. The Department recommends the foregoing findings be made and the Solid Waste Facility Certification be issued. (Grievant's Exhibits 32 -33)

13. After receiving Grievant's memorandum, Davis sent Robins a memorandum dated December 2, 1996, which provided in pertinent part:

. . .

This is a direct order. Prepare the certification as directed, sign the certification, and forward it by Friday, December 6, 1996 to your supervisor as is customary practice. Failure to comply with this order can result in disciplinary action up to and including dismissal. A recurrence of similar conduct could also result in disciplinary action and/or an adverse performance evaluation. (Grievant's Exhibit 35).

14. On December 2, 1996, Grievant pointed out to Davis that a public bike path ran close to the land application site, and indicated to Davis that this may influence Davis' decision on site accessibility with respect to the Ben and Jerry's application. By memorandum of December 3, 1996, Davis informed Grievant that the presence of the bike path did not warrant access restrictions beyond those previously cited. Davis further stated:

My directive of 12/2/96 remains unchanged. You must sign the certification and forward it to your supervisor by Friday, December 6, 1996. (Grievant's Exhibits 37 - 38)

15. On December 4, 1996, Grievant sent a memorandum to Davis and Canute Dalmasse, Director of the Department's Office of Water Resources, which provided in pertinent part:

> . . .
> Marilyn is trying to force me to sign statements that I do not believe are true. To me this act is unethical and is potentially "unprofessional conduct" as defined by the State of Vermont Laws Relating To Professional Engineering. If Marilyn or the Agency does not withdraw Marilyn's order in writing, or propose a certification I agree to sign, by 4:30 p.m. on 12/5/96 (I am negotiable on this deadline but I have been put under a deadline to sign), I may file an unprofessional conduct complaint against Marilyn with Vermont P.E. licensing board. I verbally raised this possibility with Marilyn on 12/2/96 and again today as Marilyn was leaving the office and with Canute today in our 3:30 p.m. meeting. (Grievant's Exhibit 40).

16. By memorandum dated December 5, 1996, Dalmasse informed Grievant that "the directives contained in Marilyn Davis' December 2 and 3 memos to you remain in effect and will not be withdrawn as you requested in your December 4, 1996 memorandum to Marilyn Davis and me." (Grievant's Exhibit 42).

17. On December 6, 1996, Grievant signed his name on the line above his typed name on the signature page of the Ben and Jerry's draft certification document, and wrote "(under protest)" next to his signature. When Grievant submitted the document to Jamieson, Jamieson told Grievant that it was not acceptable to write "(under protest)" next to his signature. Jamieson informed Grievant that if was permissible for him to write a separate protest letter. Grievant then signed his name on the line above his typed name on the signature page of the Ben and Jerry's draft certification document, without writing "(under protest)" next to his signature. In addition, Grievant sent Jamieson a memorandum December 6, 1996, stating:

> Attached are the full certification materials for Ben and Jerry's Homemade, Inc. I have signed the certification under protest. I repeatedly indicated that, in my opinion, the application/management plan/certification did not conform to the current technical standards of the Vermont Solid Waste Management Rules (Rules) as discussed in my 12/4/96, 11/21/96, 9/3/96, and 8/13/96 memos, yet I was ordered to sign the certification which indicates the staff finds that application/management plan, certification does conform to the technical standards of the Rules. I was informed (I would call it threatened) of possible disciplinary actions ranging up to dismissal if I did not sign. I offered several times to sign certifications with alternative wording which indicated the Department, or someone other than me, found the application conformed with the technical standards but that compromise was rejected.
>
> To me, ordering and threatening people to sign statements they believe to be false is wrong, unethical, potentially illegal, and potentially violates the Contract with VSEA. I hope to pursue this matter in other ways.

Grievant sent copies of this memorandum to Davis, Dalmasse, Department of Environmental Conservation Commissioner William Brierly, and Agency of Natural Resources Secretary Barbara Ripley (Grievant's Exhibits 44-47).

OPINION

Grievant contends that the Employer violated Articles 5 and 67 of the Contract by discriminating against him due to his whistleblower activities, and interfered with his constitutional right to freedom of speech, by ordering Grievant, under the threat of disciplinary action, to sign a certification document which Grievant believed contained untrue statements. Grievant also contends that the Employer did not honor Grievant's right as a professional engineer to follow the Fundamental Canons of the Laws and Rules of Professional Engineering, and decline to sign statements he believed to be false.

In past cases, the Board has indicated the analysis it will employ where employees claim management took action against them for engaging in protected activities such as whistleblowing or exercise of free speech rights. The Board has determined that it will employ the analysis used by the U.S. Supreme Court. Once the employee has demonstrated his or her conduct was protected, she or he must then show the conduct was a motivating factor in the decision to take action against him or her. 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. Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977). Grievance of McCort, 16 VLRB 70 (1993); *Affirmed*, (Unpublished Decision, 1994). The so-called Mt. Healthy analysis has been employed by the VLRB in protected activity grievance cases specifically involving whistleblowing; Grievance of Cronin, 6 VLRB 37 (1983), Unpublished Decision, 1987); Grievance of McCort, 16 VLRB 70 (1993), *Affirmed*, (Unpublished Decision, 1994); Grievance of McCort,. 18 VLRB 446 (1995), *Affirmed*, ___ Vt. ___ (1997); Grievance of Gadreault, 8 VLRB 87 (1985); Grievance of Choudhary, 15 VLRB 118 (1992), *Affirmed*, Unpublished Decision, 1994); and free speech rights. Grievance of Morrissey, 7 VLRB 129 (1984); *Affirmed*, 149 Vt. 1 (1987).

The first step in the analysis is to determine whether Grievant actually was engaged in these protected activities. We first examine Grievant's whistleblowing claim. Whistleblowing is a protected activity pursuant to Article 67 of the Contract, which defines a "whistleblower" as a person who makes "public allegations of

inefficiency or impropriety in government", and provides that a "whistleblower" shall not be discriminated against for exercising free speech rights.

We conclude that Grievant had engaged in no "whistleblowing" activities at the time he was ordered to sign a certification document which Grievant believed contained untrue statements. He had engaged in an extended period of disagreement with his immediate supervisor and his division director concerning whether the Ben and Jerry's permit application met the Employer's technical standards, and whether he would sign a document certifying that Ben and Jerry's had met such standards. However, he had made no public allegations of inefficiency or impropriety by this time. Thus, he was not engaging in protected "whistleblowing" activity pursuant to the Contract. McCort, 16 VLRB at 106. (An auditor made claims in communications with his superiors that Agency of Transportation management was interfering in his conduct of an audit, but had not made his claims public.)

We conclude differently with respect to whether Grievant was engaged in protected free speech activities. Constitutional claims concerning free speech rights are properly encompassed within the definition of a "grievance". Grievance of Morrissey, supra. The problem in any case is to arrive at a balance between the interests of the employee, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. Morrissey, 149 Vt. at 14; *citing* Pickering v. Board of Education, 391 U.S. 563 (1968).

The threshold inquiry in free speech cases is whether the employees's speech conduct can be "fairly characterized as constituting speech on a matter of public

concern". Morrissey, 149 Vt. at 15; *citing* Connick v. Myers, 461 U.S. 138 (1983). Grievant's dialogue with his supervisors on whether the Ben and Jerry's permit application met the Department's technical standards can be so characterized given the public health implications of treatment of sludge.

If the employee's speech touches upon matters of public concern, then the employee's interest in the speech activity must be balanced against the government's interest in maintaining efficiency and discipline. Morrissey, 149 Vt. at 16; *citing* Connick v. Myers, 461 U.S. at 150. The State's interest in maintaining efficiency and discipline did not outweigh Grievant's interest in speaking on a matter of public concern. The potential public health implications involved in the disagreement expressed by Grievant on the treatment of sludge outweigh any negative effect such speech may have had on efficient operations of the Employer.

Also, the fact that Grievant's speech was expressed privately in communications with supervisors, rather than involving public expression, does not mean his speech was unprotected. A public employee does not forfeit protection against government infringement of freedom of speech by deciding to express views privately with supervisors rather than publicly. Givhan v. Western Line Consolidated School District, 439 U.S. 410, 414-416 (1979). Thus, we conclude that Grievant was engaged in protected free speech activities.

The second step in the Mt. Healthy analysis is that Grievant must show that his protected speech was a motivating factor in the Employer ordering Grievant to sign a certification document which Grievant believed contained untrue statements.

In Sypher, 5 VLRB at 131, the VLRB noted the guidelines it would follow in determining whether protected activity was a motivating factor in an employer's decision to take adverse action against an employee: whether the employer knew of the employee's protected activities; whether the timing of the adverse action was suspect; whether there was a climate of coercion; whether the employer gave protected activities as a reason for the decision; whether an employer interrogated the employee about protected activities; whether the employer discriminated between employees engaged in protected activities and employees not so engaged; and whether the employer warned the employee not to engage in protected activities.

Grievant has presented insufficient evidence by which we can conclude that his free speech activities motivated the Employer to order Grievant to sign a certification document which Grievant believed contained untrue statements. None of the elements listed in Sypher, other than knowledge of Grievant's speech, are present in this case. Mere knowledge alone is insufficient for us to conclude that Grievant's free speech activities motivated the Employer to order Grievant to sign the certification document. McCort, 16 VLRB at 108.

The evidence indicates that Grievant's supervisors seriously considered concerns expressed by Grievant, investigated the validity of those concerns, and attempted to work with Grievant to achieve a mutually satisfactory solution. The fact that ultimately no mutually satisfactory solution was reached, and the Employer ordered Grievant to sign the certification document over his objections, does not indicate that Grievant's speech motivated the Employer's actions. Instead, it indicates that the Employer was exercising its legitimate management prerogative to require

an employee to adhere to interpretations of standards established by the Employer. Grievant's unwillingness to accept his supervisors' ultimate authority over him to interpret technical standards once they had taken Grievant's concerns into consideration, rather than Grievant's speech itself, motivated the Employer to order Grievant to sign the certification document.

The Employer also acted reasonably in not allowing Grievant to write "under protest" next to his signature, and instead permitting Grievant to write a separate letter of protest. This resulted in an appropriate balance between Grievant's free speech interests and the Employer's interests in requiring employees to adhere to reasonable management policies.

Grievant further contends that the Employer's actions constituted discrimination against him, and intimidation and harassment of him, in violation of Article 5 of the Contract. Grievant's contentions in this regard add nothing further to his allegations which we already have addressed of discrimination based on whistleblowing activity and free speech.

Finally, Grievant contends that the Employer did not honor Grievant's right as a professional engineer to follow the Fundamental Canons of the Laws and Rules of Professional Engineering, and decline to sign statements he believed to be false. The Board has such adjudicatory jurisdiction as is conferred on it by statute, and in deciding grievances the Board is limited by the statutory definition of grievance. In re Grievance of Brooks, 135 Vt. 563, 570 (1977). We are not given authority under our grievance jurisdiction to interpret the Fundamental Canons of the Laws and

Rules of Professional Engineering, and thus decline to address Grievant's claim in this regard.

ORDER

NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the Grievance of Jeffrey Robins is DISMISSED.

Dated this 13th day of February, 1998, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Catherine L. Frank, Chairperson

Carroll P. Comstock

John J. Zampieri