VERMONT LABOR RELATIONS BOARD

WILLARD MILLER	)	
	)	
v.	)	DOCKET NO. 99-76
	)	
UNIVERSITY OF VERMONT	)	

MEMORANDUM AND ORDER

The issue in this matter, in which University of Vermont Assistant Professor Willard Miller ("Grievant") has filed an unfair labor practice charge and grievances, is whether to issue an unfair labor practice complaint and whether to grant the University's motion to dismiss the grievances.[1]

On December 13, 1999, Grievant filed two grievances and an unfair labor practice charge against the University President and Board of Trustees. In one grievance, Grievant alleged that the University President and Board of Trustees violated Sections 270.5A, 270.5B and 270.5C of the Officers' Handbook of the University through denying him due process, and abusing their authority with no rational basis, due to his union organizing activities on the campus for the last quarter of a century. Grievant alleges that the University President and Board of Trustees abused their authority by attempting to break his tenure contract with continuous real, annual salary cuts, denial of promotion and sabbatical leaves, exclusion from department and college committees and teaching of courses required for philosophy majors, and various other discriminatory actions. Grievant alleges that these actions constituted a sustained attempt to break his tenure contract without the due process protection of a formal termination proceeding.

In the other grievance, Grievant alleged that he was discriminated against based on sexual orientation, in violation of Sections 040.1 and 040.2 of the Officers' Handbook

and Section 961(6) of the State Employees Labor Relations Act, because the University denied full domestic partnership benefits to his domestic/life partner of 18 years, Ann Lipsitt.

In his unfair labor practice charge, Grievant alleges that the University of Vermont administration discriminated and retaliated against him due to his union organizing activities, and discriminated against him for giving testimony under the State Employees Labor Relations Act. He alleges that the University administration has engaged in a pattern or practice of retaliation against him for union organizing activity going back to 1973. He contends that his union activities became central to the pattern of penalties that have been directed against him. He cites as penalties *de facto* salary cuts and denial of sabbatical leave.

In a January 3, 2000, response to the unfair labor practice charge, the University contended that the charge should be dismissed as untimely. The Employer further contended that, without waiving the timeliness argument, the charge is without merit and that the University did not discriminate or retaliate against Grievant because of his union activity.

On April 14, 2000, the University filed a motion to dismiss the grievances. The University seeks to dismiss the grievances for the following reasons: 1) the grievances were not filed within 30 days of the receipt of the final decisions of the University as required by the Labor Relations Board Rules of Practice; 2) the grievances were not filed in a timely fashion in accordance with sections 231 and 270.6 of the Officers' Handbook of the University; 3) the grievances are barred by the principle of laches; 4) Grievant has waived or is estopped from raising any of his claims in this proceeding by failing to

[1] Labor Relations Board Member Edward Zuccaro has not participated in the decision in this matter.

pursue such matters in the past and/or accepting the University's final decisions; and 5) Grievant has not cited a rule or regulation alleged to have been discriminatorily applied to him.

On May 23, 2000, Grievant filed a memorandum in opposition to the University's motion to dismiss his grievances. He contends that he exhausted all his administrative remedies in a timely manner, and timely filed his grievances within 30 days of receipt of the University's final decision. He further contends that his grievances are not otherwise time-barred because he has stated a valid "continuing grievance" claim. He contends the principle of laches and the doctrine of equitable estoppel do not support dismissal of his claims. Finally, Grievant maintains that he has adequately stated a claim for the discriminatory application of a rule or regulation through his citation of various sections of the Officers Handbook the University has violated, and by his allegations of numerous ways he has been treated differently than other faculty members.

Unfair Labor Practice Charge

We first consider whether to issue an unfair labor practice complaint in this matter. The State Employees Labor Relations Act, 3 V.S.A. Section 901 *et seq.*, provides that the Board shall not issue an unfair labor practice complaint based on any unfair labor practice occurring more than six months prior to the filing of the charge with the board unless the person aggrieved thereby was prevented from filing the charge by reason of service in the armed forces. 3 V.S.A. Section 965(a). Therefore, the Board has declined to find an unfair labor practice where the charge was filed more than six month after the alleged unfair labor practice. Vermont State Colleges Faculty Federation, Local 3180, VFT, AFT, AFL-CIO, 15 VLRB 216 (1992). Harrington v. Department of Corrections, et

al, 14 VLRB 166 (1991). Vermont State Employees' Association v. Department of Public Safety, 6 VLRB 217 (1983). The filing of a grievance on the matter does not toll or relax the responsibility to file an unfair labor practice charge within six months of the alleged occurrence of the unfair labor practice. Champlain Valley Union High School Teachers' Association v. Champlain Valley Union High School Board of Directors, 4 VLRB 315 (1981).

In applying these standards to this case, we conclude that the unfair labor practice charge is untimely. There must at minimum be an alleged violation of unfair labor practice provisions within six months of when the unfair labor practice charge was filed to support the issuance of an unfair labor practice complaint. Grievant has made no such alleged violation.

In his unfair labor practice charge, he alleges that the University of Vermont administration discriminated and retaliated against him due to his union organizing activities, and discriminated against him for giving testimony under the State Employees Labor Relations Act. He contends that his union activities became central to the pattern of penalties that have been directed against him, and cites as penalties *de facto* salary cuts and denial of sabbatical leave. The latest *de facto* salary cut received by Grievant was for the 1997-98 academic year, well before the six-month limitations period for filing an unfair labor practice charge. Also, Grievant does not allege that there was any administrative decision denying him a sabbatical leave within six months of when he filed his unfair labor practice charge.

To the extent that Grievant may claim that the determination on his 1998-99 salary contributes to the issuance of an unfair labor practice complaint, such a claim also

fails on timeliness grounds. University President Judith Ramaley informed Grievant by letter of May 10, 1999, that she was denying his request for reconsideration of the 12.5% salary increase he had been given for 1998-99. If Grievant wished to file an unfair labor practice charge concerning this action, he needed to do so within six months. He did not file a charge until more than seven months later. The fact that Grievant filed a grievance concerning the 1998-99 salary determination did not excuse his failure to file a timely unfair labor practice charge since the filing of a grievance on the matter does not toll or relax the responsibility to file an unfair labor practice charge within six months of the alleged occurrence of the unfair labor practice. Champlain Valley, supra.

The whole of the unfair labor practice charge filed herein concerns alleged discriminatory conduct against Grievant occurring much earlier than six months prior to the filing of the charge. Earlier events may be utilized to shed light on the true character of matters occurring within the six-month period where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. Local Lodge No. 1424, International Association of Machinists, AFL-CIO v. National Labor Relations Board, 362 U.S. 411, 416-17 (1960). National Labor Relations Board v. Lundy Manufacturing Corp., 316 F.2d 921, 927 (2d Cir. 1963). Grievant's efforts to use earlier events to support an unfair labor practice finding fail since he has made no allegation of any violation drawn from within the six-month period. Thus, we decline to issue an unfair labor practice complaint.

Motion to Dismiss Grievances

In determining whether to grant the University's motion to dismiss the grievances filed herein, we will discuss each grievance in turn. We first address the grievance concerning continuous real, annual salary cuts, denial of promotion and sabbatical leaves, exclusion from department and college committees, exclusion from teaching of courses required for philosophy majors, and various other discriminatory actions.

Among the reasons advanced by the University in support of the motion to dismiss is that the grievance was not filed in a timely fashion in accordance with sections of the Officers' Handbook of the University. We agree that this grievance is untimely to the extent that it contains any allegations concerning the University's actions predating the review of Grievant's salary for the 1998-99 academic year. Grievances filed with the Board are heard only after exhaustion of any required administrative procedures in the University. Article 18, Section 1, Board Rules of Practice. The Officers' Handbook provides that grievances must be "submitted within 30 days of final action by the . . . President if the appeal is made to him/her". Section 270.6(b)(1).

Grievant filed the grievance now before us, concerning his salary for the 1998-99 academic year and other alleged discriminatory actions, on October 8, 1999 with the University grievance committee following University administration denials of Grievant's requests for reconsideration of the salary determination. Clearly, at this point, the time had expired to grieve any actions occurring during preceding academic years. Grievance of Gobin, 14 VLRB 40, 46 (1991); *Reversed on Other Grounds*, 158 Vt. 442 (1992). If Grievant wished to grieve salary determinations and other actions from earlier

years, he needed to do so within the 30 day period set forth in the Officers' Handbook. His failure to do so means he has waived his right to contest those actions.

The University further alleges that the grievance should be dismissed in its entirety on timeliness grounds because it was not filed within 30 days of the receipt of the final decision of the University as required by the Labor Relations Board Rules of Practice. We conclude that the University has not established this claim. Grievant contends that he filed his grievance in a timely manner pursuant to the University's grievance procedure once his requests for reconsideration of his 1998-99 salary level were denied. The materials on file appear to support Grievant's position, and it would be inappropriate to grant the motion to dismiss on this basis without further factual development at an evidentiary hearing.

The University also seeks dismissal of this grievance in its entirety on the basis that Grievant has not cited a University rule or regulation alleged to have been discriminatorily applied toward him. Since Section 18.3 of the Board Rules of Practice requires that a grievance contain "specific references to . . . the pertinent rule(s) or regulation(s) which are alleged to be violated", the University contends that Grievant's failure to identify with any such specificity any such rule or regulation warrants dismissal of the grievance.

Grievant contends, to the contrary, that the University has engaged in a pattern and practice of discriminatory and retaliatory conduct for his union activity, and that he has cited various sections of the Officers' Handbook of the University to support these claims. Grievant's theory is that he has stated a valid "continuing grievance" claim, and that he is seeking to establish that the determination on his 1998-99 salary is only the

latest in a long series of adverse and discriminatory actions directed against him in retaliation for his protected union activities.

In order to determine whether Grievant has set forth a valid continuing grievance, we must apply the standards for continuing grievances to the specifics of the claims made by Grievant in his grievance. The Board has accepted the validity of a continuing grievance in cases where pay practices were involved and employees initially did not grieve the alleged violations within contractual time limitations, but grieved the alleged violations during the period they were still occurring. The Board has held that grievants were permitted to institute grievances over the matter at any time during the period in which the alleged violations were occurring, since there was a new occurrence of the alleged violation every time a paycheck was issued, with the restriction that the grievants waived their right to back pay for all periods prior to the pay period immediately preceding the filing of the grievances. Grievance of Shine, 21 VLRB 103 (1998). Grievance of Reed, 12 VLRB 135, 143-44 (1989). Grievance of Cole, 6 VLRB 204, 209-210 (1983). Also, to render a grievance timely, the aggrieved employee must demonstrate that at least one alleged violation occurred within the specified timeframe for filing grievances. Grievance of Boyde, 165 Vt. 624, 626 (1996); Shine, supra; Reed, supra; Cole, supra.

In his grievance, Grievant contends that the University violated Sections 270.5A, 270.5B and 270.5C of the Officers' Handbook through denying him due process, and abusing their authority with no rational basis, due to his union organizing activities on the campus for the last quarter of a century. In support of these allegations, Grievant cites actions of continuous real, annual salary cuts, denial of sabbatical leaves, exclusion from

department and college committees, exclusion from teaching of courses required for philosophy majors, and unequal application of "departmental rules" for promotion, class visitations and student evaluations.

As indicated above, in order to have filed a valid continuing grievance in each of these areas, Grievant must demonstrate that at least one alleged violation occurred in each area within the specified timeframe for filing grievances. Boyde, supra; Shine, supra; Reed, supra; Cole, supra. Grievant has not made such a showing with respect to "real, annual salary cuts" since he received a 12.5% salary increase for the period in which he timely grieved, the 1998-99 academic year (*See* Grievant's Binder 1, Document 4).

Grievant also has not made the required showing in any of the other areas. He acknowledges that there was no administrative determination denying a promotion or a sabbatical leave within the grievance filing period (*See* Grievant's Opposition to the University's Motion to Dismiss Grievances, page 14, footnote 3). Similarly, his allegations concerning unequal application of rules for classroom visitations and student evaluations are made against department chairpersons whom preceded the grievance filing period (*See* Grievance, pages 3 and 5 - 9). Further, Grievant has cited no actions with respect to excluding him from department and college committees and from teaching of courses required for philosophy majors that occurred during the grievance filing period (*See* grievance generally and Grievant's Binders 1 and 2).

Accordingly, Grievant is left without any factual allegations to support his claim of a continuing grievance. The alleged retaliatory and discriminatory actions that he cites to support his allegations of violations of Officers' Handbook sections all predate the grievance filing period. He is left without any valid factual basis to demonstrate

violations of the rules and regulations he cites. Under such circumstances, we conclude that it is appropriate to grant the University's motion to dismiss with respect to this grievance.

We reach a different conclusion with respect to the other grievance. Therein, Grievant alleged that he was discriminated against based on sexual orientation, in violation of Sections 040.1 and 040.2 of the Officers' Handbook and Section 961(6) of the State Employees Labor Relations Act, because the University denied full domestic partnership benefits to his domestic/life partner of 18 years, Ann Lipsitt. The University has not demonstrated that Grievant filed this grievance in an untimely manner. Further, Section 040.2 of the Officers' Handbook prohibits discrimination against employees based on sexual orientation, and Grievant is entitled to an evidentiary hearing to seek to demonstrate that the University's denial of full domestic partnership benefits to his partner constituted the discriminatory application of a rule or regulation.[2]

Based on the foregoing reasons, it is hereby ordered:

1. The Labor Relations Board declines to issue an unfair labor practice complaint in this matter, and the unfair labor practice charge is dismissed;

2. The University of Vermont's motion to dismiss the grievance of Willard Miller concerning real annual salary cuts, denial of promotion and sabbatical leaves, exclusion from department and college committees and teaching of courses required for philosophy majors, and various other discriminatory actions; is granted; and

[2] Grievant's allegation of a violation of 3 V.S.A. Section 961(6), which makes it an unfair labor practice for an employer to discriminate against an employee based on sexual orientation, is appropriately brought in an unfair labor practice proceeding rather than a grievance. Since Grievant did not timely file an unfair labor practice charge in this case, Section 961(6) is not applicable in this matter.

3. The University of Vermont's motion to dismiss the grievance of Willard Miller, alleging that he was discriminated against based on sexual orientation because the University denied full domestic partnership benefits to his partner, is denied.

Dated this 25th day of August, 2000, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Catherine L. Frank, Chairperson

Carroll P. Comstock

Richard W. Park

John J. Zampieri