

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	
VERMONT STATE EMPLOYEES')	DOCKET NO. 03-30
ASSOCIATION and ROBERT HOOPER)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On July 3, 2003, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of the VSEA and Robert Hooper. Therein, Grievants contend that the State of Vermont Department of Social and Rehabilitation Services ("Employer" or "SRS") discriminated against Hooper on the basis of his union activities and membership in violation of Article 5 of the collective bargaining agreement between VSEA and the State for the Non-Management Unit, effective July 1, 2001 – June 30, 2003 ("Contract"), by not selecting Hooper for an Interim Intake Supervisor position. Grievants further allege that the Employer violated Articles 2, 15 and 18 of the Contract; and Policies 4.0, 4.6 and 4.9 of Personnel Policies and Procedures; by rehiring Karen Shea into a Social Worker B position and then selecting Shea rather than Hooper for the Interim Intake Supervisor position.

A hearing was held on April 15, 2004, in the Labor Relations Board hearing room in Montpelier before Board Members Richard Park, Chairperson; Carroll Comstock and Joan Wilson. VSEA Deputy Counsel Michael Casey represented Grievants. Assistant Attorney General Joseph Winn represented the Employer. The parties filed post-hearing briefs on May 6, 2004.

FINDINGS OF FACT

1. The Contract provides in pertinent part as follows:

ARTICLE 2 MANAGEMENT RIGHTS

1. Subject to law, rules and regulations, including, for example . . . 3 VSA 327(a), 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 3 VSEA RIGHTS

- . . .
3. VSEA TIME OFF: Subject to the efficient conduct of State business, which shall prevail in any instance of conflict, permission for reasonable time off during normal working hours without loss of pay and without charge to accrued benefits shall not be unreasonably withheld. . . Subject to the foregoing, time off shall be granted in the following instances to:

- (a) Members of the VSEA Board of Trustees to attend 12 regular Trustee meetings and up to two special Trustee meetings a year.
- (b) Members of the Council for attendance at any of the four regular council meetings per year. The State may grant permission for attendance at not more than one additional special meeting.
- (c) Officers/Delegates, up to a maximum of four (4) shall be allowed reasonable time off, not to exceed an aggregate of 160 hours for all bargaining units in any calendar year to attend national or regional meetings of the VSEA national affiliate;
- (d) Unit Chairperson, up to 40 hours per year, subject to the operating needs of the department for conduct of unit Labor Relations/Contract Administration business;
- (e) Members of VSEA standing committees will be permitted to attend ten meetings per year;
- (f) Unit executive committee members will be given time off to attend five meetings per year;
- (g) Stewards for the processing and handling of complaints and grievances, including necessary appearances at all steps of the grievance procedure; up to 100 hours per steward per year shall be considered a reasonable time for processing and handling of complaints and grievances, and may be extended by mutual agreement in any instance;

Non-Management Unit: up to 95 stewards

An employee will not be permitted more than a total of 240 hours, 280 for Unit Chair persons, time off in any fiscal year under paragraph 3, subsections A-G above.

...

**ARTICLE 5
NO DISCRIMINATION OR HARASSMENT;
and AFFIRMATIVE ACTION**

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 . . . membership or non-membership in the VSEA . .

**ARTICLE 15
GRIEVANCE PROCEDURE**

...

2. **DEFINITION**

...

- (b) "Grievance" is an employee's . . . or the employee's collective bargaining representative's expressed dissatisfaction, presented in writing, with aspects of employment or working conditions under a collective bargaining agreement or the discriminatory application of a rule or regulation.

...

**ARTICLE 18
VACANCIES/PROMOTIONS**

1. When management decides to fill a permanent, vacant bargaining unit position through competitive procedures, notice shall be posted for ten (10) workdays prior to the application deadline, statewide in the case of a state promotional or open competitive procedure, agency-wide when only an agency promotional procedure is being utilized. . .
2. Vacancy notices shall include entry KSA's or examination subject areas, a brief description of duties, and any special skills required.
3. The appointing authority or designee shall consider all certified applicants.
4. No employee will have his/her name involuntarily removed from the register prior to its expiration without notice from the Department of Personnel
5. An Appointing Authority may elect to define posting parameters for a particular position within the department and to a particular worksite, unit, division, institution, departmental region, class or series, or combination thereof.

...

2. 3 V.S.A. Section 327(a) provides: “When a vacancy in the classified service occurs, the appointing officer shall make a diligent effort to recruit an employee from within the classified service to fill the vacancy.”

3. The State Personnel Policies and Procedures provide in pertinent part as follows:

Policy 2.3
RULES AND REGULATIONS FOR PERSONNEL ADMINISTRATION
...
CHAPTER 8 – REGISTERS

8.01 **Establishment of a Register:** The Commissioner will prepare a list of persons qualified and eligible for appointment to positions in one or more classes. This list will include candidates for re-employment, competitive appointment, transfer, demotion and restoration. . . Candidates for competitive appointment may include agency promotional, State promotional and/or open-competitive candidates.

...
CHAPTER 9 – CERTIFICATION OF NAMES FROM A REGISTER

9.01 **Request for Certification:** When a classified position becomes vacant . . . and such position is to be filled by competitive procedures, a request for certification shall be submitted to the Commissioner on a prescribed form. Upon receipt of such request, the Commissioner will certify from the appropriate register the names of available persons having the three highest qualifying scores . . . Candidates eligible for re-employment, transfer, demotion or restoration will be certified without scores as appropriate.

...

CHAPTER 10 – APPOINTMENT

...

10.02 **Permanent Full-Time Appointment:** Selection for permanent appointment shall be made for each position from the certificate submitted by the Commissioner under the provisions of chapter 9, section 9.01, except as otherwise provided. Persons so selected shall after satisfactory completion of a probationary period be given permanent status in the position occupied.

...

10.05 **Limited Appointment:** When the services of a person are required to fill a position temporarily vacant by reason of a leave of absence or otherwise, a limited appointment may be made by the appointing authority. The Commissioner shall certify under the provisions of section 9.01, the names of eligible persons who are willing to accept a limited appointment. . .

...

Policy 4.0 RECRUITMENT

...

PURPOSE AND POLICY STATEMENT

It is the policy of the State of Vermont to actively recruit and select the most qualified persons to fill positions in the classified service, while at the same time providing an equal employment opportunity for all.

When a vacancy in the classified service occurs, the appointing authority shall make a diligent effort to recruit employees from within the classified service to fill the vacancy.

...

LEVELS OF RECRUITMENT

Except in limited circumstances where administrative appointment . . . is appropriate, there are three (3) levels of recruitment as follows:

Agency: At the agency recruitment level, the vacancy is posted within the agency/department where the position is located. Only classified, permanent status employees from within the agency/department may apply. . .

All agency applicants must submit a separate standard *State of Vermont Employment Application* directly to the personnel officer of the agency or department. . .

State Promotional: At the State promotional recruitment level, applications are accepted from classified, permanent status State employees from inside or outside the agency/department where the vacancy is located. . . All applicants must submit a separate standard *State of Vermont Employment Application* for each position applied for . . . The applicant must . . . appear on the hiring certificate . . .

Open Competitive: At the open competitive level, recruitment is open to applicants from inside and outside State government. . .

...

Policy 4.6 TRANSFER/PROMOTION/DEMOTION

...

PROMOTION

State employees who have successfully completed an original probationary period may apply for positions above their current pay grade as an agency or State “promotional applicant”. . . The employee must apply for specific positions under recruitment to the Department of Personnel or to the designated personnel officer if recruitment for the position has been decentralized or is within the agency.

The applicant must meet the minimum qualifications for the position and pass any required exams. State promotional applicants are referred on a hiring certificate . . .
...

Policy 4.9 REGISTER

...
REGISTER – is a list of all applicants eligible for appointment to a given job class (including candidates for competitive appointment, transfer, demotion, and restoration) from which a hiring certificate for a given position is compiled.

...
RESTORATION – is the hiring within two (2) years of a former permanent status or limited status employee, who was not dismissed from State Service and whose performance at the time of separation was at least satisfactory . . .
Restoration rights apply to classes of positions assigned to the same or lower pay grade than the class of position previously held. Applicants must apply for specific positions and meet any minimum education and experience requirements.

ESTABLISHMENT OF A REGISTER

...
At the beginning of a recruitment process, a register for the job class is established. . . All . . . restorations . . . are added without a competitive exam score . . . but must meet the minimum qualifications . . .

Policy 4.10 CERTIFICATION

DEFINITIONS

...
HIRING CERTIFICATE – is an official document listing applicants who are eligible for appointment to a particular classified position. It is a vehicle for referring names of eligible applicants to appointing authorities who use it to make their selection to fill a vacancy.

...
(Grievants' Exhibit 11, pages 22-23, 28-29, 41-42, 43-44, 46)

4. Robert Hooper has been employed on a permanent basis by the State since 1983. He worked for the Department of Social Welfare from 1983 to 1985. In July 1985, Hooper accepted a position in the Disability Determination Unit of SRS. In 1987, he was promoted to a Social Worker B Trainee position. He was upgraded to a permanent Social Worker B position, effective October 2, 1988. He has continued as a Social Worker B to

the present. Hooper has a Bachelors degree in Individual and Family Studies from Pennsylvania State University (Grievants' Exhibits 12, 15).

5. During the years 1983 - 1989, Hooper always received overall performance ratings of "consistently meets job requirements/standards". This was the third category on a five-step rating scale ranging from "unsatisfactory" to "consistently and substantially exceeds job requirements/standards". Hooper's overall performance was rated "outstanding" for the period March 1990 to March 1991, the highest rating on a three-step rating scale with "unsatisfactory" as the lowest rating and "satisfactory" as the middle rating. He received overall "satisfactory" ratings on the three-step rating scale for the periods March 1991 – March 1992 and March 1992 – March 1993. He received a "satisfactory" overall rating for the period March 1995 – March 1996, and "excellent" overall ratings for the periods March 1996-March 1997 and April 1997-April 1998, on a four-step rating scale ranging from "unsatisfactory" to "outstanding". He was named Social Worker of the Year in the Burlington SRS office in 1996. He received a "satisfactory" overall rating for the period March 2000 – March 2001. Hooper received several letters and memoranda commending his performance throughout his tenure with the Employer (Grievants' Exhibit 15, State's Exhibit 2).

6. Hooper has been active in the VSEA throughout his State employment as a shop steward, Chapter President, elected member of the VSEA Council, member of the Non-Management Unit bargaining team, Chair of Master bargaining team, VSEA Vice President and VSEA President. Hooper was VSEA President from 1993 to 2001. In 2000 and 2001, Hooper was out of the SRS office on VSEA business two to three days a week. SRS Commissioner William Young agreed to give Hooper a workload reduction during

this period due to his extensive VSEA obligations. As VSEA President, Hooper was responsible for overseeing VSEA operations and staff. Once Hooper ceased being VSEA President in September 2001, his VSEA obligations were significantly reduced and he returned to full-time work at SRS. The Employer never told Hooper that he could not go to a VSEA function. The Employer made accommodations in assignments given Hooper due to his VSEA responsibilities (State's Exhibit 1, Grievants' Exhibit 12).

7. The Burlington SRS office is comprised of several units. The Intake Unit is responsible for receiving telephone calls regarding alleged child abuse, neglect and delinquency. The Intake Unit investigates such allegations and determines whether a case should be opened. If opened, a case is forwarded to one of the casework units where a social worker coordinates appropriate intervention to protect the child. The Intake Unit Supervisor reviews intake calls, responds to emergency cases, assigns cases for investigation, and provides supervision and input on investigations. The position is high-pressure, sensitive and has a high degree of visibility in the community.

8. Hooper generally performed casework services during his career as a social worker. However, during the period he was VSEA President, at times he was assigned to field calls for the Intake Unit. This was done to adjust to Hooper's changed work schedule as a result of VSEA commitments and to accommodate his VSEA activities. There also have been periods during the years Hooper has been a social worker that he has been required to take overflow cases for the Intake Unit and perform intake investigations.

9. During June 2002, Susan Shattuck, the Intake Unit Supervisor in the Burlington SRS office, requested and was granted a two-year leave of absence. Lynda

Schoenbeck, District Director of the Burlington SRS office, decided to hire an interim Intake Supervisor through promotion of an SRS employee. Schoenbeck privately solicited three employees from the Burlington SRS office to fill the position, including Social Worker B Karen Shea. Shea, who would be resigning shortly from her social worker position, informed Schoenbeck that she was not interested in the position. Neither of the other two employees solicited by Schoenbeck expressed interest in the position.

10. On July 23, 2002, the Employer sent an e-mail message to all employees of the Employer throughout the state announcing the anticipated filling of several social worker position vacancies (including Shea's position), as well as the Interim Supervisor of the Intake Unit position, in Burlington. The Employer sent out a request to recruit for the social worker positions in late July and August. The Social Worker B position to be vacated by Shea was recruited at the "State Promotional Only" level, meaning that applications were to be accepted from classified, permanent status State employees from inside or outside SRS (Grievants' Exhibits 1, 2 and 11, page 29).

11. In late July, after Schoenbeck had solicited other employees about the Interim Intake Supervisor position, Hooper expressed interest in the position to Schoenbeck. Schoenbeck indicated that the position would require Hooper to be in the office more often and that Hooper would have to be more fastidious about his files. Schoenbeck did not make a specific reference to Hooper's VSEA activities during this conversation. Schoenbeck also told Hooper that Burlington Assistant Director Betsy Shuey might have mandatory bumping rights into the Intake Supervisor position if her Assistant Director position was eliminated. Hooper requested that Schoenbeck let him know how the issue involving Shuey was resolved because he was interested in the

position. Other than Hooper, no other SRS employee expressed an interest in the Interim Intake Supervisor position. Shuey subsequently decided that she was not interested in the Interim Intake Supervisor position. Shuey transferred to a position in the State Department of Health effective early October 2002 (Grievants' Exhibit 7).

12. Shea was a Social Worker B in the Burlington SRS office from May 2000 to September 2002. She resigned her Social Worker B position effective September 3, 2002, to go to work for Casey Family Services. Upon her resignation, Shea ceased to be a member of the State classified service. She had restoration rights as defined in Policy 4.9 of State Personnel Policies and Procedures. Shea did not have mandatory reemployment rights which generally would have granted her the right to be reemployed by the State.

13. Shea received a Bachelors degree in Social Work from the University of Vermont in May 1998, and obtained a Masters degree in Social Work from UVM in May 2000. Shea received an "outstanding" overall rating for the period November 2000 to November 2001 on a four-step rating scale ranging from "unsatisfactory" to "outstanding". Shea did not have experience supervising employees (Grievants' Exhibits 6, page 2; 13, pages 1-3; State's Exhibit 4).

14. Shea did not appear on the hiring certificates generated by the Department of Personnel in July and August 2002 for the Social Worker B vacancies in the Burlington SRS office (State's Exhibit 16, pages 51-55).

15. On September 5, 2002, Darlene Brown of the Agency of Human Services Personnel Unit sent a memorandum to Schoenbeck's assistant informing her that no employees of the Employer applied for the vacant social worker positions in Burlington by the close of agency recruitment on August 8, 2002. Brown attached to the

memorandum hiring certificates for the positions. The only person listed on the hiring certificate for the position vacated by Shea was Richard Herbert. Herbert was a State Department of Taxes employee seeking a transfer (Grievants' Exhibit 5, State's Exhibit 16, pages 50-55).

16. On September 19, 2002, Shea spoke with Schoenbeck. Shea told Schoenbeck that she was not happy in her new job with Casey Family Services. Shea informed Schoenbeck that she was interested in returning to work in the Burlington SRS office. Schoenbeck sent an email message to her superior, John Swartz, the Employer's Regional Manager, on September 20, 2002, stating: "Is there anything I can anticipate with regard to the Intake Supervisor position. I believe she would take it if we could make a time commitment." Swartz responded that day: "Please call Joe Benner and ask him if we can just hire Karen back and put her in the Intake job as a state employee, or does she need to be hired as though she is an 'outsider'". Schoenbeck forwarded the e-mail exchanges between her and Swartz to Benner, and asked him: "Joe: can you review below and let me know how we could manage this re-hire?" (Grievants' Exhibit 6, page 1).

17. Benner informed Rossie Conklin of the Department of Personnel in a September 20, 2002, e-mail message that Shea wished to return to SRS, her old position was still vacant, and the Employer had permission to fill it. Benner inquired: "Since it has been such a short time since she left, could we simply hire her back (as we did with Ann Marie Miles recently)?" Conklin responded that the Employer could rehire Shea (Grievants' Exhibit 6, page 2).

18. The reference to Ann Marie Miles concerned a Social Worker B in the Burlington SRS office resigning in August 2002 and then changing her mind about leaving her position. In late August 2002, the Department of Personnel authorized the Employer to allow Miles to return to her position without recruitment (State's Exhibit 12).

19. Shea met with Schoenbeck at the Burlington SRS office on the afternoon of Friday, September 20, 2002. Shea indicated that she was interested in the Interim Intake Supervisor position or other available positions. During the meeting, Schoenbeck informed Shea that she would rehire her into her former Social Worker B position, and then promote her to the Interim Intake Supervisor position.

20. On September 20, 2002, after her meeting with Schoenbeck, Shea informed other employees of the Burlington SRS office that she would be hired as the Interim Intake Supervisor. Subsequently that afternoon, Hooper heard of the selection of Shea for the Intake Supervisor position.

21. On or about September 24, 2002, Hooper approached Schoenbeck and expressed his interest in the Interim Intake Supervisor position. Schoenbeck then had a discussion with Swartz regarding the Interim Intake Supervisor position. Swartz and Schoenbeck decided to establish an interview panel for the Intake Supervisor position. Schoenbeck contacted Shea and Hooper and told them they would be interviewed for the Intake Supervisor position. Shea told Schoenbeck that she had given Casey Family Services notice of her resignation and asked if she would be offered a job at SRS. Schoenbeck assured Shea that she would have a position.

22. Schoenbeck decided who would be on the interview panel. The panel consisted of Swartz, Jennifer Morrison and Peigi Huseby. Morrison was a Burlington Police Department Sergeant in charge of the Chittenden Unit for Special Investigations (“CUSI”). CUSI investigated allegations of child abuse, sexual and physical, in Chittenden County. Huseby was a Public Nurse Health Specialist with the Vermont Department of Health, and worked in the same office as Burlington SRS workers.

23. The interview panel conducted interviews with Hooper and Shea on October 7, 2002, at the Burlington SRS office. The panel interviewed Hooper and Shea separately. They asked Hooper and Shea essentially the same questions. Prior to the interview, the only documents that Schoenbeck provided to the interview panel were resumes provided by Hooper and Shea. The panel did not review prior performance evaluations of Hooper and Shea.

24. The interview panel members unanimously concluded that Shea should be selected for the position. Morrison determined that Shea was a stronger candidate for the position due to having more education and demonstrating more enthusiasm for the position than Hooper. Swartz viewed Shea as more interested in the position and more enthusiastic about it. Huseby had worked with Shea and was impressed with her as an employee. She also viewed Shea as exhibiting a more collaborative approach to supervision than Hooper, and thought this was desirable for the position. Huseby also was concerned that Hooper may not possess the necessary diplomacy and tact for the position. This concern was primarily based on a comment Hooper made during the interview that he was not going to get pregnant and take time away from the position.

25. Schoenbeck decided prior to the interview that she would go along with the interview panel's choice for the position. Morrison was not aware that the panel was making the final decision on which person would be placed in the position. During consideration of whom to hire for the Interim Intake Supervisor position, Schoenbeck reviewed Hooper's most recent performance evaluation. She did not review any of his prior evaluations. After Hooper expressed interest in the Intake Supervisor position, Schoenbeck mentioned at a meeting of SRS supervisors that Hooper would need to be in the office more if he was selected for the position.

26. On October 10, 2002, Brown sent an e-mail message to Benner stating: "It is my understanding that I'm putting Karen (Shea) back in a Social Worker position and then next pay period putting her in SSS on an interim basis for two years." "SSS" referred to "Social Services Supervisor" (Grievants' Exhibit 8, page 19).

27. Shea reported to work on October 14, 2002, as a Social Worker B. Shea did not complete an application for employment in the Social Worker B or Intake Supervisor positions prior to returning to work at SRS. Schoenbeck directed Shea to work in the Intake Supervisor's office in the Intake Unit building, instead of her old Social Worker cubicle in another building. This was the only available space in the Intake Unit. Shea's name was placed on the Intake Supervisor's mailbox. On October 16 or 17, Schoenbeck informed Shea that she had been selected for the Interim Intake Supervisor position.

28. On October 18, 2002, Schoenbeck sent an e-mail message to the staff of the Burlington SRS office, stating: "It has been recommended by the interview committee that Karen Shea be promoted to the Interim Intake Supervisor position. She

has accepted the offer and will officially begin her duties on Monday, October 21st. I am very happy to have Karen join the administrative team” (Grievants’ Exhibit 9).

29. Shea is now in the Intake Supervisor position on a permanent basis. The Employer intends to place Shattuck in another supervisory position in the Burlington SRS office at the end of her leave.

30. On November 8, 2002, VSEA Field Representative Marty Raymond filed a Step II grievance on behalf of VSEA and Hooper. The grievance contended that the Employer violated the Contract and personnel policies and procedures by failing to properly post the Social Worker B position in which Shea was placed, hiring Shea into the Social Worker B position although her name never appeared on a hiring certificate for the position and Shea never applied for the position, and promoting Shea rather than Hooper into the Interim Intake Supervisor position. The grievance was denied at Steps II and III of the grievance procedure (State’s Exhibits 7 – 11).

OPINION

We first address Grievants’ contention that that the Employer violated Article 5 of the Contract by discriminating against Robert Hooper due to his union activities and membership by giving the Interim Intake Supervisor position to Shea rather than Hooper. In grievances where employees claim the employer took action against them for engaging in union activities and membership, the Board employs the analysis used by the United States Supreme Court in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977): 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. Grievance of Sypher, 5 VLRB 102 (1982). Grievance of Roy, 6 VLRB 63 (1983). Grievance of Cronin, 6 VLRB 37 (1983). Grievance of Danforth, 22 VLRB 220 (1999).

Hooper engaged in the protected conduct of union membership and activities. He has been a VSEA member and activist throughout his State employment as a shop steward, Chapter President, elected member of the VSEA Council, member of the Non-Management Unit bargaining team, Chair of Master bargaining team, VSEA Vice President and VSEA President from 1993 to 2001.

Grievants must demonstrate that this union activity was a motivating factor in the Employer's decision to not select him for the Interim Intake Supervisor position. 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 factors the Board reviews in determining whether the protected conduct of union membership and engaging in union activities constituted a motivating factor in an employer's adverse action against an employee are: 1) whether the employer knew of the protected activities, 2) whether a climate of coercion existed, 3) whether the timing of the action was suspect, 4) whether the employer gave protected activity as a reason for the decision, 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 such activity. Id. at 302-303. Horn of the Moon Workers Union v. Horn of the Moon Cafe, 12 VLRB 110, 126-27 (1988).

The only factor present here is that the Employer knew of Hooper's protected activities. However, Grievants have not demonstrated that this knowledge resulted in Hooper's VSEA membership and activities constituting a motivating factor in the Employer's decision not to select him for the Interim Intake Supervisor position.

Grievants base their claim of anti-union animus on a contention that District Director Diane Schoenbeck, on two occasions, expressly tied Hooper's authorized absences from the office to engage in union activity to her decision that he was therefore unqualified to be supervisor: first, when she told Hooper that he would need to be in the office a lot more if he wanted to be a supervisor and, second, when she made a similar statement during a meeting of Burlington SRS office supervisors. We disagree that Schoenbeck expressly tied Hooper's union activity absences to a decision that he was unqualified to be a supervisor.

On both occasions cited by Grievants, Schoenbeck generally indicated that the Intake Supervisor position would require Hooper to be in the office more often. She did not make a specific reference to Hooper's VSEA activities on these occasions. This evidence is insufficient by itself to demonstrate that Hooper's VSEA activities were a motivating factor in the Employer not selecting him for the Intake Supervisor position. It is reasonable to construe Schoenbeck's statements as observations that the Intake Supervisor needed to be in the office more than a Social Worker B.

The plausibility of such an interpretation is furthered once the timing of the comments is considered. Schoenbeck did not make such comments during a period when Hooper was often away from the office due to VSEA activities. Since he ceased being VSEA President the previous September, Hooper's office absences due to VSEA

activities had been reduced significantly. This bolsters a conclusion that Schoenbeck was not focused on holding Hooper's VSEA activities against him when she made her comments.

Further, Grievants have not presented any corroborating evidence bolstering their claim of improper motive. The evidence is to the contrary. The Employer made accommodations in assignments given Hooper due to his VSEA activities, at one point allowing him a workload reduction due to his extensive VSEA responsibilities, and never sought to prevent him from attending VSEA functions. Grievants have not met their burden of demonstrating anti-union animus by the Employer.

Grievants further allege that the Employer violated Articles 2 and 18 of the Contract; and Policies 4.0, 4.6 and 4.9 of Personnel Policies and Procedures; by rehiring Karen Shea into a Social Worker B position and then selecting Shea rather than Hooper for the Interim Intake Supervisor position. The Employer contends that the Board lacks jurisdiction to decide Grievants' claims based on the rehire of Shea into the Social Worker B position.

Grievants contend that the rehire violated the Contract and personnel policies and procedures because Shea did not apply, and was not placed on the hiring certificate, for the position. The Employer contends that the Board has no jurisdiction to decide these claims because neither VSEA nor Hooper have standing to assert them. In addition, the Employer alleges that the claims concerning Shea's rehire should be dismissed as untimely filed at earlier steps of the grievance procedure. Thus, as a threshold matter, the Board must decide these issues of standing and timeliness.

The jurisdiction of the Board in grievance proceedings is limited by the requirement that there be an "actual controversy" between the parties. In re Friel, 141 Vt. 505, 506 (1982). To satisfy the actual controversy requirement, there must be an injury in fact to a protected legal interest or the threat of an injury in fact. Id. Grievance of Boocock, 150 Vt. 422, 425 (1988). We conclude that Hooper suffered an injury in fact stemming from the Employer's rehiring of Shea into a Social Worker B position effective October 14, 2002. This rehiring was the first of two steps by the Employer for its announced promotion of Shea four days later, on October 18, 2002, to Interim Intake Supervisor, an action adverse to Hooper's legal interests.

The rehiring of Shea into the Social Worker B position and subsequent promotion of her to Intake Supervisor were inextricably intertwined. The Employer had forethought of promoting Shea to the Intake Supervisor position when rehiring her into the Social Worker B position. Further, the selection process for the Intake Supervisor position was limited to employees of the Employer, and Shea was eligible to be placed in this position only to the extent that her rehiring as a Social Worker B was proper. Accordingly, the appropriateness of Shea's promotion necessarily is affected by the validity of her rehire as a Social Worker B. Hooper has standing to contest the Social Worker rehiring process to the extent that it affected his legal interests in being promoted to Intake Supervisor.

VSEA also has standing to assert the claims concerning Shea's rehire as a Social Worker B as Hooper's exclusive bargaining representative. The definition of "grievance" in the State Employees Labor Relations Act expressly contemplates representative grievances being brought by the employees' collective bargaining representative. 3

V.S.A. Section 902(14). This provides VSEA with the ability to join in this grievance.

Grievance of VSEA (Re: Compensatory Time Credit), 11 VLRB 300, 304, 307 (1988).

We turn to addressing the timeliness of Grievants' claims based on the rehire of Shea into the Social Worker B position. The Board will resolve an issue on the merits if at all possible unless the collective bargaining agreement requires it to be dismissed on procedural grounds. Grievance of Brewster, 23 VLRB 96, 98 (2000). Grievance of Kimble, 7 VLRB 96, 108 (1984). Grievance of Amidon, 6 VLRB 83, 85 (1983). One of the principal reasons for which the Board has dismissed grievances on procedural grounds has been if grievances were not timely filed at earlier steps of the grievance procedure.

Under contracts between the State and the VSEA providing that grievances must be filed within specified times at earlier steps of the grievance procedure, the Board, with the approval of the Vermont Supreme Court, has refused to consider grievances which were untimely filed at earlier steps of the grievance procedure. Grievance of Adams, 23 VLRB 92 (2000). Grievance of Boyde, 18 VLRB 518 (1995); *Affirmed*, 165 Vt. 624 (1996). Grievance of Ulrich, 12 VLRB 230, 239 (1989); *Affirmed*, 157 Vt. 290 (1991).

Here, the Grievance Procedure article of the Contract requires that Step II grievances be filed "within fifteen workdays of the date upon which the employee could have reasonably been aware of the occurrence of the matter which gave rise to the complaint". Article 15, Section 3(a) (2). If a grievance is not filed within contractual time frames, the "matter shall be considered closed". Article 15, Section 3(b)(1).

The Employer contends that Grievants did not adhere to this contractual timeframe because the Step II grievance here was filed more than 15 workdays after Shea

was rehired as a Social Worker B. We disagree that the rehiring of Shea as a Social Worker B triggered the 15 workday requirement. Hooper's reasonable awareness of the occurrence of the matter which gave rise to the complaint was when he became aware that he had suffered an injury in fact to a protected legal interest. This did not occur at the point Shea was rehired as a Social Worker B since by itself this did not result in an injury to him. It occurred on the date he was notified that the Intake Supervisor position that he had applied for had been given to Shea. On this date, October 18, 2002, his claim became ripe, thereby triggering the time for filing a grievance. It was at this point that the Employer's plan of rehiring, then promoting, Shea came to fruition. The grievance was filed within 15 workdays of this date, making it timely.

The issues of standing and timeliness having been resolved, we address the merits of Grievants' claims that the Employer violated Articles 2 and 18 of the Contract; and Policies 4.0, 4.6 and 4.9 of Personnel Policies and Procedures; by rehiring Karen Shea into a Social Worker B position and then selecting Shea rather than Hooper for the Interim Intake Supervisor position. Grievants contend first in this regard that the rehire of Shea into the Social Worker B position violated the Contract and personnel policies and procedures because Shea did not apply, and was not placed on the hiring certificate, for the position.

Once Shea resigned from the State classified service, effective September 3, 2002, her rights for rehire were limited to restoration rights. Pursuant to Policy 4.9 of Personnel Policies and Procedures, such rights were that she was eligible to be rehired within two years to a position assigned to the same or lower pay grade than the position she previously held provided that she applied for the position and met any minimum

education and experience requirements. In order for Shea to be rehired into a Social Worker B position, Article 18, Section 3 of the Contract, and Policies 4.0, 4.6 and 4.9 of the Personnel Policies and Procedures required that Shea apply for the position and appear on a hiring certificate for it. Shea neither applied for nor appeared on the hiring certificate for a Social Worker B position prior to the Employer rehiring her into such a position. Thus, the Employer violated the Contract and policies in rehiring Shea as a Social Worker B.

Nonetheless, the Employer contends that the rehire of Shea should not be impeded because she was an outstanding social worker and to make her and the Employer “jump through unnecessary hoops that would not have changed the end result makes no sense.” This contention disregards the “Purpose and Policy Statement” of Policy 4.0, Recruitment, of the Personnel Policies and Procedures, which states succinctly: “It is the policy of the State of Vermont to actively recruit and select the most qualified persons to fill positions in the classified service, while at the same time providing an equal employment opportunity for all. When a vacancy in the classified service occurs, the appointing authority shall make a diligent effort to recruit employees from within the classified service to fill the vacancy.” The latter sentence of this statement is identical to 3 V.S.A. Section 327(a), which also is incorporated in Article 2 of the Contract. The provisions of the Personnel Policies and Procedures violated by the Employer in rehiring Shea as a Social Worker B are the specific means to ensure adherence to the policy and purpose behind the merit system in state government, and it is inappropriate for the Employer to minimize compliance with them.

Moreover, we disagree with the Employer's statement that to make Shea and the Employer "jump through unnecessary hoops that would not have changed the end result makes no sense". We cannot conclude that the "end result" of hiring Shea, rather than Hooper, for the Intake Supervisor position would have been no different. The Employer's mishandling of the process of the rehiring of Shea as Social Worker B and subsequent promotion to Interim Intake Supervisor was so serious as to result in Hooper being denied a fair opportunity to compete for the Intake Supervisor position.

The Employer was required by statute, rules and the Contract to "make a diligent effort to recruit employees from within the classified service to fill (a) vacancy" that arises in the classified service. Here, the Employer's efforts to recruit employees from within the classified service to fill the vacancy in the Intake Supervisor position fell far short of "diligent". Schoenbeck's action of offering the Intake Supervisor position to Shea on September 20 even though Shea was no longer in the classified service, and even though Hooper had expressed interest in the position and was in the classified service, was in complete disregard of this requirement.

When the offer to Shea was temporarily retracted the following week to allow her and Hooper to be interviewed for the position, the Employer continued to act contrary to any meaningful effort to recruit from within the classified service. The Employer had decided to fill the Intake Supervisor position through an internal promotion. Nonetheless, the Employer considered and selected Shea for the position even though the rehiring of her into the classified service as a Social Worker was in circumvention of mandatory hiring practices. The Employer's mishandling of the rehiring of Shea as a Social Worker B meant that the promotion process for the Intake Supervisor position was fundamentally

compromised. The Employer's persistent and serious disregard of mandated recruitment and selection procedures resulted in a process fundamentally unfair to Hooper and should not be allowed to stand.

Grievants having established violations of the Contract and personnel policies and procedures, we need to determine the remedies to grant Grievants due to the procedural irregularities in rehiring Shea for the Social Worker B position and promoting her to the Interim Intake Supervisor position. Grievants request that Hooper be placed in the Intake Supervisor position effective October 2002. Alternatively, Grievants request that Hooper's salary and benefits be adjusted retroactive to October 2002 to the rates he would have received had he been awarded the Supervisor position and that he be given the right of first refusal for the next two supervisory job openings in the Burlington SRS office. Grievants further request that Hooper be made whole by awarding him full back pay and benefits as a result of being denied the Supervisor position effective October 2002.

The proper remedy in such a case is to make Hooper whole. To make Hooper whole is to place him in the position he would have been in had the violations of the Contract and personnel policies and procedures not occurred. Grievance of Kirby, et al, 15 VLRB 158, 194 (1992).

We conclude that the remedy requested by Grievants goes beyond making Hooper whole. He was placed at an improper disadvantage in competing for the Intake Supervisor position through the Employer's actions, but we do not conclude that it necessarily follows that he is entitled to placement in the Intake Supervisor position effective October 2002 or the alternative remedy requested by Grievants. Upon

consideration of all the circumstances, such a remedy would result in Hooper receiving a windfall.

This is because Shea's interests have to be fairly considered in developing a remedy. The Employer's serious missteps in this matter should not result in Shea being precluded from being fairly considered for the Intake Supervisor position. This would make her as much of a victim of the Employer's shortcomings as is Hooper. She acted in reliance on the Employer's representations in being rehired as a Social Worker B and then promoted to the Intake Supervisor position. If the Employer had applied personnel policies and procedures correctly, Shea could have applied for and been selected for the Social Worker B position properly, thus making her eligible to be promoted to the Intake Supervisor position. We conclude that she should not be foreclosed from that opportunity now through the Board granting the remedy requested by Grievants.

Instead, we conclude that the proper remedy generally for the violations that occurred here is to declare the selection of Shea for the Intake Supervisor position invalid and order the reopening of the selection process. Id. However, this remedy must be further refined given that a substantial period of time has passed since Shea was selected for the position, and we need to ensure that the remedy is fair to both Hooper and Shea and protects the Employer's interests.

We conclude that the remedy ordered by the Board in Grievance of Kirby, et al, 15 VLRB 204 (1992), adapted to the circumstances of this case, provides the appropriate balance with respect to fairness considerations and respective interests. A requirement that no members of the previous interview panel, or any members of the prior decision-

making process, are involved in the reopened process provides a balanced playing field for both candidates.

A provision that Shea shall remain in the Intake Supervisor position on an acting basis until the selection process is complete protects the Employer's interests in conducting business and does not unduly disrupt Shea's work situation. Further, allowing Shea to apply for the Intake Supervisor position, but not allowing her to be given consideration or credit based on her performance to date in the position, balances Shea not being placed in a untenable position due to the Employer's failings and Hooper not being placed at an improper competitive disadvantage. A requirement that the selection process shall be based on the minimum qualifications, position description and class specification as they existed in October 2002 is directed towards recreating the situation that would have existed but for the Employer's improper actions.

Finally, provisions are needed to ensure fairness to Hooper and Shea in the event that Hooper is selected for the position. If Shea is not selected for the position, she should be guaranteed employment with the Employer so that she is not involuntarily removed from employment through no fault of her own. She should be placed in a Social Worker B position or another position which is at least the same pay grade as a Social Worker B position, and shall be treated for pay purposes as if she was involuntarily demoted. If Hooper is selected for the position, he should be awarded back pay and benefits, at the legal rate of interest, in the amount he would have received if selected for the position in October 2002, minus any income received by him in the interim.

We recognize that the remedial action we have devised may not be perfect. It represents our best attempt to place Hooper and Shea in the positions they would have

been in had the Employer followed appropriate hiring practices. Should the parties mutually agree to alternative remedies that meet their interests, they may jointly petition the Board to reopen this case to substitute the agreed upon remedies for that ordered by the Board.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered:

1. The Grievance of the Vermont State Employees' Association and Robert Hooper is sustained to the extent indicated in the Opinion;
2. The appointment of Karen Shea to the Intake Supervisor position in the Burlington Social and Rehabilitation Services office is declared invalid, and the selection process for the position shall be reopened forthwith. No members of the previous interview panel, or any members of the prior decision-making process, shall be involved in the reopened process. The candidates for selection to the position shall be limited to Hooper and Shea. They shall be eligible to be selected for the position provided that they apply for the position. The Employer shall forthwith notify them of the requirements for applying for the position;
3. Shea shall remain in the Intake Supervisor position on an acting basis until the selection process for the position is complete. Shea shall be eligible to apply for the Intake Supervisor position but shall be given no consideration or credit based on her performance in the position;
4. The selection process shall be based on the minimum qualifications, position description and class specification for the Intake Supervisor position as they existed in October 2002;
5. If Shea is not selected for the position, she shall be placed in a Social Worker B position or another position with the Employer which is at least the same pay grade as a Social Worker B position, and shall be treated for pay purposes as if she was involuntarily demoted;
6. If Hooper is selected for the position, he shall be awarded back pay and benefits, at 12 percent interest per annum, in the amount he would have received if selected for the position in October 2002, minus any income received by him in the interim. Such award shall run through the date upon

which Hooper is hired into the position following the reopening of the selection process; and

7. The Labor Relations Board retains jurisdiction in this matter for the purpose of entertaining a motion jointly filed by the parties requesting that this matter be reopened to substitute alternative remedies agreed upon by the parties for the remedies ordered herein by the Board, which motion shall be filed within 20 days of issuance of this decision.

Dated this 16th day of June, 2004, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Richard W. Park, Chairperson

Carroll P. Comstock

Joan B. Wilson