VERMONT LABOR RELATIONS BOARD

APPEAL OF:	)	
	)	DOCKET NO. 05-13
ELLEN HARRIS	)	

MEMORANDUM AND ORDER

The issues before the Labor Relations Board are: 1) whether to grant a motion filed by Ellen Harris ("Appellant") to compel discovery, and 2) to respond to a request by Appellant that the Board determine whether notes taken by Shevonne Travers, the immediate supervisor of Appellant, are not discoverable because they are protected by the attorney-client privilege.

In the motion to compel discovery, Appellant requests that the Board order the State of Vermont Department of Education ("Department of Education:" or "Employer") to fully respond to Appellant's interrogatories and requests to produce seeking: 1) general information regarding "hiring into range" requests in the Department of Education, and 2) specific information pertaining to the request to hire Appellant into range (Interrogatories/Requests to Produce #3, 4, 5, 6, 7, 8 and 20). Appellant requested that she be hired into range, meaning that she be paid at a higher salary than the first salary step of her position. The Employer requested the State Department of Human Resources to approve hiring Appellant into range. The Department of Human Resources denied this request, and the Employer did not contest this denial. The Employer offered to hire Appellant at the first salary step of her position, and Appellant accepted the position on that basis.

Appellant is claiming in this appeal that her probationary employment was terminated due to gender discrimination. She contends that issues pertaining to her hiring,

and decisions made by management level personnel at that time, may serve to show the existence of gender bias against her from the outset of her employment. Appellant argues that information relating to other requests for hiring into range might be helpful to demonstrate that the expressed reasons for her termination were pretextual, and that gender-based discrimination was a substantial motivating factor for the discharge.

The Employer responds that the nexus between the hiring into range denial and the termination of Appellant's employment is extremely attenuated, and that discovery of hiring into range information will not lead to the production of relevant evidence of gender discrimination as a basis for Appellant's termination. The Employer contends that Appellant has not met the threshold test of relevance for production of information because she acknowledged in her deposition that she knew of three women hired by the Employer who had their hiring into range requests granted, and thought it was a possibility that her request may have been denied because she was the wife of the former Commissioner of Education. The Employer contends that this testimony of Appellant is affirmative evidence in the record that gender discrimination was not a basis for the hiring into range refusal.

In ruling on a motion to compel discovery, the Board applies Rule 26(b)(1) of the Vermont Rules of Civil Procedure, which provides that "parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action". The information sought is discoverable "if it appears reasonably calculated to lead to the discovery of admissible evidence".

We conclude that the requested information appears reasonably calculated to lead to the discovery of admissible evidence. The period between Appellant's hiring and

termination was less than five months. Actions of the Employer at the time of the hiring may shed light on its motives in terminating her employment a short time later. The information requested leads down the path of furthering the inquiry whether Appellant's employment was terminated due to gender discrimination. Grievance of Vermont State Colleges Faculty Federation, 22 VRRB 48, 50 (1999).

The fact that Appellant identified three women who were hired into range by the Employer is not sufficient to defeat Appellant's ability to obtain more comprehensive information on the hiring into range practices of the Employer. The Employer can present evidence on the three women when it responds to any evidence presented by Appellant that gender discrimination against her began with her hiring, but it is premature at this stage of the case to foreclose Appellant from making further inquiries into the Employer's hiring into range practices.

Also, we are not persuaded by the Employer's argument that Appellant should be precluded from obtaining the requested information because Appellant indicated in her deposition that she thought it was a possibility that her request may have been denied because she was the wife of the former Commissioner of Education. Raising such a possibility does not suffice to preclude Appellant from inquiring into other possible unlawful motives for her termination.

We next respond to Appellant's request that the Board determine whether notes taken by Shevonne Travers, the immediate supervisor of Appellant, are not discoverable because they are protected by the attorney-client privilege. Appellant states that she has no ability to determine whether the Employer's assertion of attorney-client privilege is or is not well-founded. Accordingly, she has requested the Board to review the unredacted

notes *in camera* and make a determination as to whether any or all of the redacted material should be disclosed to Appellant.

The Employer has provided us with the unredacted notes, and we have reviewed them *in camera*. The notes discuss a May 16, 2005, meeting in the office of Commissioner of Education Richard Cate and communications among the Employer representatives on May 16 and 17, 2005. Present at the meeting either in person or through conference call were Commissioner Cate; Elaine Pinckney, Deputy Commissioner; William Reynolds, Department of Human Resources General Counsel; Joseph Winn, Assistant Attorney General; William Reedy, Department of Education General Counsel; John Turner, Employer Human Resources Administrator; Shevonne Travers, immediate supervisor of Appellant; and Douglas Dows, Director of the Safe and Healthy Schools Division and the supervisor of Travers. The purpose of the meeting was to discuss the Employer's response to the appeal filed by Appellant in this matter on May 13, 2005.

Upon review of the notes, we conclude that they are protected by the attorney-client privilege. The burden of establishing the existence of an attorney-client privilege rests on the claimant of the privilege. State v. Kennison, 149 Vt. 643, 648 1987). In order for a claimant to succeed on a claim of privilege, he or she is obliged to prove that he or she falls within the scope of that privilege. Id. Vermont Rule of Evidence 502(b) sets forth the general rule of privilege in Vermont, stating in part:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between himself or his representative and his lawyer or his lawyer's representative, . . . (4) between representatives of the client or between the client and a representative of the client . . .

The Employer has met its burden of establishing that the notes in their entirety involve confidential communications made for the purpose of facilitating the rendition of professional legal services to the Employer among representatives of the Employer and their attorneys. As such, the notes are protected by the attorney-client privilege and are not discoverable. In so ruling, we are mindful of the possibility of attorneys being included by parties at meetings solely for the purpose of ensuring that the content of the meetings will not be discoverable. It is evident that was not the case here, but we caution that we would not find appropriate such attempts at shielding otherwise discoverable information.

Based on the foregoing reasons, it is ordered:

1) The Motion to Compel Discovery filed by Appellant is granted, and the Employer shall respond fully to the requested interrogatories and requests to produce by October 11, 2005; and

2) The notes taken by Shavonne Travers at issue herein are not discoverable because they are protected by the attorney-client privilege.

Dated this 27th day of September, 2005, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

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Edward R. Zuccaro, Chairperson

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Carroll P. Comstock

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Richard W. Park

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John J. Zampieri