

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 15-46
THOMAS BENOIT)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On November 16, 2015, the Vermont State Employees' Association ("VSEA") filed a grievance with the Vermont Labor Relations Board on behalf of Thomas Benoit ("Grievant"), contending that the State Department of Environmental Conservation ("Employer" or "DEC") violated Articles 5 and 18 of the collective bargaining agreement between the State and VSEA for the Non-Management Unit effective July 1, 2014, to June 30, 2016 ("Contract"), and Personnel Policy 4.0 and 4.11, in not promoting Grievant, an Environmental Analyst V with the Employer, to the newly created Environmental Analyst VI Solid Waste Supervisor position. Grievant alleges that he possessed better qualifications for the supervisor position than the successful candidate, but was denied the promotion partially due to his union involvement and prior grievance activity. Grievant asserts that the interviewers failed to consider Grievant's considerable supervisory experience and relevant qualifications due to his union activity. Grievant requested as a remedy that he be awarded the Solid Waste Supervisor position.

Hearings were held in the Labor Relations Board hearing room in Montpelier on September 29 and October 6, 2016, before Board Members Gary Karnedy, Chairperson; Edward Clark, Jr., and Robert Greemore. VSEA General Counsel Timothy Belcher represented Grievant. Assistant Attorney General Melanie Kehne represented the Employer. The deposition of Marie "Mia" Roethlein was admitted into evidence in lieu of live testimony at the October 6 hearing by

agreement of the parties. Grievant and the Employer filed post-hearing briefs on October 31, 2016.

FINDINGS OF FACT

1. The Contract provides in pertinent part:

...

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, filing a complaint or grievance . . .

...

ARTICLE 18 VACANCIES/PROMOTION

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 level KSA's (Knowledge, Skills, and Abilities) or examination subject areas, a brief description of duties, and any special skills required.
3. The Appointing Authority of designee shall consider all certified applicants.
4. An Appointing Authority may elect to define posting parameters for a position within the department and to a particular worksite, unit, division, institution, departmental region, class or series, or combination thereof.

...

(Exhibit 1)

2. Section 4 of State Personnel Policies and Procedures addresses recruitment and posting of vacancies in classified state government positions. Number 4.11 of Section 4 specifically establishes policies for interviewing and reference checking of applicants for positions. It provides in pertinent part:

...

GENERAL

...

The Department of (Human Resources) encourages hiring authorities to interview State and agency promotional candidates. Some agencies have their own interviewing policies that require interviewing of all agency candidates.

STRUCTURED INTERVIEW PROCESS

The Department of (Human Resources) strongly recommends the use of the structured interview. A structured interview is one in which: (1) there is a review/analysis of the job and its requirements; (2) a set of job-related interview questions is developed prior to the interview and is used for all candidates; and (3) there is a systematic means of evaluating candidates' responses. Further, the Department of (Human Resources) recommends the use of interview panels when practicable or appropriate.

...

(Exhibits 2, 3)

3. Grievant received a Bachelor of Science degree in Wildlife Biology from the University of Vermont in 1995. In 2008, he was awarded a Master of Public Administration degree from the University of Vermont (Grievant Exhibit 11).

4. Grievant was an Environmental Chemist for Severn Trent Laboratories in Colchester, Vermont from October 1997 to October 1998. He performed environmental testing and sampling work there, and had supervisory authority over three employees. He was an Environmental Engineer for North Country Environmental in South Barre, Vermont, from October 1998 to September 1999, where he engaged in environmental testing, sampling and site remediation. He supervised 7 employees (Exhibit 11).

5. The DEC hired Grievant as an Environmental Analyst III in the Environmental Assistance Division in September 1999. He worked in the areas of environmental assistance, solid waste plans, unregulated hazardous waste, and public outreach. He was involved, along with other employees, in developing a high school program on hazardous wastes. He made

presentations at national professional conferences. He worked there until November 2005. He then moved to the DEC Hazardous Waste Section as an Environmental Analyst IV (Exhibit 11).

6. In November 2006, Grievant transferred to the DEC Solid Waste Program as an Environmental Analyst IV. Grievant was involved in solid waste plan and permit review, unregulated hazardous waste, inspections, outreach and compliance. Cathy Jamieson was his supervisor. Jamieson completed a performance evaluation report on Grievant covering the period December 20, 2007, to March 1, 2008, and rated his overall performance as “excellent”. The Solid Waste Program had a staffing reduction in November 2009. Grievant was subject to a reduction in force, and moved then to an Environmental Analyst IV position with the DEC Water Quality Division. In this position, Grievant engaged in stormwater permit review and approval, outreach, and inspections. Grievant became an Environmental Analyst V a few years ago, and remains in that position at present (Exhibits 11, 17, 18).

7. Grievant has not supervised employees during his employment with DEC since 1999 except for at times supervising DEC interns.

8. Grievant applied to be a member of the Employer’s Spill Team in early 2010. The Spill Team assesses the environmental impact of spills, oversees their cleanup, and enforces environmental regulations triggered by spills. Grievant was not selected to be on the team. Spill Team member Charles Schwer agreed to meet with Grievant and John Brabant, a long-time Agency of Natural Resources employee and VSEA Steward, to discuss why Grievant was not selected for the spill team. The meeting occurred on March 4, 2010. It began in a cordial manner. Schwer indicated that it would be a challenge for Grievant to be on the team because he did not work in the Waste Management Division. Grievant expressed disagreement with this view, and indicated that he intended to pursue not being selected for the team. At some point, the

discussion became heated. Schwer became angry, and said something to the effect that Grievant's expressed disagreement with not being selected was not conducive to being part of a team and that a member of the Spill Team had to be a team player. Schwer subsequently apologized to Grievant during the meeting for becoming angry. Grievance of Benoit, 31 VLRB 237, 247, Finding of Fact No. 15 (Exhibit 17).

9. In August 2010, Grievant filed a grievance contending that the Employer violated the collective bargaining agreement in not selecting Grievant to fill a vacancy on the Spill Team. The Labor Relations Board dismissed the grievance after an April 14, 2011, hearing (Exhibit 17).

10. Schwer was a friend of Grievant prior to the Spill Team issue. Subsequently, Schwer and Grievant were no longer friends. Schwer became a member of VSEA in 2011.

11. The Solid Waste Program is one of several programs in the Waste Management and Prevention Division of DEC. The Solid Waste Program consists of three sections: Materials Management, Certification, and Compliance. In 2014, the Solid Waste Program added two supervisory positions. An Environmental Analyst V supervisory position was added to the Compliance section, and an Environmental Analyst VI supervisory position was added to the Materials Management section. Solid Waste Program Manager Cathy Jamieson was directly involved in developing the new positions. When the recruiting process for the positions was underway, Schwer became Director of the Waste Management and Prevention Division (Exhibits 9, 10).

12. Jamieson was the hiring manager for the Environmental Analyst VI supervisory position in the Materials Management section. This position included oversight of the recently enacted universal recycling law. Jamieson checked in with Schwer at various stages of the hiring process, including discussion of the process to be used to fill the position. Schwer did not

determine who would be on the interview panel, he was not involved in developing the interview questions for the first round of questions, and he did not decide which candidates would receive second interviews.

13. The Environmental Analyst VI supervisory position was designed to supervise employees in the Materials Management section that at the time included Bryn Oakleaf, Mia Roethlein, Joshua Kelly and three other employees (Exhibit 10).

14. Grievant applied for the Environmental Analyst VI supervisory position in the Materials Management section. There were eight other applicants for the position, including Oakleaf and Kelly.

15. The programs administered by the Materials Management section had changed considerably since Grievant left the Waste Management and Prevention Division in 2009. This largely resulted from five new solid waste laws relating to electronic waste recycling, mercury lamp recycling, universal recycling, paint recycling, and battery recycling. The most significant of these is the universal recycling law, which phases in mandatory recycling and composting.

16. At the time Grievant applied for the Environmental Analyst VI supervisory position in the Materials Management section, he had been a VSEA Steward for more than 10 years. In that role, he has represented employees in enforcing collective bargaining agreement provisions. He had represented employees in their dealings with Jamieson. One of these employees was John Brabant, an Agency of Natural Resources employee and a VSEA Steward. Brabant and Jamieson at times had a contentious relationship. Grievant also was a member of the Non-Management Unit bargaining team and the VSEA Council, both elected positions, at the time he applied for the position. He also was a labor-management committee member. No one at

the DEC has raised questions with Grievant about his VSEA activities or questioned him about the filing of a grievance.

17. The posted job description for the Environmental Analyst VI position provided in pertinent part:

...

Overview

This position will be working in the Solid Waste Program. Primary responsibilities include supervision of 6 staff working on sustainable materials management and product stewardship programs. This position will have the oversight of implementing the statewide materials management plan and the Universal Recycling law along with several extended producer responsibility programs. Additional expectations will include review and approval of municipal Solid Waste Implementation Plans; development and distribution of outreach methods and materials promoting waste reduction and sustainable materials management; providing technical assistance; and coordination with multiple internal and external groups.

General Job Description

Planning, analytical and environmental work at an advanced professional level for the Department of Environmental Conservation. Duties involve complex tasks in the technical review and analysis of environmental policies, programs, activities and data in a variety of regulatory, non-regulatory, and technical programs. Duties entail the collection and analysis of environmental data, evaluation of conceptual plans for environmental investigation, and the preparation, execution and evaluation of environmental studies. Duties may include administrative and general supervisory work, which is limited to project team management. Work involves independence in assuring completion of work assignments; and responsibility and accountability for work performed by project teams. Provides expertise in a specialized environmental technology elements or programs, which is not duplicated in the Department. Position differs from a lower level analyst in the number and complexity of assigned responsibilities. Work is performed under the general direction of a section supervisor or division director.

Preferred Qualifications

- Preference will be given to candidates with a strong background in solid waste.

Minimum Qualifications

EDUCATION AND EXPERIENCE:

Education: Bachelor's degree in a biological-life or physical science, engineering, or an environmental or natural resources field.

Experience: Five years at a professional level in an environmental or natural resources field.

OR

Education: Master's degree in a biological-life or physical science, engineering, or an environmental or natural resources field.

Experience: Three years at a professional level in an environmental or natural resources field.

OR

Experience: One year experience as an Environmental Analyst V or two years as an Environmental Analyst IV.

...

(Exhibit 9)

18. Jamieson selected five applicants to interview for this position. All five worked at DEC. Three of the five candidates had solid waste experience – i.e., Grievant, Joshua Kelly, and Brynn Oakleaf.

19. Kelly received a Bachelor of Science degree in Biology from St. Lawrence University in 2001. Prior to receiving his Bachelor degree, Kelly served in AmeriCorps for two years, the first year as a team member and the second year as a team leader for a group of 14 volunteers. After receiving his Bachelor degree, Kelly worked as a Field Representative for the Trust for Public Land in Montpelier from February 2002 to February 2009. He identified, initiated and delivered land conservation projects in Vermont and New Hampshire. He worked as Executive Director of Lamoille County Natural Resources Conservation District from April 2009 to October 2009, facilitating partnerships with federal and state agencies to complete watershed projects and programs. He managed and coordinated projects, programs, budgets, finances and two staff members. He then was Project Manager for Highfields Center for Composting in Hardwick, Vermont, from October 2009 to August of 2011, where he was responsible for identifying, initiating and developing community composting programs in communities around Vermont. He was Program Officer for the Institute of Sustainable Communities in Montpelier from August 2011 to June 2013. There, he designed, developed and coordinated 3-day

workshops for teams of local government leaders from cities and regions across the United States on sustainability topic areas such climate adaptation, sustainable economic development, and low carbon transportation (Exhibit 12).

20. Kelly was hired as an Environmental Analyst IV with the DEC Solid Waste Program in July 2013. In this position, his duties included: 1) planning, developing and implementing environmental plans and programs; 2) reviewing and analyzing proposed projects and plans for statutory and regulatory consistency and environmental impact; 3) researching, collecting, analyzing and entering information into databases and draft reports; 4) preparing environmental impact statements and recommendations for corrective action/alternatives; 5) reviewing and processing grant loan applications; and 6) developing and distributing informational and educational materials. In this job, which he held at the time he applied for the Environmental Analyst VI position, he was involved in implementing the universal recycling law (Exhibit 12).

21. Jamieson set up an interview panel consisting of herself and three other DEC employees: Dennis Fekert, Solid Waste Certification Supervisor; Mia Roethlein, an employee in the Materials Management Section who would be supervised by the person selected for the position; and Carey Hengstenberg, Planning Manager in DEC, who formerly worked in the Solid Waste Program. All the interview panel members knew Grievant from his work in the Solid Waste Program prior to his leaving the program in November 2009. Jamieson and Roethlein had favorable views of his performance when he worked in the Solid Waste Program (Exhibit 10).

22. Jamieson prepared a list of interview questions which she circulated to the interview panel. The panel revised one of the questions, but otherwise made no changes. Each candidate for the Environmental Analyst VI position was asked the following questions:

1. Why are you interested in this position and what about this position is of most interest to you?
2. Summarize your knowledge and work experience with solid waste management and programs that promote waste reduction and diversion. What do you see as the greatest challenge in implementing the Universal Recycling Law?
3. Do you have experience with supervising staff? If so, please explain. What do you like about being a supervisor? What do you find challenging?
4. It is routine and necessary for staff to work together to accomplish tasks. Give an example of how you have worked with a team to complete a task. Have you ever been on a team where someone was not pulling their own weight and, if so, how did you handle it? Have you ever been a team leader?
5. What type of experience do you have with public speaking and working with the public? Do you have experience speaking to groups that may not be satisfied with your position?
6. How comfortable would you be in informing a town or business of the need to comply with a requirement, such as the Universal Recycling law? Can you give us an example of where you had to promote compliance with a new program or requirement?
7. Could you describe a professional situation where things didn't go as you had intended and how you resolved it? What did you learn from it?
8. How would your current and past supervisors describe you, including your best assets and most significant challenges? How might your staff answer this question?
9. What was your best supervisor and co-worker relationship and why did it work?
10. Can you describe a time when you felt like you went above and beyond your job expectations?

(Grievant Exhibit 13)

23. Interview panel members had a printout of the questions for each interview, with space to take notes. Panel members also had been provided the candidates' applications and resumes, and they had the job description for the position (Exhibit 13).

24. Interview panel members posed these questions to each candidate. Each member of the interview panel rated the responses to the questions on a scale of "1" to "5", with "1" being the lowest rating and "5" being the highest. They did not have discussions with other panel members before rating the responses. Scores were based solely on responses to the interview questions, and not on any other information the interview panel members had about a candidate. Kelly received the highest overall rating from the four members of the interview panel of the five

candidates interviewed. He had an overall score of 182.5. Grievant received the fourth highest overall rating. He had an overall score of 120 (Grievant Exhibits 13, 14).

25. Grievant provided relatively short answers to interview questions without providing much detail. His interview ended more quickly than the other candidates who were rated higher than him. He displayed a good demeanor and demonstrated that he was a hard worker. His responses focused more on his solid waste experience up to 2009 than on the new laws and current work of the Materials Management Section. He did not establish strong connections between his experience and the requirements of the position.

26. Kelly provided detailed and thorough answers on how his experience and skills were relevant to the position. He provided enthusiastic answers to the interview questions that demonstrated an understanding of, and strong interest in, the Universal Recycling Law and other current work of the Materials Management Section. He discussed his direct experience with implementation of the universal recycling law. He also displayed an aptitude for public relations and public education and discussed how his experience was relevant to these components of the position.

27. Jamieson and Hengstenberg were generally aware of the Spill Team grievance filed by Grievant when they interviewed him for the Environmental Analyst VI supervisory position. Jamieson was unaware at that time of the conversation among Grievant, Schwer and Brabant after Grievant was not selected for the Spill Team. Roethlein was not aware of the grievance; she was aware that Grievant was involved in the VSEA.

28. The top two scorers on the interview questions, Kelly and another candidate, were given second interviews with Jamieson and Schwer. Grievant and the third and fifth rated candidates did not receive a second interview.

29. After the second round of interviews, Kelly was offered and accepted the position. He has been in the position since early 2015.

OPINION

Grievant contends that his prior grievance activity and his activities as a Vermont State Employees' Association ("VSEA") steward, member of the VSEA negotiation team, and other VSEA activities were motivating factors in the Employer's decision to not promote Grievant, an Environmental Analyst V with the Employer, to the newly created Environmental Analyst VI supervisory position in the Materials Management section of the Department of Environmental Conservation. Grievant alleges that he possessed better qualifications for the supervisor position than the successful candidate, but was denied the promotion partially due to his union involvement and prior grievance activity. Grievant asserts that the interviewers failed to consider Grievant's considerable supervisory experience and relevant qualifications due to his protected activities.

In cases where employees claim management took action against them for engaging in protected activities, the Board has long employed the following analysis: 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 Sypher, 5 VLRB 102 (1982). Grievance of Cronin, 6 VLRB 37 (1983). Grievance of Danforth, 22 VLRB 220 (1999), *Affirmed*, 172 Vt. 530 (2001).

Grievances of Cray, 25 VLRB 194 (2002); *Affirmed*, Sup.Ct. Dock. No. 2002-538 (November 6, 2003). Grievance of VSEA and Hooper, 27 VLRB 167, 182 (2003).

The factors which we consider in determining whether protected activity was a motivating factor in an employer's decision to take adverse action against an employee are:

- 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 as a reason for the decision protected activities;
- 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. Sypher, 5 VLRB at 131.

In general, an adverse employment decision following engaging in protected activity is not legally suspicious on its own. In re Grievance of Rosenberg and Vermont State Colleges Faculty Federation, AFT, UPV, Local 3180, AFL-CIO, 176 Vt. 641 (2004). Moreover, the longer the time period between the adverse decision and the protected activity the more attenuated causation becomes. Id. There must be some facts other than chronology alone to suggest that the timing of the employer's decision was suspicious. Id.

A climate of coercion is one in which the employer's "conduct may reasonably be said to have a tendency to interfere with the free exercise of employee rights". Grievances of McCort, (Unpublished decision, Supreme Court Docket No. 93-237, 1994). Also, the presence of improper employer motivation need not be shown by direct evidence. An employer's unlawful

motive may be inferred from the circumstances where no direct evidence of the employer's intent exists in the record. Kelly v. The Day Care Ctr., Inc., 141 Vt. 608, 613 (1982).

In applying these standards here, we first examine the Employer's knowledge of Grievant's protected activities. The evidence indicates that the Employer had knowledge of Grievant's prior grievance and his VSEA activities. Grievant contends that this knowledge led to unlawful animus against him from two Employer representatives, Charles Schwer and Cathy Jamieson, which was a motivating factor in the hiring decision for the Environmental Analyst VI supervisory position.

Grievant contends that there was direct evidence of unlawful animus against him with respect to his prior grievance on the part of Charles Schwer, the director of the division in which the Environmental Analyst VI supervisory position is placed. Grievant asserts that the animus developed due to a confrontation between Schwer and Grievant years earlier with respect to Grievant not being selected to be a member of the spill team. Grievant filed his prior grievance over this non-selection. Grievant has not demonstrated that this earlier confrontation between Schwer and Grievant had any effect on the hiring decision for the Environmental Analyst VI supervisory position. Schwer did not determine who would be on the interview panel, he was not involved in developing the interview questions for the first round of questions, and he did not decide which candidates would receive second interviews. Thus, Schwer played no part in the decision to not grant Grievant a second interview for the position. Schwer only became actively involved in which candidate to select when he participated in the second interviews during the hiring process. At this point, Grievant was no longer being considered for the position.

Nonetheless, Grievant contends that Cathy Jamieson, the head of the program in which the Environmental Analyst VI supervisory position is placed and the Employer representative

most involved in the hiring decision, had clear animus against him resulting from his accompanying employee John Brabant as a VSEA steward to difficult meetings with Jamieson. Grievant has not demonstrated that his role in these meetings resulted in Jamieson developing animus towards him due to his VSEA activities. The evidence indicates that Brabant and Jamieson at times had a contentious relationship, but this does not mean that this translated to Jamieson developing an animus towards Grievant. The evidence does not indicate that such animus resulted.

Grievant has not presented other evidence to indicate that the Employer's decision to not select him for the Environmental Analyst VI supervisory position was motivated by Grievant's protected activities. There is nothing suspect about the timing of the hiring decision. Grievant's prior grievance occurred several years earlier, and the evidence does not indicate that this distant grievance had any impact on the hiring decision. Grievant has not demonstrated that a climate of coercion existed. There is no evidence of statements made to Grievant by his superiors, or any other conduct engaged in by the Employer, to indicate that his protected activities were held against him. No one at the Department of Environmental Conservation raised questions with Grievant about his VSEA activities. Further, Grievant has not presented evidence demonstrating that he was treated differently than employees not engaged in protected activities.

The evidence simply does not indicate that Grievant's protected activities played any part in the Employer's decision not to select him for the position. Instead, it is apparent that the Employer's hiring decision was based on which person was best suited for the position, and the Employer determined that Grievant was not that person. In short, Grievant has fallen well short of his burden of showing that the Employer had an unlawful motive in not selecting him for the Environmental Analyst VI Solid Waste Supervisor position.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the Grievance of Thomas Benoit is dismissed.

Dated this 23rd day of November, 2016, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Gary F. Karnedy

Gary F. Karnedy, Chairperson

/s/ Edward W. Clark, Jr.

Edward W. Clark, Jr.

/s/ Robert Greemore

Robert Greemore