VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 83-43
CHARLES MORRISSEY	)	

MEMORANDUM AND ORDER

This matter came for hearing before the Labor Relations Board on the State's motion to quash notices of depositions. Grievant's attorney, David Putter, on August 23, 1983, noticed the depositions of Governor Richard A. Snelling and his Assistant, Nancy Knox, to be held September 13, 1983. On September 1, 1983, the State moved that the Board quash the notices of deposition and order that Governor Snelling and his Assistant, Nancy Knox, are not amenable to process before the Labor Relations Board and that no subpoenas may issue to compel their testimony by deposition or otherwise.

The parties filed memoranda in support of their respective positions and a hearing was held before the full Board on September 8, 1983. At the hearing, the Board provided Grievant an opportunity to file depositions taken in the course of discovery and permitted the parties to submit additional memoranda. On September 16, 1983, Grievant's attorney, David Putter, filed a Memorandum of Law and the original transcript of the depositions of Alexander Shak and Milton Eaton, two excerpts of the deposition of Linda Paradee and excerpts from the Governor's press conferences. On September 22, 1983, the State filed a Supplemental

Memorandum in Support of its Motions and a partial transcript of the deposition of Jacquel-Anne Chouinard. Grievant filed a Supplemental Memorandum on September 28, 1983. The State filed a Reply Memorandum on October 3, 1983.

At the outset, we note that we ordinarily have the right to issue subpoenas because under 3 VSA §928(b)(6), parties of interest have the right to examine witnesses before the Board. Accordingly, in Section 11.11 of our Rules of Practice, we have provided that the parties may apply to the Board for the issuance of subpoenas and the Board may issue subpoenas at any time. Also, the Board having adopted V.R.C.P. 30, attorneys for the parties may issue subpoenas. Due process must be observed in Board hearings. An essential ingredient of due process is the ability of parties to compel production of all necessary evidence to assure a full and meaningful hearing on the merits. See In Re Albert Brooks, 135 Vt. 563, 569 (1977); Fairchild v. Vermont State Colleges, 141 Vt. 362 (1982). Subpoena power is the means by which the fundamental right is enforced.

This Board's power to compel testimony is no greater, however, than the courts'. Until directed otherwise by the courts or the legislature, we will interpret the reach of compulsory process before the Board to be subject to the same constraints of common law and public policy which limit the courts. We believe that certain of those constraints, embodied in the doctrine of executive privilege, preclude the compulsion of the Governor to testify in the circumstances of this case. The doctrine

applies equally in this matter to his Assistant, Nancy Knox. The role of Assistant Nancy Knox in the matters at issue was as an agent of the Governor with no independent authority and was merely carrying out the Governor's directions. As the Governor's agent, the Assistant has the same standing as the Governor to invoke executive privilege. Hartranft's Appeal, 85 Pa. 433 (1877). Harding v. Pinchot, 306 Pa. 139 (1922). Kirk v. Baker, 229 S2d 250 (Fla. 1969).

This Board shares the general reluctance of the courts to issue compulsory process to the chief executive officer. The doctrine of executive privilege as developed by the courts is based on sound policy: the need to maintain confidential the thought processes and deliberations of the executive to encourage thorough and candid executive decision making, to maintain respect for the separation of powers inherent in our State and Federal Constitutional framework of government; the need to avoid undue interference with the functions of the executive branch of government; and the need to avoid discrediting the judicial system by issuing orders which are impossible to enforce. See generally Comment, Executive Privilege at the State Level, 1974 Univ. of Ill. Law Forum, 631. We are obliged as are the courts to give full recognition to these basic policy mandates. Because this Board is an agency of the executive branch of government, some of these policy considerations may weigh more heavily on the Board than on the courts.

To decide the motions pending in this grievance, we need not hold that the executive's privilege is absolute. We do hold that the Governor

and his Assistant have at least a qualified privilege and that on the present record, this privilege is sufficient to shield them from compulsory process.

To overcome the Governor's qualified privilege, Grievant must make a showing of compelling necessity. The Grievant must show that without evidence from the executive he is prevented from bringing to the hearing all relevant material evidence which supports his position in the dispute. Grievant must also show that the evidence he seeks from the executive is not available from other sources. US v. Nixon, 418 US 683 (1973). Hamilton v. Verdow, 414 A2d 914 (1980). Kerr v. US District Court, 426 US 394 (1975). Hartranft's Appeal, supra. Harding v. Pinchot, supra. Grievant has failed on the present state of the record to make the required showing to overcome the Governor's and Knox's qualified privilege.

The issue before the Board is whether there was cause for Grievant's dismissal. In determining whether cause exists, our function is to determine de novo and finally the facts of a particular dispute, and whether management, in imposing a penalty based on those facts, exercised its discretion within the limits of law or contract. In re Grievance of Goddard, 142 Vt. 437 (1983). In re Grievance of Muzzy, 141 Vt. 463 (1982). Grievance of Colleran and Britt, supra.

The deposition taken of Milton Eaton, Secretary of the Agency of Development and Community Affairs, who dismissed Grievant, reveals the following reasons for Grievant's dismissal as Editor of Vermont Life

magazine: unwillingness to accept and cooperate with the publisher of Vermont Life, failure to control and work with other Vermont Life staff, failure to communicate with Eaton as to work problems, and insubordination by publicly accusing Eaton of lying and publicly accusing the publisher of incompetence. (Eaton Deposition, pg. 107-137). These reasons are subject to factual verification without the testimony of the Governor and Knox. Any relevant information on these reasons is available from other sources.

The remaining issue is whether there is a sufficient showing that the testimony of the Governor and/or Knox is necessary on the issue of whether the penalty imposed by management is within the range of its discretion. The factors relevant for consideration in determining the legitimacy of a particular disciplinary action were enunciated by the Board in Grievance of Colleran and Britt, supra.

Grievant's claim, in essence, is that the Governor and Knox influenced the discretionary action of Secretary Eaton so that the Board cannot properly determine whether the discretion was exercised within the limits of law without hearing the testimony of the Governor and Knox.

We believe Grievant has not demonstrated the required compelling necessity, and it is possible to review management's exercise of discretion and provide Grievant a "meaningful opportunity to be heard", In re Grievance of Brooks, supra, at 570, without the testimony of the Governor and Knox.

Secretary Eaton claims he made the decision to dismiss Grievant, (Eaton Deposition, pgs. 20-21, 91-92, 100-102, 105-106), as he is authorized to do by statute, 3 VSA §2421. Eaton further claims the Governor told Eaton the day before Grievant's dismissal that it was Eaton's decision what to do regarding the investigation of Grievant and that the Governor did not know of Eaton's intention to discharge Grievant before the actual dismissal although he knew Eaton was considering dismissal (Eaton Deposition, pgs. 88-91). There is no showing made to contradict this testimony and lead us to believe that the Governor, either personally or through Knox, may have dictated or substantially influenced this decision.

By seeking to depose the Governor and Knox, Grievant is attempting to inquire into the mental processes and underlying motives of the Governor and Knox and the communications between them that would show underlying motivation. The requisite showing of potential improper motivation on the part of the Governor and Knox has not been made to warrant the taking of their depositions. Hamilton v. Verdow, supra.

We believe a fair reading of the depositions filed in this case indicate Knox may have had some involvement in Secretary Eaton's decision to dismiss Grievant. She participated in two meetings (i.e., on May 11, 1983, and on the morning of May 25, 1983), wherein actions of Grievant which eventually resulted in imposition of dismissal against him were discussed. (August 11, 1983, Deposition of Alexander Shak, pgs. 49-50, 83-84; August 29, 1983, Deposition of Alexander Shak, pgs. 7-8, 28;

Eaton Deposition, pgs. 8-9, 10-13; September 22, 1983, Deposition of Jacquel-Ann Chouinard, pgs. 1-3). In addition, Knox discussed the situation involving Grievant prior to Grievant's dismissal outside of those two meetings with Secretary Eaton and Alexander Shak, Commissioner of Housing and Community Affairs, who was involved in the situation involving Grievant in Eaton's absence (August 11, 1983, Shak Deposition, pgs. 87-89; August 29, 1983, Shak Deposition, pgs. 62-63, 67-69; Eaton Deposition, pgs. 90, 101-103).

Based on the existing record, Grievant has not shown that Knox's involvement was so great that the Governor's or Knox's discretion was substituted for Eaton's. Grievant has, however, proved to our satisfaction a sufficient degree of involvement by Knox in the process to establish a likelihood that the taking of her deposition is an effort to obtain information "reasonably calculated to lead to the discovery of admissable evidence", VRCP Rule 26, regarding the exercise of Eaton's discretion.

However, this does not mean Grievant has made a showing of compelling necessity sufficient to overcome the Governor's and Knox's qualified privilege. Grievant's failure of proof is on the issue of whether relevant information is available from other sources. Grievant has failed to demonstrate why any relevant information available from Knox cannot also be obtained from Eaton, Shak, and the participants of the May 11 and 25 meetings (i.e., Shak, Eaton, Personnel Commissioner Chouinard, Deputy Personnel Commissioner Scott Cameron, Vermont Life publisher Leslie Parr, Agency Personnel Officer Douglas Bernardini, Agency Planning Director Barry Driscoll). Accordingly, the Board is unable to find that

any relevant information available from Knox is not also available from other sources.

For the reasons stated above, it is hereby ORDERED that Grievant's notices of depositions of Governor Richard A. Snelling and his Assistant, Nancy Knox, dated August 23, 1983, are QUASHED.

Dated this 6th day of October, 1983, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William C. Kemsley, Sr.

James S. Gilson