

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 82-24
JOE ROY)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On April 19, 1982, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Joe Roy ("Grievant"), alleging that the performance evaluation Grievant received for the period December 5, 1980, to December 11, 1981, in which he received an overall rating of "2" ("inconsistently meets job requirements/standards") and "2" ratings in a number of factors, violated the collective bargaining agreements between the State and VSEA, effective for the periods July 1, 1979, to June 30, 1981, and July 1, 1981, to June 30, 1982 ("Contracts"). Specifically, the grievance alleged violations of Articles XIII and 13 of the Contracts, in that Grievant was not advised during the period covered by the performance evaluation that purported deficiencies would affect his performance rating, and Articles V(1) and 5(1), Articles VI (3) and 6(3), and Articles VIII(1) and 8(1) of the Contracts, in that it was issued because of Grievant's union activities. The grievance requested the performance evaluation be amended by giving Grievant an overall "3" rating, and "3" ratings in every factor.

Hearings were held before the Board on September 30, 1982; November 23, 1982; December 30, 1982; February 10, 1983; and February 17, 1983. Grievant was represented by VSEA Staff Attorney Michael Zimmerman. Assistant Attorney General Michael Seibert represented the State. Chairman Kimberly Cheney was absent from the November 23, 1983, hearing.

At the December 30, 1982, hearing, the parties stipulated he could participate in the decision by reviewing the record. He has done so. Member James S. Gilson was absent during the afternoon of the February 10, 1983, hearing, and did not attend the February 17, 1983, hearing. At the February 17 hearing, the Board ruled that Member Gilson would not participate in the decision unless Chairman Cheney and Member William G. Kemsley, Sr. could not resolve the case, in which case he would review the record. Member Gilson has not participated in the decision.

Subsequent to the hearings, the parties submitted, on March 14, 1983, a Deposition of Grievant taken on March 4, 1983. At the deposition, the parties could not stipulate to the admission of certain exhibits (Grievant's Exhibit 24, Page 4; Grievant's Exhibit 29, Grievant's Exhibit 30) which originated after Grievant received his performance evaluation which is the subject of this grievance, and left the question of admission to the Board's decision. The Board has decided to not admit those exhibits into evidence. On March 10, 1983, the Board informed the parties that Requested Findings of Fact and Memoranda of Law were due March 31, 1983. Both parties requested and were denied extensions to file briefs. Neither party filed briefs.

FINDINGS OF FACT

1. At all times relevant herein, Grievant was a permanent status employee, as that term is used in the Contracts. As such permanent status employee, Grievant was entitled to all rights afforded to such employees by statute, by the Rules and Regulations for Personnel Administration, and by the Contracts.

2. At all times relevant herein, Grievant's position title was Job Service Counselor, his pay grade was 13, and his work place was the Vermont Job Service Office, Springfield, Vermont.

3. A job counselor performs professional employment counseling work involving providing vocational guidance to persons seeking work. Among the work duties of a counselor are to conduct employment counseling interviews, assist applicants to evaluate their present work qualifications and interests, administer and interpret aptitude and other tests, and to place applicants in jobs (State's Exhibit 23).

4. Grievant began work as a Job Service Counselor in the Springfield office June 6, 1977, and remained there in that position until February, 1982. For the period June 6, 1977 - December 5, 1980, Grievant always received at least an overall "3" rating ("consistently meets job requirements/standards") on his performance evaluations, and for the period December 5, 1979 - December 5, 1980, received an overall "4" rating ("frequently exceeds job requirements/standards") (State's Exhibits 1, 2, 3 and 7).

5. At all times relevant herein, Grievant's immediate supervisor was James Hennessey, Manager of the Springfield Job Service Office. Hennessey's immediate supervisor was Edwin Milkey, Area Job Service Manager, until August 1981, at which time Milkey was replaced by Ralph Devenger. Next in the chain of command was Stuart Verchereau, Job Service Director, who reported directly to the Commissioner of the Department of Employment and Training.

6. In the Spring of 1980, Grievant became a VSEA steward. In August of 1980, Grievant was elected to the office of President of the Springfield Chapter of VSEA. In September of 1980, Grievant was elected to serve as an alternate member of the VSEA bargaining team, and served in that position until approximately September 20, 1981. Grievant was the only Department of Employment and Training employee on the bargaining team during that period, and there had been no Department employees on the bargaining team in the recent past. Grievant's VSEA activities required him at times to request that he be absent from work. In 1980, Grievant was absent from work because of Union activity approximately 17 days, and was absent approximately 20 days in 1981 for that reason.

7. In October, 1980, the Job Service instituted a Competency-Based Counseling (CBC) program. CBC was instituted to effect standardized performance levels for Job Service counselors. All counselors were required to participate in the CBC training. The CBC program was divided into nine modules (Relationship Skills, Group Training in Listening and Communication Skills, Accountability and Productivity, Individual and Group Assessment, Group Counseling and Guidance, Continuity of Service, Community Relations, Career Development, Professional Development) (State's Exhibit 4). To complete the modules, counselors were required to do independent reading, take tests, submit essays and acquire skills in each module on their own initiative (during work hours). They were required to demonstrate proficiency in each module.

8. In an August 22, 1980, memorandum to all local Job Service offices, Verchereau set a timetable which provided counselors would complete the modules by September 30, 1981, but stated:

While it is our intention to have all counselors complete the program by FY82, progress through the modules will vary according to the individual. By design each counselor will progress at his own or her own speed (State's Exhibit 4).

9. On December 30, 1980, Verchereau sent a memorandum to all local office managers which provided job service counselors "can be placed in a performance warning for failure or refusal to participate or for not successfully finishing the (CBC) program, without good cause, within one calendar year from the start date. Being placed in the warning status could lead to additional disciplinary action, up to and including dismissal if adequate progress is not made" (State's Exhibit 6).

10. Verchereau established time deadlines for the completion of the CBC program because most counselors were making little progress in the program.

11. Grievant was aware of the contents of Verchereau's December 30, 1980, memorandum soon after it was issued.

12. The General Aptitude Test Battery (GATB) is a 2 1/2 hour test given by the Vermont Job Service to applicants to measure a person's level of achievement in specific areas of employment. GATB tests are administered by Job Service counselors. Grievant was certified as a GATB test administrator in the Fall of 1980.

13. As part of the requirement for being certified, Grievant had to take a test and give a critique of the training session (Grievant's Exhibit 31). At some point, Verchereau asked Susie Wilson, the Training Specialist for the Department of Employment and Training who certified

Grievant as a CATB test administrator, for a copy of Grievant's test and critique. Verchereau has never asked Wilson for the test and critique done by any other employees. Wilson gave Verchereau a copy of the test and critique. The test and critique were placed in Grievant's personnel file in September, 1981.

14. Grievant did not like the CBC program, did not think it was useful in performing his job duties, and resisted its implementation.

15. On April 2, 1981, Grievant attended the last day of a three-day CBC training session in Burlington. At 9:30 a.m., during a break in the training, Grievant approached Joseph Citro, the CBC trainer, and requested that training be dismissed early that day so that those having a long way to go would not be required to drive on their own time. Grievant informed Citro it was agency policy to let training out early on the final day and that he had read a memo so stating. Citro informed Roy he was aware of no such memo and the trainees were digressing from the agenda which had to be covered. Citro told Grievant he would dismiss the training when it was over.

16. After the break, when the training group was reconvened, Grievant told the group that as a VSEA steward he knew the Department had a policy that travel time should be taken into consideration in determining whether to dismiss training sessions early, and that he had seen a memo so stating. Grievant encouraged the group to keep to the training agenda and to keep their discussions brief.

17. A few days after the training session, Citro asked Grievant to provide the memo he had referred to. Grievant was unable to provide the

memo. On or about April 10, 1981, Citro told Grievant that in the absence of a memo he thought Grievant acted improperly to speak to the group as he had. Grievant apologized for his actions, and Citro told Grievant he considered the matter closed. At that time, Citro told neither Hennessey nor Verchereau of the incident.

18. On April 7, 1981, Verchereau sent a memorandum to all local Job Service offices regarding the timely reporting of Job Corps placement and assistance record forms. Verchereau instructed the local offices to submit any overdue forms immediately, and stated:

We need not be reminded of the fact that untimely reporting of placement costs this agency money in terms of contract cost reimbursement. This loss of funds will ultimately affect the entire local office staffing patterns (State's Exhibit 11, Grievant's Exhibit 28).

19. On April 19, 1981, Hennessey told Grievant that Hennessey, Area Manager Milkey, and Department Personnel Officer Philippa Maloney wished to meet with Grievant the following day to discuss his role as a VSEA bargaining team member. Hennessey did not tell Grievant to ask VSEA representatives to come to the meeting.

20. Grievant did meet with Hennessey, Milkey and Maloney on April 20, 1981, in the conference room at the Springfield Job Service office. Maloney initiated the discussion by stating that Hennessey had expressed concern about the amount of time Grievant would be out of the office because of upcoming contract negotiations. Maloney mentioned that it was a new occurrence for a Department employee to be on the bargaining team and the Department was looking for an idea of how much time he would be out of the office because of VSEA business. Hennessey asked

whether it was really necessary for Grievant, as an alternate, to attend every bargaining session. Grievant told them he thought it was important to be there so he was well-informed as to negotiations. Grievant also told Maloney he was concerned about being so questioned since he was aware of no other department personnel officer expressing such concerns about other employees on the VSEA bargaining team. At one point during the meeting, Grievant stated that if there was a disagreement as to his attendance at bargaining sessions, the parties could go before the Labor Relations Board and ask for a clarification. The tone of the meeting was neither hostile nor friendly, but relatively neutral.

21. The practice of VSEA at that time, acquiesced in by the State, was that alternates attended bargaining sessions.

22. On May 5, 1981, Citro visited the Springfield Job Service office to monitor the progress of the CBC program there. In a report he wrote on the visit, Citro concluded that the progress of CBC in the office was poor, and that he did not "see much indication of teamwork and unity in this office toward implementing the program. Involvement of manager and staff seems minimal". Citro's memorandum was critical of the entire office, and not just Grievant. A copy of Citro's report was given to Grievant on June 22, 1981 (Grievant's Exhibit 10).

23. On May 5, 1981, Citro told Hennessey of the April 2, 1981, CBC training incident. This was the first time Hennessey had heard of the incident, and he told Citro to tell Verchereau of it.

24. On May 6, 1981, Grievant submitted an essay required by the "Relationship Skills" module of the CBC program to Citro. The assignment

was intended to be a discussion of Grievant's relationship skills learned from the CBC module. Grievant's essay discussed relationships in reference to Spinoza's Ethics. Citro and Verchereau concluded Grievant's essay had nothing to do with the assignment, and Verchereau, noting that he had "no time for this sort of portentous, pseudo-intellectual game-playing", required Grievant to submit another essay (State's Exhibit 8). Grievant submitted another essay which was accepted. We find that although Grievant's "Spinoza Essay" may have been a serious attempt to complete the assignment, it was written in such a way that it had the effect of demonstrating his scorn for the CBC program and his lack of respect for his supervisors.

25. Request for Annual Leave form used in the Springfield Job Service office provided in pertinent part: "I respectfully request approval for annual leave..." In submitting two requests for annual leave on May 19 and May 20, 1981, Grievant crossed out the word "respectfully". Hennessey approved both requests, but on the latter request, approved June 15, 1981, Hennessey informed Grievant on the form, "I would suggest that in the future the wording on the form remain the same without ~~strikeout of officially approved format~~" (State's Exhibit 11, Pages 34 and 35).

26. At some point subsequent to Citro's visit to the Springfield office on May 5, 1981, the Department began gathering evidence on Grievant's purported performance deficiencies and documenting them.

27. At some point during the first half of 1981, the relationship between Grievant and Hennessey became more tense and confrontative.

28. Prior to June 11, 1981, Grievant requested time off for VSEA business verbally. On June 11, 1981, Hennessey informed Grievant and

Mark Horowitz, an office employee who was on the VSEA Council (an advisory body to the Board of Trustees which meets four times a year), by memorandum that all requests for leave time to participate in VSEA activity would have to be made in writing (Grievant's Exhibit 12). Grievant received the memorandum June 11, 1981.

29. On June 12, 1981, Grievant requested time off for VSEA activity for June 15, 1981, and June 26, 1981. That day, Hennessey approved the June 15, request, but denied the June 26 request because Citro was visiting the Springfield office on June 26 to provide CBC training and to monitor the CBC program (Grievant's Exhibit 14). When Hennessey informed Grievant he was denying his request, Grievant told Hennessey he had the right to grieve the denial. Grievant then left the office to engage in VSEA business. That denial by Hennessey is the only time he denied Grievant's request for leave because of VSEA activity at all times relevant herein. Grievant did not engage in VSEA activity on June 26 and was in the office that day. Citro was present as scheduled.

30. On June 12, 1981, Wilson visited the Springfield Job Service office to review the performance of that office in administering GATB tests. She observed Paul Donnelly administering the GATB test, the only other employee in the Springfield office besides Grievant who administered GATB tests. Wilson determined that while a few areas of Donnelly's test administration needed improvement, he generally was following procedures. She also reviewed scoring and documentation of a few GATB tests done by Donnelly on previous days, and determined he had few errors (State's Exhibit 9).

31. Grievant was not in the office on June 12 when Wilson was present. However, Wilson reviewed past GATB tests administered by

Grievant and made copies of 47 pages of test results he scored. She concluded Grievant was not adhering to scoring procedures and was making an unusual number of errors. We find included among Grievant's errors were scoring mistakes which gave erroneous results of persons' aptitudes for specific jobs (State's Exhibit 9).

32. Wilson discussed her findings regarding Grievant with Hennessey on June 15, 1981. She told Hennessey she was reluctant to have Grievant continue to use the GATB if he did not follow standardized scoring procedures and was sloppy about scoring and documentation. She informed Hennessey she wished to observe Grievant administering the GATB and would attend the next GATB training session conducted by Grievant (State's Exhibit 9).

33. Wilson wrote a report on her June 12, 1981, visit to the Springfield office (State's Exhibit 9) which Hennessey received in the latter part of June. Hennessey did not provide Grievant with a copy of the report until he gave him a performance evaluation placing him in a warning period on September 1, 1981.

34. At some time after May 5, 1981, and before June 12, 1981, Citro told Verchereau of the April 2, 1981, CBC training incident. Verchereau ordered Citro to write a report on the incident. Citro wrote a report June 12, 1981 (State's Exhibit 10, Pages 2 and 3).

35. On June 12, 1981, Verchereau sent a memorandum to Hennessey with Citro's report attached. In the memorandum, Verchereau stated:

During the past two years you have been indicating to me the effects that Mr. Roy's statements and action have been having on the Agency and other staff.

Attached you will find a memo from Mr. Citro about an incident that happened at a Counselor's Training Session. As a result of this latest incident, please advise Mr. Roy that conduct of this sort will not be tolerated in the future and that if it is he will receive an appropriate reprimand.

As you can see from Mr. Citro's memo his action had a detrimental effect on the training. He was completely out of line to make such statements and to also convey that he was the Union representative with some sort of authority on speaking for somebody (State's Exhibit 10, Page 1).

36. Grievant's "statements and action" of the "past two years" mentioned by Verchereau referred to Hennessey telling Verchereau of Grievant questioning local office goals in office meetings.

37. Grievant was not shown by Hennessey and did not see Verchereau's June 12, 1981, memorandum and Citro's June 12, 1981, report until he was given his performance evaluation placing him in a warning period September 1, 1981.

38. During the period June 17 to June 19, 1981, Paul Ohman, CETA program specialist, returned three CETA application forms which Grievant had previously worked on to Hennessey because of errors by Grievant. Two of the forms, a required "family income" section, had not been completed, and on the third form Grievant had neglected to sign the form as certifying individual (State's Exhibit 11, Pages 1 through 7).

39. Grievant saw the forms Ohman had returned before Hennessey saw them, and Grievant attached a note to the forms which provided, "sure, let's build up the evidence for Joe's incompetence and attitude" (State's Exhibit 11, Page 2). This was the first indication Grievant had that some form of evidence gathering was going on regarding his performance.

40. Hennessey and Ohman discussed the errors made by Grievant on the CETA applications with Grievant. Grievant corrected the errors, and resubmitted the forms.

41. On June 25, 1981, Wilson visited the Vermont Job Service office in Springfield to observe Grievant administering a GATB test. Wilson observed nine areas where Grievant was not following standardized procedures, areas she detailed in a subsequent report on the visit (State's Exhibit 12). We conclude Grievant was not following standardized procedures in these areas. After observing the test, Wilson discussed these nine areas with Grievant and told him of his deficiencies in administering the GATB. Grievant told Wilson he thought evidence gathering was going on against him. At the time Grievant was not aware Wilson had previously copied 47 pages of GATB tests he administered. Wilson advised Grievant to review the standardized scoring procedures and the GATB manual.

42. Wilson did not review Donnelly's GATB test administration at that time because she believed he was generally following established procedures.

43. At some point prior to July 7, 1981, Wilson wrote her report on her June 25, 1981, observation of Grievant's GATB test administration. In the report, which detailed Grievant's testing deficiencies, Wilson recommended that a GATB testing session administered by Grievant be observed in two months time, and if Grievant's testing methods had not improved that Grievant's Test Administrator's certification be revoked (State's Exhibit 12).

44. Hennessey received a copy of Wilson's report sometime in July, 1981. He discussed Wilson's findings briefly with Grievant on August

13, 1981. He told Grievant to follow the established testing procedures; to "go by the book". Hennessey did not provide Grievant with a copy of Wilson's report at that time even though Grievant requested it. Grievant did not see the report until he received a performance evaluation placing him in a warning period on September 1, 1981.

45. On June 26, 1981, Citro visited the Springfield Job Service office. Grievant told Citro he had knowledge of evidence gathering going on against him. Citro responded that the Department operated behind closed doors.

46. Grievant was on leave for VSEA activity July 6, 17 and 21, 1983.

47. On July 15, 1981, Grievant asked Hennessey if they could have a discussion about what was going on in the office. Grievant and Hennessey met later that afternoon. Grievant told Hennessey he knew there was some evidence gathering going on, and thought they could resolve any problems informally. Hennessey told Grievant he had "pissed some people off". Grievant asked Hennessey whether he wanted him to continue working for him. Hennessey responded to the effect that "right now, it's a 50-50 proposition". Hennessey discussed with Grievant the problems Grievant had with the CBC program; that Grievant was opposing directions regarding the program he received from supervisors. Grievant told Hennessey he would complete the CBC program. Hennessey told Grievant he thought Grievant was manipulating him regarding the CBC program.

48. On July 21, 1981, in negotiations between the State and VSEA for a collective bargaining contract to succeed the 1981-82 contract, the State presented a proposal providing, "Alternates on bargaining

team only get release time if master team member not available" (Grievant's Exhibit 26). When the proposal was introduced, the State's Chief Negotiator, Alan Drachman, remarked that the proposal was made as a result of a request from the Department of Employment and Training and the Buildings Division. The State agreed to withdraw this proposal on August 26, 1981.

49. On July 16, 1981, Hennessey informed Grievant that three Job Corps placement and assistance reports were due July 28, 1981. On August 11, 1981, Hennessey informed Grievant three additional Job Corps placement and assistance reports were due on August 20, 1981. It was Grievant's responsibility to submit these reports. Five of the six reports were not submitted by Grievant by the due dates (State's Exhibit 11, Pages 14, 15, 16, 18, 19, 22, 23).

50. On July 22, 1981, Grievant requested leave from contract negotiations for the dates August 5, 10, 11, 25, 26 and 27, 1981, and September 10, 11, 14, 15 and 16, 1981. Hennessey gave "conditional approval" for all these dates. However, he informed Grievant the actual granting of leave time for those dates may be contingent upon workload and staffing (Grievant's Exhibit 19). Ultimately, Grievant was given leave for all requested dates for negotiations in August and September, 1981.

51. In approximately August, 1981, Grievant told VSEA Executive Director, Judy Rosenstreich, he was having trouble getting leave time for contract negotiations, and asked Rosenstreich to call Hennessey. Rosenstreich called Hennessey and told him Grievant's participation at bargaining sessions was important.

52. On August 12, 1981, Verchereau sent a memorandum to all local Job Service offices which provided that all counselors were required to submit three tapes required in the CBC program (i.e. tapes of interviews between counselor and applicant) by the end of August, 1981. Verchereau stated that, "no tapes should be submitted simply to meet the guideline, disregarding the quality of content". The memorandum further provided counselors would be put on performance warning if they did not submit the required three tapes and would be given technical assistance if the tapes were submitted but were not satisfactory (Grievant's Exhibit 20).

53. Grievant submitted three tapes by the end of August, 1981. The tapes were not satisfactory.

54. On September 1, 1981, Hennessey handed Grievant a performance evaluation, covering the period December 5, 1980, to September 1, 1981, and an accompanying memorandum which placed Grievant in a "performance warning period" from September 1, 1981 to December 11, 1981. The evaluation was signed by Hennessey as immediate supervisor, and concurred in by Devenger and Verchereau (State's Exhibit 13).

55. In the performance evaluation, Grievant was given an overall rating of "2" ("Inconsistently meets job requirements/standards"), and was given a "2" rating, with accompanying comments, in the following individual factors:

QUALITY OF WORK - Work quality has deteriorated sharply and is currently inconsistent. His performance has needed increasingly more review by supervisory staff.

LEARNING ABILITY - Learning speed and retention are satisfactory. Adherence to procedures provided is lacking. More intensive and extensive supervision and review of his work has been necessary.

TECHNICAL AND PROFESSIONAL

KNOWLEDGE AND ABILITY - Has professional knowledge and ability but frequently has not applied it properly to his work.

JUDGMENT - This is questionable when recent actions at CBC training and supervisory reviews are considered.

PERSONAL RELATIONSHIPS - Deals well with the public but his relationships with management and supervisors are divisive to staff team building.

EFFECTIVENESS IN PURSUING TASKS

AND ACHIEVING RESULTS - Has potential to be an effective employee. Is hampered by the above-mentioned problem areas.

Grievant received a "1" rating ("Unsatisfactory"), and accompanying comment, in the following individual factor:

ATTITUDE, INTEREST AND INITIATIVE -

Has disregarded operational instructions provided by management and training personnel. Respect for the chain of command is limited and there is almost a continuous challenge to management.

(State's Exhibit 13, Pages 1 and 2)

56. Under "Summary Comments", the performance evaluation provided:

Mr. Roy is an intelligent employee with good potential. However, he persists in performing his job in an independent manner that is often contrary to established procedure, regulations, and policy. He equates his productive output with good performance when in fact much of the required documentation is incomplete, incorrect or unsatisfactory (State's Exhibit 13, Page 2).

57. The memorandum accompanying the performance evaluation, from Hennessey to Grievant, provided:

Failure to show satisfactory progress during the warning period and/or failure to achieve and maintain at least a satisfactory performance rating by and beyond the end of the warning period could result in disciplinary action up to and including dismissal. Every other Thursday, starting September 10, I will discuss with you your progress toward attaining the desired performance (State's Exhibit 17, Page 3).

58. Cited as "actions and areas... illustrative" of Hennessey's "particular concerns" in the memorandum were the April 2, 1981, CBC Training Incident ("... Your statement to the group surpassed your rights and responsibilities as a union representative and as a trainee. You also conveyed to the group, as fact, information which was clearly unsubstantiated..."), the May 6, 1981, "Spinoza" essay ("... I must assume that your initial essay was your way of stating your reluctance to produce quality work related to the required CBC training...), failure to stay on schedule to complete the CBC training program, GATB test administration deficiencies ("... monitoring reviews performed in June, 1981, by Susan Wilson... indicated serious deficiencies in both test administration and scoring."), problem with the proper completion of forms and other required paperwork and negative attitude toward supervisory, management and training personnel ("... Little things like the need to cross out the word 'respectfully' from the leave request are a constant reminder of your attitude toward management and this agency...") (State's Exhibit 13, Pages 3 through 7).

59. When Hennessey handed Grievant the performance evaluation and memorandum, he told Grievant "Stuart (Verchereau) wanted me to tell you he appreciates your VSEA work on behalf of all Job Service Employees", or words to that effect.

60. When Hennessey handed Grievant the performance evaluation and accompanying memorandum, he also showed Grievant for his review a packet of material. Included in the packet were Citro's June 12, 1981, report on the April 2, 1981, CBC training incident; Grievant's "Spinoza" essay; Grievant's leave requests where he had crossed-out "respectfully"; Wilson's June 25, 1981, report; the 47 pages of GATB test results copied by Wilson on June 12, 1981, the CETA applications which Grievant had to resubmit because of errors; and Verchereau's August 12, 1981, memorandum regarding submission of CBC tapes.

61. Grievant received copies of the above-mentioned material in the packet the following day when he received his personnel file.

62. The September 1, 1981, performance evaluation and accompanying memorandum were written by Hennessey with the assistance of Verchereau, Devenger, Maloney, State Employee Relations Director Thomas Ball and Department Consultant Thomas Pombar. Hennessey had met with all these individuals in Montpelier on August 12, 1981.

63. On September 1, 1981, Verchereau issued a memorandum to Job Service offices, requiring the local office to submit plans for satisfactory completion of three CBC tapes (Grievant's Exhibit 12). Hennessey discussed this memorandum with Grievant on September 8, 1981.

64. At a Step I grievance meeting on the September 1, 1981, performance evaluation, Grievant's representative, Allan Willard, asked Hennessey if he told Grievant about performance deficiencies. Hennessey responded, "when you try to establish something like this, you don't go around and tell him about it", or words to that effect. At the meeting, there was

discussion about work deficiencies cited on the performance evaluation and accompanying memorandum.

65. On September 8, 1981, Grievant submitted to Hennessey a request for leave for VSEA business, mostly bargaining sessions, for the days September 9, 10, 11, 16, 17, 18 and 22, 1981, and October 1 and 2, 1981. Hennessey asked Grievant if all this leave time was necessary. Grievant responded it was. Grievant ultimately was granted leave time for whatever dates he requested (Grievant's Exhibit 22).

66. At the VSEA Annual Meeting, on or about September 18-19, 1981, Grievant was not re-elected as an alternate member of the VSEA bargaining team. Grievant informed Hennessey of this on September 24, 1981 (State's Exhibit 15, Page 7).

67. On September 25, 1981, Wilson visited the Springfield Job Service office to observe the administration and scoring of the GATB by Grievant to five examinees. Wilson found that while the testing session was an improvement from the one observed on June 25, 1981, there were still a few areas of concern in administration of the test and Grievant was still not following scoring procedures, which resulted in erroneous results on the aptitudes of certain employees. Wilson discussed these findings with Grievant on September 25, 1981 (State's Exhibit 14).

68. In a report on the September 25, 1981, visit, Wilson recommended that Grievant not be decertified in GATB testing; that his test administration had improved and if he took greater care in administration of the test and scoring, the existing problem areas could be remedied (State's Exhibit 14).

69. Hennessey received a copy of Wilson's report on October 22, 1981, and discussed it in detail with Grievant and provided him with a copy of it on October 27, 1981.

70. A Step II hearing was held on October 1, 1981, on the grievance over Grievant's September 1, 1981, performance evaluation. Verchereau was the Step II hearing officer. At the hearing, discussion occurred on Grievant's purported work deficiencies cited in the performance evaluation.

71. On October 7, 1981, Verchereau issued his Step II decision. Verchereau changed the evaluation from "warning" to "special"; and stated "this will now serve as the formal notice of your work deficiencies" (Grievant's Exhibit 8).

72. Pursuant to the September 1, 1981, memorandum accompanying Grievant's performance evaluation, performance progress meetings were held between Hennessey and Grievant on September 24, 1981, and October 27, 1981, wherein Grievant's progress in correcting the performance deficiencies cited on the September 1, 1981, evaluation and accompanying memorandum was discussed. There is no evidence to indicate performance progress meetings were held on any other days.

73. Between September 15 and 28, 1981, Grievant received three letters of commendation from outside agencies which dealt with Grievant in his capacity as Job Service Counselor (Grievant's Exhibit 24, Pages 1 through 3). Hennessey saw two of those letters soon after they were received by Grievant.

74. At a October 28, 1981, meeting among Verchereau, Citro, Job Service managers and counselors, Verchereau announced a "blanket

pardon" for all CBC "offenders"; that time deadlines would be moved up a year and anyone who was disciplined concerning CBC progress would have disciplinary letters removed from their personnel files. The intent of the pardon was to apply to those who were having problems completing the work, but not to those who were recalcitrant in accepting the CBC program.

75. Subsequent to the meeting, Grievant asked Hennessey if the pardon applied to him. Hennessey responded it did not; that there was more involved with his performance than just CBC.

76. On November 6, 1981, Grievant met with Citro and they reviewed CBC tapes Grievant had submitted. In a critique of the tapes, Citro informed Grievant that he did not see any evidence of an attempt to use CBC facilitation techniques (State's Exhibit 16). Hennessey reviewed Citro's critique on November 10, 1981, but did not discuss it with Grievant.

77. On November 25, 1981, Verchereau sent a memorandum to all local offices providing that there should be a written agreement between managers and counselors about CBC progress and performance standards and expectations. A deadline of December 1, 1982, was set for the satisfactory completion of CBC training, and Verchereau stated, "there is only one consequence of failure to meet the deadline, a less than satisfactory performance evaluation that could lead to termination" (State's Exhibit 17).

78. Pursuant to this memorandum, Hennessey drafted a "training agreement" which provided, among other things, a time-frame for Grievant's completion of the CBC modules and the following paragraph:

There is only one consequence of failure to meet the deadline, a less than satisfactory performance evaluation that could lead to termination.

Grievant refused to concur with the "agreement" because he did not believe any agreement had actually been reached, and he did not agree with the paragraph regarding the consequence of failing to meet the time deadlines. On December 3, 1981, Grievant signed the Hennessey-drafted "agreement", but stated "...my signature confirms knowledge of the above, but not an agreement to either the total nor any part" (State's Exhibit 18).

79. Grievant received an annual performance evaluation on December 11, 1981, covering the period December 5, 1980 to December 11, 1981. The evaluation was signed by Hennessey as immediate supervisor, and concurred in by Devenger and Verchereau. Grievant was given an overall "2" rating ("Inconsistently meets job requirements/standards"). He received the same "2" rating and accompanying comments in the individual factors of "Learning Ability", "Technical or Professional Knowledge and Ability", and "Effectiveness in Pursuing Tasks and Achieving Results" as he had received in the September 1, 1981, "special" evaluation. Grievant received "2" ratings, with accompanying comments, in the following individual factors:

QUALITY OF WORK -	Although minor concessions have been made in the last three months, the quality of his work remains inconsistent.
JUDGMENT -	Questionable. Joe's response to testing and CBC training is in conflict with departmental needs.
PERSONAL RELATIONSHIPS -	Generally deals well with the public, but his relationship with management, supervisors and staff are divisive to local office team building.

Grievant received a "1" rating ("Unsatisfactory") in the following individual factor:

ATTITUDE, INTEREST AND INITIATIVE - Little evidence of improvement exists in this area. Mr. Roy has demonstrated an apparent unwillingness to listen to management and other staff regarding performance deficiencies.

In the Summary Comments section, Grievant received virtually identical comments as he received in that section in the September 1, 1981, evaluation, with the following sentence added, "This performance level has been reviewed with Joe during the past three months with virtually no improvement or change in his method of operation".

In the "Areas of Improvement" section, the following comments were made:

A specific list of examples needing improvement were contained in the special evaluation of 9/1/81. While areas needing improvement have been discussed with Mr. Roy, there seems to be no acceptance by Mr. Roy that performance deficiencies do actually exist. Performance in CBC training and GATB testing continues to be weak. The need to develop, establish and implement rapport with management is essential.

(State's Exhibit 19)

80. We conclude, based on all the evidence, the overall "2" rating, "2" and "1" ratings in individual factors, and accompanying comments were within the legitimate discretion of management to impose.

81. Grievant appealed the performance evaluation he received September 1, 1981, for the period December 5, 1980 to September 1, 1981, to the Board. However, the Board dismissed the grievance because it was filed in an untimely manner in violation of Section 23.1 of the Board's Rules of Practice. (Docket No. 81-83, Grievance of Joe Roy, October 21, 1982).

OPINION

Prior Notice of Work Deficiencies

The first allegation by Grievant is the annual performance evaluation he received for the period December 5, 1980 - December 11, 1981, violated Article XIII and 13 of the Contracts, in that Grievant was not advised during the period covered by the performance evaluation that purported deficiencies would affect his performance rating.

The relevant Contract language provides:

During the rating year, immediate supervisors shall call the employee's attention to work deficiencies which may adversely affect a rating (Article XIII, 1979-81 Contract, Article 13, 1981-82 Contract).

In order to meet this contractual requirement, a supervisor is required to give an employee clear indication s/he is dissatisfied with that employee's performance. Grievance of Smith, 5 VLRB 272 (1982).

Grievant's supervisor, James Hennessey, gave Grievant clear indication he was dissatisfied with his performance and called his attention to work deficiencies which adversely affected his annual performance evaluation.

This was accomplished largely through the "special" performance evaluation Hennessey gave Grievant on September 1, 1981. In that evaluation, which was done on the same form as the annual performance evaluation, Grievant was given "2" ratings and accompanying comments identical or similar in individual factors, virtually the same "Summary Comments" and the same overall "2" as he later received on his annual evaluation. Specific instances of the concerns of Hennessey regarding Grievant's performance were detailed in the memorandum accompanying the September 1, 1981, performance evaluation (See Finding 58). Specific performance

deficiencies and attitude problems of Grievant discussed therein gave Grievant clear indication of specific instances in which Hennessey was dissatisfied with his performance in those areas where he was given "2" ratings and adverse comments in the annual performance evaluation.

We recognize the legitimacy of the September 1, 1981, evaluation was questioned by Grievant since it was the subject of a grievance. However, the grievance was untimely filed with the Board and dismissed by the Board. Accordingly, for purposes of analyzing the grievance before us, we consider the September 1, 1981, evaluation as appropriately issued.

In addition to the September 1, 1981, evaluation, Grievant was given subsequent notice of alleged work deficiencies by Hennessey. Two performance progress meetings were held between Hennessey and Grievant between the "special" evaluation and the annual evaluation wherein Grievant's progress in correcting the performance deficiencies cited on the "special" evaluation were discussed. These deficiencies were also discussed with Grievant by Hennessey at the Step I grievance meeting regarding the September 1, 1981, evaluation.

Discrimination Because of Union Activities

Grievant's second allegation is the annual performance evaluation violated Articles V(1) and 5(1), Articles VI(3) and 6(3), and Articles VIII(1) and 8(1) of the Contracts, in that it was issued because of Grievant's union activities.

Articles VIII(1) and 8(1) of the Contracts are applicable here. They provide there shall be no discrimination against any employee because of

"...membership... in the Association or any other factor for which discrimination is prohibited by law". Discrimination because of union activity is clearly prohibited by law. 3 VSA §961 provides: "It shall be an unfair labor practice for an employer... (3) By discrimination in regard to... any term or condition of employment to... discourage membership in any employee organization".

Grievant clearly engaged in union activity; being a VSEA steward, Chapter president and alternate member on the VSEA bargaining team.

In similar cases, where employees have filed grievances claiming management took action against them for engaging in protected activity, we have employed the analysis used by the US Supreme Court and National Labor Relations Board: Once the employee has demonstrated his/her conduct was protected, s/he must then show the conduct was a motivating factor in the decision to take action against him/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 Cronin, 6 VLRB 37 (1983). Grievance of Sypher, 5 VLRB 102 (1982). Mt. Healthy City School District Board of Education v. Doyle, 429 US 274 (1977). NLRB v. Transportation Management Corp., ___ US ___, No. 82-168, June 15, 1983, 51 LW 4761. Wright Line, 105 LRRM 1169, 251 NLRB No. 150 (1980).

In applying this test here, Grievant must show his union activity was a motivating factor in the decision to issue him an adverse performance evaluation. In Sypher, supra, at 131, we noted the guidelines we would follow in determining whether protected conduct was a motivating factor in an employer's decision to terminate an employee:

...whether the employer knew of the employee's protected activities, whether there was a climate of coercion, whether the timing of the discharge was suspect. Ohland v. Dubay, 133 Vt. 300 (1975); whether the employer gave as a reason for his decision a protected activity, Mt. Healthy, *supra*; Givhan v. Western Line Consolidated School District, 439 US 410 (1979); Pickering v. Board of Education, *supra*; whether an employer interrogated an employee about protected activity, NLRB v. Fictures Manufacturing Corp., *supra*; whether the employer discriminated between employees engaged in protected activities and employees not so engaged, National Labor Relations Board v. Great Dane Trailers, Inc., 388 US 26 (1967); or whether the employer warned the employee not to engage in protected activity, Fry Roofing Co., 99 LRRM 1544 (1978).

Although the case before us does not involve an employee termination, but an adverse performance evaluation, we see no reason why the same guidelines are not applicable. In applying these guidelines to the evidence, it is a close question whether Grievant's union activities were a motivating factor in the annual performance evaluation issued by Hennessey.

Evidence was presented on numerous incidents, which Grievant apparently alleges demonstrate retaliatory motive by the Employer for discrimination because of his union activities.

We will examine those incidents and determine whether they demonstrate some retaliatory motive on the Employer's part. The April 2, 1981, CBC Training Incident, in which Grievant erroneously told the training group that as a VSEA steward he knew that there was a Department policy that travel time should be taken into consideration in determining whether to dismiss training sessions early and encourage the group to keep discussions brief, was the subject of a critical follow-up memorandum from Job Service Director Verchereau and was included as part

of his performance evaluation. It is apparent the Employer was not interfering with Grievant's rights as a union representative by these actions, but was rightly questioning Grievant's unsubstantiated statements which disrupted a training session.

The second area to be examined is the Department's documentation of Grievant's performance deficiencies beginning in May, 1981. While this could be an indication of anti-union animus if performance deficiencies were fabricated, that is not the case here. The documentation here, for the most part, involved actual performance problems of Grievant, and we cannot conclude any of the material was gathered because of anti-union animus.

On June 12, 1981, Hennessey denied Grievant's leave request for union business for a future date. Anti-union animus would be demonstrated here if this was part of a number of such denials or if the denial was not related to State business. However, this denial was the only time Hennessey denied Grievant's request for leave for union activity of approximately 40 such requests he made during 1980-81, and was done because of a previously-scheduled CBC training session. This does not mean Hennessey wholeheartedly approved of Grievant's leave request, as will be discussed later.

On June 12, 25 and September 25, 1981, Department Training Specialist Susie Wilson reviewed Grievant's GATB test administration. Grievant apparently alleges these reviews were to put pressure on him because of his union activity since the other counselor in the office administering GATB tests was not subject to such extensive review. We conclude there is no evidence to substantiate that claim. It is apparent the reviews were done because of Grievant's deficiencies in administering the GATB, deficiencies which were greater than those of the other counselor.

On July 21, 1981, the State presented a bargaining proposal providing that alternates on bargaining teams would only be granted leave to attend bargaining sessions if the master team member was not available. The proposal was presented, at least partially, as a result of a request by Grievant's Department. While the proposal may have arisen because of Grievant's union activity, we are reluctant to find management at fault for making the proposal. To do so would be to interfere with the free exchange of proposals necessary for productive collective bargaining since there is no allegation the proposal concerned an illegal subject of bargaining.

On September 1, 1981, when Hennessey handed Grievant his "special" warning evaluation, he remarked that Verchereau wanted him to tell Grievant he appreciated his VSEA work on behalf of all Job Service employees. What motivated Hennessey's remark is a matter of speculation, but the actual words used do not indicate anti-union animus against Grievant. We conclude from the surrounding circumstances that Grievant has not demonstrated by a preponderance of the evidence the remark demonstrated anti-union animus against Grievant.

On October 28, 1981, a "blanket pardon" was issued to CBC offenders by Verchereau which provided that anyone who had been disciplined concerning CBC progress would have disciplinary letters removed from their personnel files. Grievant apparently alleges discrimination against him because his performance regarding the CBC program was reflected on his performance evaluation. However, the pardon applied to those who were having problems completing assigned work, but not to those who were recalcitrant in

accepting the CBC program. Grievant's problems with CBC reflected on his performance evaluation involved more of an attitude problem of non-acceptance of CBC itself than lack of progress in completing CBC work.

A relevant element in determining whether an employee's union activity was a motivating factor in any action taken by the employer is timing of the action. Here, the timing of the performance evaluation is suspect on its face, since it was issued during a year Grievant became much more involved in VSEA activity and his last performance evaluation had been very good. However, this without more does not indicate anti-union animus since, as will be discussed later, the evidence indicates Grievant had performance problems in 1981 which he did not have in past years.

The remaining incident to be examined is the April 20, 1981, meeting among Grievant, Hennessey, Area Manager Milkey, and Department Personnel Officer Maloney regarding Grievant's role as a bargaining team member. In our view, anti-union animus is demonstrated against Grievant by this meeting. At the meeting, where VSEA representatives were not asked to attend, Grievant was questioned as to the need for him to attend the bargaining sessions as an alternate. This would appear to be an area that would be better discussed with the VSEA as a whole, particularly since alternates attending bargaining sessions was a VSEA practice historically acquiesced in by the State. To question an individual employee such as was done here amounts to prohibited interrogation of an employee about union activity.

This action by the State demonstrates disapproval of Grievant's union activity and leads us to believe his union activities played some

part in the adverse annual performance evaluation he received. It was a new experience for the Department of Employment and Training to have a Department employee on the VSEA bargaining team, and their reaction was less than favorable. This was further demonstrated by the bargaining proposal offered at their request by the State restricting attendance of alternates at bargaining sessions. While we do not find management at fault for presenting this proposal, it demonstrates Grievant's union activity was of some concern to the Department. Also leading us to the conclusion Grievant's union activities were a motivating factor in his evaluation is the tense and confrontative relationship which developed between Hennessey and Grievant during 1981, which we conclude was caused in part by Grievant's union activities. Illustrative of this is Hennessey questioning Grievant in September, 1981, whether the leave he was requesting for negotiations sessions were all necessary. This statement was bound to cause further ill will and tension in an already deteriorating relationship.

The burden is now on the employer to show by a preponderance of the evidence it would have taken the same action even in the absence of Grievant's union activity.

The evidence indicates Grivant had the following performance problems during the rating period:

1. Resistance to the CBC Program which was a required part of his job duties - Illustrations of this are his actions at the April 2, 1981, CBC Training Session which disrupted the session and his "Spinoza" essay.

2. Lack of Judgment - This is demonstrated by his actions at the April 2, 1981, CBC training session, his "Spinoza" essay, and his crossing out the word "respectfully" when submitting leave requests.

3. Deficiencies in the Administration and Scoring of the GATB.

4. Problems with the proper completion of paperwork (i.e. CETA forms, Job Corps Forms, GATB scoring).

5. Negative Attitude Toward Supervisors - This is demonstrated by his resistance to the CBC program, his crossing out of the word "respectfull" on leave requests, and his tense and confrontative relationship with Hennessey for which we conclude he was at least partially responsible.

Accordingly, management had legitimate reasons for citing Grievant for performance deficiencies on his performance evaluation. In such dual-motive cases, where the employment decision involves two factors - a legitimate business reason and an illegitimate employer reaction to its employees engaging in protected activities, we will weigh the interests of the employees in engaging in protected activity and the interests of management in promoting the efficiency of the public services it performs through its employees and strike a balance between the competing interests. Sypher, supra, at 134. Mt. Healthy, supra. Wright Line, supra.

In weighing those competing interests here, we conclude based on a preponderance of the evidence that Grievant's performance deficiencies warranted the performance evaluation he received in every respect, and Hennessey would have issued the same performance evaluation in the absence of Grievant's union activities.

In our view what was involved here was basically a reluctance by Grievant to conform to certain required parts of his job and personality clashes between Grievant and his supervisors. While Grievant cannot be held completely responsible for the bad relationships with his supervisors, nevertheless he is required to carry out his job duties in a satisfactory manner. That he failed to do during the December 5, 1980 to December 11, 1981 rating year.

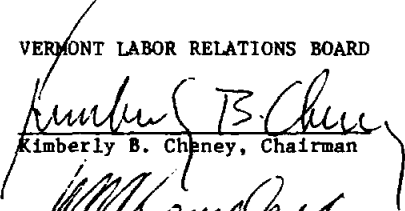
ORDER

Now, therefore, based on the foregoing findings of fact and for all the foregoing reasons, it is hereby ORDERED:

The Grievance of Joe Roy is DISMISSED.

Dated this 14th day of July, 1983, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Kimberly B. Cheney, Chairman


William G. Kemsley, Sr.