VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 85-8
STANTON BARROWS	)	

MEMORANDUM AND ORDER

On February 8, 1985, Stanton Barrows ("Grievant") filed a grievance with the Vermont Labor Relations Board concerning his dismissal from employment as a Correctional Officer A, in an original probationary period, at the Chittenden Community Correctional Center ("CCCC"). Grievant alleged: 1) no just cause existed for his dismissal; 2) the dismissal was reprisal by management against him for his "whistleblowing" actions and/or complaint activity; 3) progressive discipline and progressive corrective action were not met; 4) the dismissal constituted an abuse of discretion; and 5) the whistleblowing actions were made in the public interest and therefore overrode the "employment at will" doctrine, allowing the Board to take jurisdiction in the case. Grievant requested reinstatement to his position and to be made whole for any and all monetary and benefit losses incurred since his dismissal.

On February 20, 1985, the State of Vermont, Department of Corrections ("Employer"), filed a Motion to Dismiss the grievance. The Employer contends that because Grievant was a classified employee serving his original probationary period, the Board's jurisdiction over his grievance is governed by 3 VSA §1001(a), which provides employees in such status may appeal to the Board "if they believe themselves discriminated against on account of their race, color, creed, sex, age or national origin." The Employer contends Grievant does not identify his claim as one within the types of discrimination

specified in §1001(a), and thus the Board has no jurisdiction over the subject matter of this grievance.

The operative facts for purposes of ruling on this Motion to Dismiss are as follows: From April 16, 1984, to November 17, 1984, Grievant was employed as a Temporary Correctional Officer A. On November 18, 1984, Grievant was hired to fill a permanent classified position as a Correctional Officer A at CCCC, and was placed in a six month original probationary period. Grievant was dismissed from this position on January 10, 1985, for "gross misconduct." At the time of his dismissal, he was still in his original probationary period. During the period he was employed, Grievant made allegations of impropriety against CCCC management concerning their violation of Facility and Department policy and procedures and engaged in complaint activity regarding reimbursement for work-related medical expenses. Grievant alleges he was dismissed as reprisal for these allegations and complaint activity.

We concur with the Employer that we are without jurisdiction to review this grievance. As a classified employee in an original probationary period, Grievant's right to grieve to the Board is governed by 3 VSA §1001(a). Under §1001(a), if discrimination is not alleged on account of "race, color, creed, sex, age or national origin," the Board is without authority to review grievances of employees covered by that section. Grievance of McCluskey, 7 VLRB 359 (1984). Grievance of Peplowski, 6 VLRB 16 (1983). The grievance before us raises no claim of discrimination based on any of the factors stated in §1001(a). Thus, the grievance must be dismissed.

However, Grievant has alleged he was dismissed in reprisal for his "whistleblowing" activities; specifically for his allegations of

impropriety against CCCC management concerning their violation of Facility and Department policy and procedures. For the reasons which follow, Chairman Cheney believes this claim by Grievant indicates the Employer may have committed an unfair labor practice under the State Employees Labor Relations Act ("SELRA").

Grievant has the guaranteed right that he will not be discriminated against for exercising his constitutional rights. One of the merit system principles guiding State service is "assuring fair treatment of applicants and employees in all aspects of personnel administration... with proper regard for their...constitutional rights as citizens." 3 VSA §312(b)(5). Probationary employees such as Grievant are clearly covered by this provision since the Commissioner of Personnel is required to "prescribe rules governing appointments, probation,... separations...applicable to persons in the classified service", 3 VSA §310(e); probationary employees occupying a classified position are "persons in the classified service", 3 VSA §311(a), 3 VSA §1001(a); and rules and regulations for personnel administration must be based on merit system principles. 3 VSA §310(f).

One of the constitutional rights is free speech, and Grievant's "whistleblowing" activities may be encompassed within his free speech rights.c.f. Grievance of Morrissey, 7 VLRB 129 (1984). Accordingly, Grievant has the right not to be dismissed for exercise of his free speech rights. These rights of Grievant are protected through 3 VSA §961(1), which makes it an unfair labor practice for an employer "to interfere with, restrain or coerce employees in the exercise of their rights guaranteed by...any...law, rule or regulation." If Grievant filed an unfair labor practice charge, the Board should decide whether the Employer interfered with his constitutional right of free speech guaranteed by 3 VSA §312(b)(5).

An argument could be made Grievant is not an "employee" covered by this section since probationary employees are not normally covered under SELRA's definition of "employee". However, in Grievance of Peplowski, supra, the Board recognized probationary employees have some protection under SELRA's unfair labor practice provisions, and that protection extends to this case.

3 VSA §902(4) and §902(5) provide in pertinent part:

> 4) "Employee" means a State employee as defined by subdivision (5) of this section except as the context requires otherwise.
>
> 5) "State employee" means any individual employed on a permanent or limited status basis by the State of Vermont...and an individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice...

The "context requires otherwise" here. If we do not have authority to determine whether a probationary employee's constitutional rights were violated, the employee would have no administrative remedy to protect rights granted by 3 VSA §312(b)(5), and would have to resort to the courts. For us to review this case under our unfair labor practice jurisdiction would provide a meaningful administrative remedy to an employee who may have been unfairly dismissed for exercising his free speech rights which would not otherwise exist.

Moreover, 3 VSA §902(5) includes among the ranks of "State employees" an individual "whose work has ceased... because of any unfair labor practice." Grievant is potentially embraced within this definition if the Board determined his constitutional rights were violated.

Accordingly, this grievance is dismissed, but if Grievant so desires,

he may file an unfair labor practice charge. If Grievant files a charge alleging he was dismissed in reprisal for his "whistleblowing" activities, the Board should investigate whether the Employer dismissed him in violation of his constititutional free speech rights.

Now therefore, based on the foregoing reasons, it is hereby ORDERED the Employer's Motion to Dismiss is GRANTED and the Grievance of Stanton Barrows is DISMISSED.

Dated this 12th day of March, 1985.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

James S. Gilson

OPINION OF MEMBER GILSON

I agree this grievance should be dismissed for the reasons stated. However, for the reasons stated in my concurring opinion in Grievance of Peplowski, supra, at 29-31, I am not convinced by Chairman Cheney's view that if Grievant files an unfair labor practice charge the Board should necessarily invoke its unfair labor practice jurisdiction and determine whether the Employer dismissed him in violation of his constitutional free sppeech rights. That issue need not be decided today. If Grievant does file an unfair labor practice charge, I will decide then whether I believe he is covered by SELRA's unfair labor practice provisions.

Dated this 12th day of March, 1985.

James S. Gilson