

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 21-10
CARL BRANDON	)	

FINDINGS OF FACT, OPINION, AND ORDER

On April 15, 2021, Dr. Carl Brandon (“Dr. Brandon” “Grievant”), Professor at Vermont Technical College (“VTC”), part of the Vermont State Colleges System (“VSC” “Employer”), filed a Grievance with the Vermont Labor Relations Board (“Board”), alleging that VSC erred in its application, or failed in waiving the requirements, of VSC Policy 210: *Employee Conflict of Interest Policy*, by not allowing his high school aged son to attend his physics class for credit. Grievant alleges that the decision was motivated by his past actions or activities with the Union, and because of his age and years of service and high compensation. Grievant also claims that the decision was arbitrary and capricious and requests that the Board order the Employer to award his son credit for attending the Physics 1042 class Dr. Brandon taught.

On August 19, 2021, a hearing was held before Labor Relations Board members Richard Park, Chairperson; Karen Saudek, and David Boulanger. Grievant appeared and represented himself, and Patricia Turley, Esq., represented the Employer. The parties filed briefs with the Board on September 2, 2021.

FINDINGS OF FACT

1. Dr. Carl Brandon is a tenured faculty member at VTC and has served as a professor for more than forty years. He holds a bachelor’s degree in Physics, obtained a Ph.D. in Zoology, 23 VLRB 1, 2 (2000), and teaches physics at VTC.

2. Dr. Brandon has a son, who was a high school junior at the Sharon Academy in January 2021. Dr. Brandon was concerned about the quality of the high school physics class being offered to his son. According to Dr. Brandon the physics class focused too heavily on writing, and his son was slower at the writing component of the high school course.
3. Dr. Brandon believed that his son had an interest and aptitude for physics and wanted to offer him an alternative to the high school physics course.
4. At the time, VTC offered a Physics 1042 class, with two sections, one taught by Dr. Brandon and the other taught by the Department Chair.
5. Dr. Brandon attempted to enroll his son in the Physics 1042 section that he, Dr. Brandon, taught.
6. VSC has a conflict of interest policy that applied to Dr. Brandon. The *Employee Conflict of Interest Policy* (“Policy”) requires that “faculty, staff and others acting on its behalf have the obligation to avoid ethical, legal, financial or other conflicts of interest and to ensure that their activities and interests do not conflict with their obligation to the VSC or to its welfare.” Employer Exhibit 1.
7. The purpose of the Policy is to address situations where employees’ personal interests may conflict with their interests as an employee of VSC systems.
8. The Chancellor developed an *Illustrative Guidance* (“Guidance”) to implement the Policy in a fair and consistent manner. *Id.* at 3. The Guidance is not a comprehensive list but provides examples and guidance on the situations that may be a conflict of interest under the Policy. Employer Exhibit 2.
9. The Guidance contains a discussion, and examples, of nepotism that are violative of the Policy. Illustration 5.d provides the following:

- d. An employee shall not participate in decisions regarding students that involve a direct benefit to a close relative. Alternative arrangements for such students shall be made for close relatives. “Decisions regarding students” include, but are not limited to, acceptance to an academic program, grades and recommendation for awards or work-study employment.

Employer Exhibit 2.

- 10. Dr. Brandon admits that having his son in his class could create a perception of a conflict of interest.
- 11. Before his son could be enrolled in his Physics class for credit, Dr. Brandon needed to obtain a waiver of the Policy from the college Dean, Dean Gaillat.
- 12. Dr. Brandon’s son was not enrolled as a student at VTC at the time Dr. Brandon requested that his son attend the Physics 1042 class Dr. Brandon taught.
- 13. Dean Gaillat met with Dr. Brandon regarding the request for a waiver of the Policy. Dean Gaillat did not provide or authorize a waiver.
- 14. Dr. Gaillat provided Dr. Brandon with the alternative that his son could participate in a different section of the Physics 1042 class taught by another professor, the Department Chair.
- 15. Dr. Brandon rejected the alternative proposed by Dean Gaillat. Dr. Brandon suggested a different alternative that his son take his class and that another professor grade and evaluate his son’s work.
- 16. Dean Gaillat did not accept the alternative proposal offered by Dr. Brandon.
- 17. Unsatisfied with the response of Dean Gaillat, on Friday January 29, 2021, three days before the class was scheduled to begin, Dr. Brandon emailed VSC Chancellor Sophie

Zdatny seeking permission to waive the Policy to permit his son to take his physics course for credit.

18. After reviewing the email from Dr. Brandon, Chancellor Zdatny decided to respond given the short time before the class at issue was scheduled to begin, even though Dr. Brandon had not previously sent his appeal request to President Moulton, which would have been the next step under the Policy.
19. Before becoming Chancellor, Ms. Zdatny had served as General Counsel for VSC and was familiar with the Policy. She had experience with the Policy having previously relied on it and the Guidance to address a nepotism issue with a different employee.
20. In evaluating Dr. Brandon's request, Chancellor Zdatny reviewed the email from Dr. Brandon, the Policy, the Guidance, and considered the decision the Grievant attributed to Dean Gaillat.
21. According to Chancellor Zdatny, Dr. Brandon's request to have his son enroll in his course presented an issue of nepotism under the Policy. Dr. Brandon's son is a close relative of Dr. Brandon which falls under the nepotism provisions of the Guidance to the Policy.
22. The Guidance admonishes that an employee "shall not participate in decisions regarding students that involve a direct benefit to a close relative." Employer Exhibit 2.
23. A decision that Dr. Brandon would make about his son in his physics course would involve a direct benefit to a close relative, his son. It would be a violation of the Policy for Dr. Brandon to teach his own son.
24. Chancellor Zdatny considered the alternative offered by Dean Gaillat, that Dr. Brandon's son could take Physics 1042 with another professor. She also considered Dr. Brandon's

alternative and considered the interests and concerns raised by Academic Dean Gaillat as represented in Dr. Brandon's January 29, 2021, email.

25. She also considered that Dr. Brandon's son would be eligible to take the same physics course with a different professor.
26. At the request of Dr. Brandon, Chancellor Zdatny also reviewed the policy allowing high school students to take classes at VTC, Policy T118.
27. Because Dr. Brandon's son was not being denied the right to take a class, Chancellor Zdatny determined that Policy T118 policy was not at issue in Dr. Brandon's request for a waiver of the *Employee Conflict of Interest Policy*.
28. On January 31, 2021, Chancellor Zdatny emailed Dr. Brandon with her decision denying his request to waive the Policy to allow his son, a high school junior, take the Physics 1042 class at VTC with Dr. Brandon as the professor. Employer Exhibit 4
29. Chancellor Zdatny's decision detailed her reasoning and consideration of the Policy. In evaluating the Policy, she found it "prohibits situations whereby an employee has a conflict of interest and permitting your son to be a student in your class would violate the policy." Employer Exhibit 4.
30. Chancellor Zdatny also reviewed the request against the Guidance, finding "this situation is directly addressed by the *Illustrative Guidance's* section on Nepotism at ¶ 5.d. . . . [citing ¶ 5.d]." Employer Exhibit 4.
31. Chancellor Zdatny evaluated the alternative proposed by the Dean. She also evaluated and deferred to the professional judgment of the Dean regarding Dr. Brandon's alternative of imposing on a different professor the burden of grading the coursework Dr. Brandon assigned to his son. "I can see numerous valid causes for concern with your

proposed approach and, thus, I defer to the Dean's professional judgment on this determination." Employer Exhibit 4.

32. In making her decision, Chancellor Zdatny did not consider Dr. Brandon's length of service with VTC. Chancellor Zdatny's decision was not intended to make Dr. Brandon retire.
33. Chancellor Zdatny did not consider and was not aware of Dr. Brandon's union history or involvement when making her decision to deny his request.
34. Chancellor Zdatny did not consider Dr. Brandon's age, nor his salary when making her decision.
35. Chancellor Zdatny found that the Policy prohibits situations where an employee has a conflict of interest and permitting Dr. Brandon's son to be a student in his class would be a violation of that Policy.
36. On February 27, 2021, in response to Chancellor Zdatny's denial of his waiver request, Dr. Brandon initiated a Step Two Grievance seeking a waiver of the VSC Employee Conflict of Interest Policy with respect to his son taking a physics course taught by him.
37. The Grievance was assigned to the VSC General Counsel to represent VSC. On March 5, 2021, a remote hearing was held at which Dr. Brandon attended with a Faculty Federation representative.
38. On March 18, 2021, the step Two Grievance was denied, and Dr. Brandon thereafter filed his Grievance with the Board.
39. The denial of Dr. Brandon's waiver request did not impact his salary. The denial of his request did not result in different work responsibilities or alter his teaching schedule.

40. The denial did not impact his son's ability to take a physics course at VTC. Dr. Brandon's son was not denied the opportunity to take the physics class. He could take the Physics 1042 class offered by the Department Chair.
41. Dr. Brandon acknowledges that VSC applied the Policy to his request to have his son enroll in his physics class.
42. Dr. Brandon's son audited his father's physics course. A student auditing a course is not required to perform the graded or evaluated work and does not expect or receive a grade at the conclusion of the course.
43. Dr. Brandon claims that he suffered from the absence of his son in his class because it denied him the opportunity to get a quality evaluation from his son. According to Dr. Brandon, teachers benefit when smart students take their classes and provide feedback. He claims to have been denied the opportunity to get feedback on his teaching performance from his son.
44. The alternative proposed by Dr. Brandon would require a second professor to grade four tests and one lab report. Dr. Brandon admits that there was nothing requiring a professor to take on this responsibility and that the request would be unusual.
45. Dr. Brandon claims that he is the highest paid faculty member and that VSC denied his request as an effort to get him to retire.
46. According to Chancellor Zdatny, Dr. Brandon is not the highest paid faculty member, and she did not consider his pay, nor was she aware that anyone else considered his pay when denying his waiver request.

## OPINION

Dr. Brandon grieves the decision denying his request for a waiver of the VSC Conflict of Interest Policy to allow his son to take his physics class. At the close of Dr. Brandon's case, the Employer moved for dismissal of all his claims. The Board granted in part, and denied in part, the Employer's motion. The Board granted the motion regarding any claims alleging the Employer was motivated in making its decision by Dr. Brandon's union activity, age, or years of service at VTC.

The VLRB applies the analysis developed by the U.S. Supreme Court when evaluating age discrimination claims. Grievance of Harris, 35 VLRB 344, 376 (2020). The Supreme Court has ruled that a "plaintiff must prove by a preponderance of the evidence (which may be direct or circumstantial), that age was the 'but-for' cause of the challenged employer decision." Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 177–78 (2009). The first step in establishing that age was the but-for cause of the alleged discrimination, requires the Grievant to come forward with some evidence to establish a prima facie case of age discrimination. Gorzynski v. JetBlue Airways Corp., 596 F.3d 93, 106 (2d Cir. 2010); Carpenter v. Cent. Vt. Med. Ctr., 170 Vt. 565, 566 (1999). Because Dr. Brandon failed to allege or introduce any testimony or evidence that the decision by the Employer was based on or motivated by his age, the Board dismissed his claim of age discrimination.

To prevail in a claim that the employment decision was based on a protected activity, the Grievant must show that the protected activity was a motivating factor. See Grievance of Sypher, 5 VLRB 102, 129 (1982) (citing Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977)). Dr. Brandon's attempt to reference past actions by former administration members years ago surrounding long resolved grievances was unavailing. There



was no testimony or evidence that Chancellor Zdatny, Dean Gaillant, or President Moulton considered or knew of Dr. Brandon's past union activity when making their decision to deny his waiver request. The Board dismissed Dr. Brandon's claims that the decision to deny his request for a conflict-of-interest waiver was motivated by his union activity.

The only remaining issue to be resolved is whether the decision of the Employer was arbitrary and capricious. The Employer argues that the Board need not conduct an evaluation of the reasonableness of its decision, because the alleged harm does not involve a negative employment action. The Employer claims that Dr. Brandon seeks relief for his son, not himself, and that the alleged harm does not involve an adverse employment action or protected legal interest over which the Board has jurisdiction.

Dr. Brandon alleges that the Employer improperly applied the Policy or failed to waive it and its actions resulted in a negative employment action. Grievant claims that by denying his offer of the alternative arrangements for decisions affecting his child in the physics class, Grievant has been denied the benefit of having his son take a VTC course tuition free, depriving him of an employment benefit afforded to VSC employees. Because evaluation of this claim necessarily overlaps with an analysis of the reasonableness of the Employer's action, the Board will decline the Employer's request to dismiss the Grievance and will proceed to its analysis of Dr. Brandon's claim.

Dr. Brandon claims the decision to deny the waiver of the Policy and refusing to allow his son to participate in the Physics 1042 section he taught was arbitrary and capricious. The VLRB has ruled that a decision is arbitrary when "fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances or significance." Grievance of United Academics, AAUP/AFT and Campo, 29 VLRB 263, 293

(2007) (quoting Grievance of Fairchild, 4 VLRB 164, 176, aff'd, 141 Vt. 362 (1982)) (internal quotations omitted). "Capricious" is an action characterized by or subject to whim. Appeal of Berlin, 15 VLRB 245, 246 (1992); Appeal of DeGreenia and Lewis, 11 VLRB 227, 229 (1988).

The VSC Policy requires employees to avoid any action that would create a conflict of interest. To explain the Policy, the VSC Chancellor has issued the Guidance, which includes the following regarding Nepotism:

- d. An employee shall not participate in decisions regarding students that involve a direct benefit to a close relative. Alternative arrangements for such decisions shall be made for close relatives. "Decisions regarding students" include, but are not limited to, acceptance to an academic program, grades and recommendation for awards or work-study employment.

Employer Exhibit 2, ¶ 5.d.

Dr. Brandon's request to have his son participate in his class presents an issue of nepotism under the Policy. Dr. Brandon's son is a close relative and having his own son in his class will require that Dr. Brandon make decisions regarding his performance and grading. These decisions fit squarely within those decisions that the Guidance admonishes VSC staff and professors to avoid.

When evaluating Dr. Brandon's request, the Employer considered the Policy, the Guidance, the facts presented by Dr. Brandon, and the purpose for and behind the Policy. The purpose of the Policy is to avoid situations where VSC staff or professors have divided loyalties between their duties to the college and their personal interests. The Employer considered other instances of nepotism and how it has been applied. Dr. Brandon did not present any evidence, other than his speculation and allusions to hearsay that other professors had taught their own children. Dr. Brandon failed to sustain his burden of proving the decision was arbitrary.

Similarly, Dr. Brandon has not sustained his burden of proving that the decision to deny his requested alternative was arbitrary. The employer considered Dr. Brandon's alternative, but because the proposed alternative would require another teacher to grade four tests and one lab report, and the employer lacked the authority to require a second teacher to perform these tasks, the employer denied this alternative. Dr. Brandon admits that having his son in his class could be perceived as a conflict of interest. He also acknowledges that the Employer did apply the Policy to his request to have his son enroll in his class. The employee's decision was reasoned and considered and does not evince arbitrariness or that it was capricious.

That the initial conflict of interest decision was reviewed by the Chancellor, rather than the President, did not prejudice or harm Dr. Brandon. After receiving an unfavorable decision from Dean Gaillat, Dr. Brandon appealed his decision to the Chancellor. The Chancellor responded to Dr. Brandon's request and evaluated his claim over the weekend in advance of the impending start of the Physics 1042 course. Following the decision of the Chancellor, Dr. Brandon availed himself of, and received the due process required in, the subsequent steps of the Grievance process. In response to the Chancellor's Decision, Dr. Brandon filed a Step 2 Grievance. He and his employer thereafter progressed through the administrative grievance process consistent with the Board's goal that the parties attempt to resolve disputes before invoking the jurisdiction of the Board. See Grievance of Sklar, 19 VLRB 183, 207 (1996); Grievance of Ulrich, 12 VLRB 230 (1989); *Aff'd*, 157 Vt. 290, 293-95 (1991). Dr. Brandon did not suffer any harm or prejudice as a result of the Chancellor reviewing the initial decision of Dean Gaillat, instead of the President.

ORDER

Now, therefore, based on the Findings of Fact and Opinion outlined above, it is hereby  
Ordered that the Grievance of Carl Brandon is DISMISSED.

Dated this 28th day of October 2021, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard Park

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Richard W. Park, Chairperson

/s/ Karen Saudek

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Karen D. Saudek

/s/ David Boulanger

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David R. Boulanger