

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 92-22
BENJAMIN DAY, JR.)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On May 15, 1992, Benjamin Day, Jr. ("Grievant"), filed a grievance against the State of Vermont, Agency of Natural Resources, Department of Fish and Wildlife ("Employer"). The grievance stems from the reinstatement of Grievant to a position following a decision of the Vermont Labor Relations Board issued in an earlier grievance of Grievant in VLRB Docket No. 90-48. Grievance of Day, 14 VLRB 229 (1991).

In the 1991 decision, issued on November 14, the Board concluded that the January 4, 1991, layoff of Grievant resulted from discrimination based on the political reasons of Grievant's involvement and visible identification with the issue of antlerless deer seasons. Id. at 293-302. The Board concluded that, absent discrimination for political reasons, Grievant either would have been selected for another position created by a Department reorganization, or allowed to remain employed in the position which he occupied when laid off. Id. at 301. In making Grievant whole for this discriminatory action, the Board ordered that Grievant "be reinstated to the position which he occupied... at the time of his layoff". Id. at 301-02, 304.

In this grievance, Grievant contends that, although he was reinstated to a position, the reinstatement did not fully comport

with the Board order. Grievant contends that, following reinstatement, he was subject to a variety of adverse, hostile and retaliatory actions involving assignment of office space, assignment of duties, exclusion from meetings, reclassification of his position and delivery of mail. Grievant alleged that the actions of the Employer constituted a continuing pattern of harassment and retaliation against him. Grievant alleged that the Employer's conduct was motivated by the fact that Grievant prevailed in the earlier grievance, and/or based upon political discrimination, and/or because Grievant was regarded as a "whistleblower" based on his earlier grievance and other activities, or perceived activities. Grievant contends that these actions of the Employer violated Grievant's rights under Articles 5, 14 and 73 of the collective bargaining agreement between the State and the Vermont State Employees' Association for the Non-Management Unit, effective for the period July 1, 1990 to June 30, 1992 ("Contract"), as well as the merit system statutes and the Rules and Regulations for Personnel Administration.

Grievant requested the following relief: 1) that he be immediately restored to the position he held on January 4, 1991; 2) that the Employer cease and desist from harassing and retaliating against Grievant; 3) that the Employer restore Grievant to his former office space; 4) that the Employer cease and desist from routing Grievant's mail through the office of the Commissioner; 5) that Grievant receive full and fair consideration for any supervisory or managerial position in the

Department; and 6) that the Board provide such other relief as is found just.

Hearings were held before Board Members Charles McHugh, Chairman; Catherine Frank and Carroll Comstock. Hearings occurred on January 5, and 29, 1993; February 5 and 11, 1993; and March 4 and 22, 1993. Chairman McHugh and Member Comstock attended all hearings. Member Frank attended all hearings except February 5, and she has reviewed the portion of the record which she missed. Assistant Attorney General Michael Seibert represented the Employer. Attorney Scott Cameron represented Grievant.

Grievant filed a Motion to Amend his grievance on January 5, 1993, to allege that, as a direct result of the Employer's actions, Grievant began to suffer from situational stress syndrome and developed serious health problems, causing him to be out of work on sick leave since June 1, 1992. Grievant requested the restoration of sick leave used by Grievant. On January 8, 1993, the Employer filed an objection to the Motion to Amend. At the January 29 hearing, the Board indicated that it would not rule on the motion to amend, and that the issue was deferred until any compliance proceedings in this matter.

Following the conclusion of the hearings, the parties filed briefs on April 12, 1993. The Board takes official notice in this matter of, and incorporates herein by reference, the Findings of Fact set forth in the above-referenced decision in Docket No. 90-48.

FINDINGS OF FACT

1. The position which Grievant occupied at the time of his layoff on January 4, 1991 was entitled Director of Wildlife, the

pay grade for which position was 27. The duties which Grievant was performing at the time of his layoff on January 4, 1991 involved land acquisition and management. He also assisted the wildlife staff by answering correspondence and performing biological work on projects and performing other duties on an ad hoc basis. These were not duties formerly assigned to the Director of Wildlife prior to the July 1990 Department of Fish and Wildlife reorganization.

2. Approximately one year after the Department's reorganization of July 1990, Department Commissioner Timothy Van Zandt requested various persons and groups within the Department to provide him with their comments and appraisal of the reorganization and its impact on the Department.

3. In response to the Commissioner's request for feedback concerning the reorganization, meetings were held within each of the five Department districts. Each district coordinator held a meeting within the district to consider the comments of district staff. Subsequently, each coordinator wrote a memorandum to the Employer's Director of Operations, Angelo Incerpi. The memoranda reflecting the comments of the employees from each of the districts contained the common themes that the organizational structure decision making was inefficient, lines of communication and authority were not clear, morale was poor, and it was more difficult to get the job done. Every district stressed the need for positions in central office with line authority over the fisheries and wildlife biology functions (Grievants's Exhibits 8, 9, 10A, 10B and 11).

4. On October 7, 1991, Van Zandt issued a memorandum to "all staff" which provided:

I've just completed two meetings with staff on our administrative team where the main topic of discussion was in regards to the reorganization comments generated by affected field and Waterbury staff. These comments clearly indicated a need for a public affairs manager to coordinate/direct all of our information and educational outreach programs; and also similar positions to provide line authority/direction in the central office for fisheries and wildlife.

Having separate fisheries and wildlife managers in the central office does not conform to the structural goals I set in designing the organization. I strongly feel that I need a coordination/blending of these two disciplines at the Waterbury level to assist Angelo and me in developing final Department positions/policies.

Administrative policy and fiscal restraints prohibit me from creating any additional positions, so it should be understood that to fill these needs, a reassignment of duties will have to be accepted by qualified employees currently on staff. I still see a need for the F&W coordinators so these positions will not be changed.

My target date to accomplish the above is the 1st of November.

(Grievant's Exhibit 18).

5. Rod Wentworth holds the position of Fish and Wildlife Impact Assessment Specialist, specializing in fisheries and hydro issues. He is a professional biologist whose major work experience has involved him with fisheries and hydro issues. During the period between January 4, 1991 and January 6, 1992 (i.e., Grievant's period of layoff), Wentworth was the only person in the Department to hold the position of Fish and Wildlife Impact Assessment Specialist. During that period of time, and following January 6, 1992, until the Spring of 1992, Wentworth regularly attended coordinators meetings. Incerpi required Wentworth to attend such meetings. Other regular

attendees at coordinators meetings included the five district coordinators, Van Zandt, Incerpi, Sandy Barton (Business Manager), and the Commissioner's secretary, Bonnie O'Meara.

6. At an October 8, 1991, coordinators meeting, Incerpi explained that needs were apparent for: 1) a public affairs manager, and 2) an overall coordinator to direct fisheries and wildlife in the central office. Incerpi indicated that individuals would be interviewed and chosen on a competitive basis, and that a target date to formulate specifications for the position was November 1 (Grievant's Exhibit 19).

7. At an October 31, 1991, coordinators meeting, the coordinators told Van Zandt and Incerpi that the "overall coordinator" position did not address the perceived needs of the fisheries and wildlife biologists. Incerpi justified the decision to go forward with the overall coordinator position, stating that he was overloaded and that the position would relieve some of his work load. The coordinators objected, and stated that they felt they needed separate supervisors over fisheries and wildlife. At the close of the discussion, Incerpi indicated that management needed the overall coordinator position and intended to go forward with it (Grievant's Exhibit 21).

8. At a December 10, 1991, coordinators' meeting, the November 14, 1991, decision of the Labor Relations Board ordering the reinstatement of Grievant was discussed. Van Zandt was not present at the meeting. Incerpi informed the coordinators that the Department had not yet made a decision as to whether it would appeal the Board decision, and told them that if Grievant was

reinstated a vacant marketing slot would be used and the Department would not have to lay off anyone. During the meeting, Incerpi indicated that management had tabled the decision to create the overall coordinator position due to staff objections to the position (Grievant's Exhibit 23).

9. The decision not to appeal the November 14, 1991, decision of the Board was made by December 16, 1991. On December 16, Incerpi asked Mark Scott, who holds the position of Education Coordinator assigned to the Waterbury office, to tell the temporary employee working for Scott that she would have to move out of her office to make room for Grievant. On December 18, 1991, Incerpi asked Wentworth and Scott to move Grievant's desk to that office.

10. The office to which Grievant was to be assigned upon reinstatement was a small, inadequate work space. Scott was troubled by this assignment of office space to Grievant, and spoke about it to Incerpi on two different occasions. Scott offered to move into the small office himself, and allow Grievant to occupy his office. Incerpi responded that Scott needed the larger office.

11. The office to which Grievant was assigned prior to his January 4, 1991, layoff was not used, except sporadically, prior to August 1, 1991. From August through October, 1991, two Department employees who were in the central office on a limited basis used the office.

12. Sometime in November of 1991, John Kapusta, Hunter Education Safety Chief, spoke with Incerpi about the possibility

of reassigning two of his hunter education coordinators to the central office on a part-time basis. These hunter education coordinators, Richard Hislop and Eric Nuse, had permanent offices in Essex and St. Johnsbury, respectively. At the time this issue was first discussed, Incerpi told Kapusta that he could not assign Nuse and Hislop to the central office at that time because there was not enough room. After the decision was made to reinstate Grievant, but prior to December 31, 1991, Incerpi decided that Hislop and Nuse could use the office formerly assigned to Grievant. Kapusta informed Hislop and Nuse of this office assignment on December 31, 1991. Subsequently, Hislop and Nuse used the office on a part-time basis (Grievant's Exhibit 25).

13. At the time Grievant was assigned to the small office formerly occupied by the temporary employee, more adequate office space was available to assign to Grievant in addition to his former office, including Barton's former office.

14. Prior to January 2, 1992, Incerpi approached Wentworth and informed him that Grievant would be reinstated. Incerpi informed Wentworth that Grievant would be assigned to a job which was the wildlife equivalent of Rod Wentworth's job as impact assessment specialist. Wentworth's job duties required him to be heavily involved in the environmental assessment of hydro relicensing projects, among other things. During this conversation, Incerpi asked Wentworth for ideas about possible job duties which could be assigned to Grievant. In asking Wentworth for ideas about jobs for Grievant, Incerpi made it

clear that Van Zandt had determined that Grievant would not be assigned supervisory, managerial or administrative duties. Wentworth prepared a document entitled "Jobs for Ben". These "jobs" were merely ideas and suggestions, and were not intended by Wentworth to be a complete job description or a full slate of projects (Grievant's Exhibit 27).

15. The job duties suggested by Wentworth were adopted by Incerpi nearly verbatim, without addition, as a list of "jobs" for Grievant. The listed "jobs" were: 1) review of hydro relicensing applications and attendance at weekly hydro team meetings, 2) department representative at Act 250 meetings, 3) dam safety certification for VELCO wetland, 4) dam safety review procedure, 5) establishing more guidelines for Act 250 permit review decision making, 6) environmental information and education services, and 7) participation on various teams (Grievant's Exhibit 28).

16. On January 2, 1991, Van Zandt sent Grievant a letter which stated:

You are to report for work on Monday, January 6, 1992. You are expected to report at 7:45 a.m. Your work schedule will be 7:45 - 4:30 with 45 minutes for lunch, unless an alternative is approved in accordance with Agency Policies.

You are to report to your immediate supervisor, Angelo Incerpi, Operations Director. Your duties will include working on the Wildlife Impact Assessment project, and your position will be reclassified to the duties of a Fish and Wildlife Impact Assessment Specialist, PG-21.

I will meet with you and Angelo to discuss any questions you may have regarding this assignment, and to go over the general specifications of this job.

(Grievant's Exhibit 26)

17. The "wildlife impact assessment project" identified by Van Zandt did not exist at the time of his letter and never existed.

18. On or about January 6, 1992, Grievant's attorney, Scott Cameron, spoke to Charly Dickerson of the Department of Personnel for the purpose of determining how Grievant's salary would be affected by the personnel action which Van Zandt, in his January 2 letter, had advised would be forthcoming (i.e., reclassification of the position to "Fish and Wildlife Impact Assessment Specialist, PG 21"). Dickerson informed Cameron that the reclassification action would not result in a reduction in Grievant's salary, since under the Personnel Rules and Regulations it would be treated as a downward reallocation through no fault of the employee.

19. On January 8, 1992, the State Department of Personnel issued a Notice of Action, reclassifying the position to which Grievant had been assigned upon reinstatement. The Notice of Action makes it clear that Grievant was never reinstated to his former position as Director of Wildlife, Pay Grade 27. Instead, Grievant's position was reclassified to Fish and Wildlife Impact Assessment Specialist, Pay Grade 21. The effective date of the action was January 5, 1992. The Notice of Action taken by the Department of Personnel was based on a Request For Classification form completed by the Employer without Grievant's involvement (Grievant's Exhibit 46).

20. Grievant was not provided with a copy of the Notice of Action or the completed Request For Classification form until

April 23, 1992. At no time prior to April 23, 1992, was Grievant aware that his position had been reclassified.

21. Upon his return to work on January 6, 1992, Grievant met with Incerpi. Grievant asked Incerpi whether he would perform his duties as Director of Wildlife. Incerpi informed Grievant that was "not in the cards", that Van Zandt would "not hear of it". Incerpi handed Grievant the list of "jobs" discussed above in Finding #15, and discussed the list with Grievant. Incerpi also gave Grievant a class specification for a Fish and Wildlife Impact Assessment Specialist. Incerpi provided Grievant with no other direction as to his job duties on January 6 or any other relevant time (Grievant's Exhibits 28, 29).

22. After meeting with Incerpi on January 6, Grievant returned to his old office, which he thought was assigned to him since no one had told him otherwise. Wentworth then told Grievant that he was going to be assigned to the office formerly occupied by the temporary employee who worked for Scott. Grievant went to that office. The office contained his former desk and chair, but no other furniture. He had no bookcase, no chair for visitors, no file cabinet and no supplies. In short, no effort had been made to prepare this space for Grievant's return.

23. The office was long and narrow, measuring 12'9" by 8' (103 square feet). Grievant's former office had measured 11.5' by 11.5', or 132 square feet. Once Grievant's desk was placed in the new office, it was hard to get around either side of it. There was no room for a file cabinet. Since he had no bookcase, all of Grievant's materials had to be kept in boxes stacked in the

office. Only one person could visit Grievant in the office at a time; if two persons were involved in a discussion one had to stand in the doorway. Unlike all other offices in the Department's central office, Grievant's new office was the only one whose door did not open into the main corridor. The door opened into another office, which was occupied by a temporary employee at times.

24. During the afternoon of January 6, Grievant met with Van Zandt and Incerpi. Van Zandt informed Grievant that the duties he had been performing as of January, 1991, were now assigned to Joe Healy. Van Zandt said something to the effect of "you and Joe are friends, and we know that you don't want him not to do these things." Also, at some point during his meeting with Incerpi and Van Zandt, Grievant (who was a high ranking officer in the Vermont National Guard) indicated that he would have to take some military leave in January and February. Incerpi stated that military leave can be abused. Grievant asked Incerpi what he meant by that comment, and Incerpi stated that he was not talking about Grievant.

25. The "jobs" to which Grievant was assigned were nowhere near sufficient to occupy Grievant's work time. The hydro relicensing work resulted in several day trips for Grievant, and attendance at weekly meetings where Grievant had nothing to contribute. Grievant's attendance at Act 250 meetings, which previously had not been attended by a Department representative for approximately four years, was unproductive. Wildlife biologists did a good job on these issues, resulting in no need

for another wildlife representative to attend these meetings. The dam safety work necessitated less than two days of Grievant's time. The Act 250 guidelines work was being done by Lawrence Garland, a district coordinator, and Garland did not need further help. Grievant did spend a substantial amount of time helping Mark Scott on reviewing education materials. The work performed by Grievant in this regard was entry level work formerly done by temporary employees.

26. At some point in January, 1992, Grievant inquired of Incerpi about being put on Department teams. Incerpi did not follow up on this oral request. On February 17, 1992, Grievant informed Incerpi in writing that he wished to be placed on the deer, nongame and bear teams (Grievant's Exhibit 34). Incerpi never responded to this request of Grievant. On April 20, 1992, Grievant asked Incerpi in writing: "Where are my committee assignments?" (Grievant's Exhibit 45). Incerpi never responded to this request. Grievant was the only professional in the Department not assigned to a team, and most professionals were assigned to more than one team.

27. Although Grievant did not have enough assigned duties to keep him busy, he tried to find other work which needed doing. Work performed by Grievant included moving boxes from the cellar, loading and unloading the materials from trucks, cleaning up storerooms, going through old mail to answer correspondence and direct information to biologists in the field, and working with Scott in responding to correspondence from other states pertaining to information and education requests. The type of

work which Grievant performed for Scott was normally performed by temporary, entry-level employees. Little of Grievant's work involved use of his advanced professional abilities as a biologist, and none involved use of his extensive management experience.

28. At various times from January until March 6, 1992, Grievant made efforts to make his superiors aware of the fact that he had very little to do, and that the work he was performing was not appropriate for his education, experience and ability. On January 7, 1992, Grievant told Incerpi that there was not enough work to keep him busy. In February, during a staff meeting when others were complaining about having more work than they could handle, Grievant told everyone, with Incerpi present, that he had very little work to do and was willing to help anyone handle their extra work.

29. At the time Grievant was reinstated, Van Zandt's secretary, Bonnie O'Meara, inquired of Incerpi as to whether Grievant should be given the agendas for the coordinators meetings and invited to those meetings. Incerpi informed O'Meara that Grievant would not be attending the coordinators meetings, and that there was no need to provide him with the agenda for these meetings. Incerpi told O'Meara that policy was discussed and made in these coordinators meetings, and Grievant should not be included. Subsequently, Grievant was not provided with agendas of meetings, nor invited to attend these meetings, which were open only to staff who were invited or had a specific agenda item to discuss. Grievant was excluded from these meetings even though

the Department's other Fish and Wildlife Impact Assessment Specialist, Rod Wentworth, regularly attended the meetings. Subsequently, Wentworth was excluded from coordinator meetings beginning in the Spring of 1992, after Grievant complained about being excluded from such meetings. Also, Grievant was not provided with copies of the minutes of these meetings and had to obtain copies of them from Wentworth.

30. In addition, Grievant was specifically excluded from one coordinators meeting where he happened to be in the room at the time the meeting began. Grievant was sitting at a table in the room with other staff who had attended an earlier meeting in the room. Incerpi told Grievant that they were having a coordinators meeting, and that Grievant "didn't need to stay." Grievant was the only person who was asked to leave the meeting.

31. At a coordinators meeting in March or April, 1992, Incerpi discussed the issue of transferring Act 250 duties normally performed by wildlife biologists in the field to Grievant. The coordinators unanimously indicated that it was not a good idea to have a central office staff person perform these Act 250 field duties. This would have been a major change in Department policy, and would have had a major impact on Grievant's job duties. Grievant was not given notice that this topic would be discussed, nor was he invited to the meeting.

32. Staff in the central office, as well as field staff who came into the central office, made remarks to Grievant about the office to which Grievant was assigned. Based on the comments, it was clear that other staff perceived this office assignment as

punishment to Grievant for grieving the 1991 layoff, and prevailing in such grievance. The most frequent comment to Grievant was that he was a "bad boy"; that he had "fought the system". Kapusta remarked to Grievant in a joking manner that if Grievant "continued to mess up, (Grievant) would be assigned to the dumpster."

33. Although the office to which Grievant was assigned was wired for a computer, and a computer had formerly been in that office, the computer was removed before Grievant moved in. Grievant believed he needed a computer to track and disseminate information regarding Act 250. Grievant went to the Learning Center in Montpelier in February, 1992, and signed up for courses designed to make him computer literate. He also spoke to Sandy Barton, the Business Manager, in March of 1992 and informed her that he wanted to order a computer and that he had signed up for computer training. Barton told Grievant not to bother with the training, because she would teach him everything he needed to know. She also told him that she would order the computer. In fact, Barton never ordered the computer. Grievant spoke to Barton in March, 1992, about the status of the computer he had requested. Barton told Grievant that she had ordered the computer, even though she had not ordered it.

34. Grievant tried to locate his bookcase after his return to work, and discovered that another employee was using it. Since the bookcase was being productively used, Grievant did not desire to take it away from another employee. Grievant contacted Bob Horton, an Agency employee, who told Grievant that he would build

Grievant a bookcase. Grievant told Barton that Horton would be building a bookcase to alert her that Horton would be submitting a voucher for payment for materials. The bookcase which Grievant ordered from Horton never arrived. Many months later, after hearings in this grievance began, Grievant contacted Horton. At this time, Horton informed Grievant that he never built the bookcase because, during a trip to the central office to remeasure Grievant's office, someone there had told him that there was no longer any need for it. Horton did not give Grievant the identity of the person who so informed him.

35. Following his return to work, Grievant did not have his mail delivered to him in a timely manner. Grievant first realized that he had a problem when he began receiving phone calls from persons inquiring as to why Grievant had not responded to correspondence that they had sent Grievant. In addition, journals and other professional materials were not reaching Grievant. On March 4, 1992, Grievant returned from military leave and found a manila folder on his desk containing sixteen pieces of mail, some of which was over seven weeks old. Barton had placed this folder on Grievant's desk. The diversion and delay of Grievant's mail was contrary to standard operating procedures in the central office. The mail of other employees was not being delayed (Grievant's Exhibit 36).

36. On February 6, 1992, Anne Noonan of the Vermont State Employees' Association wrote a letter to Van Zandt, which provided as follows:

I have been asked by employees in your department to express their concerns with your leadership in

regards to resource management, personnel relations, and administration.

The decision to bring these concerns to your attention is intended to ensure that you are aware that much dissatisfaction exists among employees of the department.

In discussion with the more than two dozen employees who asked to meet with me on this matter, it is clear that no one incident or issue prompted these concerns. An aggregate of actions and decisions on your part has led to a consensus that there is a lack of confidence in, and mistrust of, your leadership and management.

This, obviously, is a difficult message to deliver. The potential for remedial actions is yet unclear, and there is uncertainty as to your willingness to participate in actions which would alleviate these serious concerns.

If you so desire, a small group of representatives from the employees and I are available to discuss these concerns further with you.

(Grievant's Exhibit 71)

37. In response to this letter, Van Zandt informed Noonan that he would work with VSEA and the employees to try to correct the problems. Subsequently, by April 23, 1992, a decision was made to convene a joint labor-management committee which would include Van Zandt, Commissioner of Personnel Patricia DeGraw, Agency Secretary Jan Eastman and representatives of employees. Eastman and DeGraw told the employees at an April 23 meeting that all issues would be open for discussion, and specifically indicated that the organizational structure of the Department was open for review (Grievant's Exhibits 53, 54).

38. By March of 1992, Grievant concluded that his superiors in the Department were not going to allow him to assume job duties which involved the substantial exercise of his

professional and management skills. On March 6, 1992, Grievant delivered a letter to Van Zandt. Grievant sent copies of the letter to Governor Howard Dean, Secretary Eastman and Incerpi. The letter provided, among other things, as follows:

Having survived the fallout of the VLRB opinion, you decided to reinstate me. You had another opportunity to change things for the better at that time. You knew as well as anyone (since you had been told many times by your staff) that the reorganization was not working. Despite any personal feelings I might have, I would have been glad to work with you to try to address the structural problems in the Department. I would have been glad to take some of the administrative and supervisory load off Angie's shoulders. We could have worked together, along with the other employees in this Department, to define the needs of the Department and to change our organizational structure as necessary.

To my great disappointment, none of this has happened. Although my old office had remained vacant since I was originally reduced in force, you didn't even have the courtesy to let me reoccupy my old space. Instead, you sent a statement to all the other employees by sending me off to a cubbyhole down the hall. Instead of utilizing my education, knowledge and experience in a suitable (and extremely necessary) role, you assigned me to duties which are not necessary, and which could be staffed by an entry level biologist.

I have worked at the entry level biologist duties you've assigned me for the past two months. It is glaringly evident to me that these make-work projects are not challenging enough to keep any trained person busy, much less a biologist with two pertinent degrees and 35 years of experience. Not only do I consider the minor efforts I am undertaking not worth doing (for the simple reason they are already being done), but they are in direct contradiction to the VLRB ruling and a virtual waste of the \$50,000 per year salary paid to me by the license buying sportsmen of the State.

What is equally evident and needed acutely in this Department is for an experienced administrator to immediately address the supervisory and administrative shortcomings that the biologists have repeatedly brought to your attention. Nowhere in the current Department structure is there a senior wildlife biologist to fill that need . . .

(Grievant's Exhibit 35)

39. Grievant made no attempt to make this letter public. A reporter from the Rutland Herald, a daily newspaper, learned of the letter from a representative of the Governor, and interviewed Grievant and Van Zandt. There was an article on the issue in the March 10, 1992, edition of the Rutland Herald.

40. After this article and other news accounts appeared citing Grievant's dissatisfaction with his job assignments, District Coordinator Lawrence Garland wrote two memoranda to Incerpi on March 13 suggesting assignments for Grievant. Incerpi never met with Grievant to discuss any of the suggested assignments made by Garland, nor did he ever assign any of the suggested duties to Grievant (Exhibits 39, 40).

41. One of the assignments suggested by Garland was to name Grievant as the general chair of the 1994 Northeast Fish and Wildlife Conference, which was to be held in Vermont in 1994. The general chair assignment was a major responsibility which required nearly a full-time commitment. Grievant was the only employee of the Department who had experience serving in the capacity of general chair for such a conference. Grievant chaired the conference when it was in Vermont in 1973 and 1983. Incerpi was aware of Grievant's prior experience with this assignment, yet made no effort to discuss the assignment with him to see whether he would be interested. Incerpi told Van Zandt that he thought Grievant would be good as general chair, but neither Van Zandt nor Incerpi followed up on this discussion.

42. In a memorandum dated March 27, 1992, Van Zandt responded as follows to Grievant's March 6 letter:

I was surprised and disappointed by your March 6 letter. I disagree with much of what you say. Nevertheless, I intend to look forward, not back, and will reply in that spirit.

Your letter suggests that your assignments do not make appropriate use of your time or of your training and experience. I would ask that you submit a list of suggested additional tasks to Angelo Incerpi. I will then meet with Angelo and discuss our combined ideas on supplemental assignments for you.

I intend to work with staff at both the Department of Personnel and the Department of Fish and Wildlife in the coming months to consider organizational and structural modifications which may be appropriate. I will welcome input from you and all other employees of this Department in that process.

(Grievant's Exhibit 41)

43. Van Zandt's memorandum arrived on Grievant's desk sometime between April 2 and 14, 1992. Grievant first became aware of the memorandum on April 14 upon his return from sick and military leave. Grievant responded to it immediately by writing a memorandum to Van Zandt. Grievant set forth suggested additional duties, most of which involved the exercise of substantial administrative or managerial authority. Many of the duties set forth by Grievant had been performed by him as Director of Wildlife for many years (Grievant's Exhibit 43).

44. By memorandum of April 16, 1992, Van Zandt informed Grievant that he had received Grievant's April 14 memorandum and would "meet with Angelo and discuss our combined ideas on supplemental assignments for you" (Grievant's Exhibit 44). However, Van Zandt and Incerpi never met to discuss supplemental

assignments for Grievant, and never provided Grievant with supplemental assignments.

45. The workload of professionals in the central office, and Department professionals generally, was high at all times relevant. Also, as a result of the reorganization, there were tasks not being done which had been done prior to the reorganization.

46. Department employees were aware that Grievant had succeeded in his grievance against the Employer in Docket No. 90-48. Upon his reinstatement, employees perceived that Grievant was out of favor with management, primarily due to his office space and job assignments. Several employees were afraid to be closely associated with Grievant for fear that they too would be in disfavor.

47. By May of 1992, Grievant's health was being seriously affected by his work environment. Grievant was extremely frustrated with the limited job duties assigned to him. Grievant began to experience a variety of health problems, including high blood pressure, sleeplessness, stomach problems and depression. Grievant began to miss work during the month of May due to these problems.

48. Grievant was out of work on sick leave on May 11, 12 and 13. On May 14, he came to work early and met with Garland. Garland told Grievant that he had been missed the previous day as there had been a meeting of biologists. Grievant had not received notice of the meeting, which upset him. Garland described this meeting, and told Grievant that employees from three different

branches of the Department had stated that the 1990 Department reorganization was done for the sole purpose of getting rid of Grievant. When Grievant left this meeting with Garland, he was very upset. As Grievant walked down the corridor, he passed Van Zandt. Van Zandt said in a normal voice: "good morning, Ben, how are you?" Grievant responded in a sarcastic voice: "great, just great". Van Zandt then said in a sarcastic voice: "Good, I'm glad to hear that." Following this interchange, Grievant was so angry that he nearly grabbed Van Zandt but stopped himself before doing that. Upon advice of his attorney, Grievant then left work and made an appointment to see his physician.

49. Grievant saw his physician on May 18, 1992. The physician asked him questions about his work situation and other events in his life. The physician noted Grievant's high blood pressure, and concluded that Grievant was affected by a situational stress syndrome due to the conditions at work. The physician advised Grievant not to return to work. On June 2, 1992, the physician sent a letter to Van Zandt which stated:

Due to incapacitating stress syndrome related to his work environment, I have advised my patient Ben Day, to apply for a medical leave of absence until further notice. As soon as medical therapy and his clinical improvement warrant, Ben will return to his normal duties. At this time I cannot project what that time frame will be (Exhibit 47).

50. Grievant has not returned to work since May 15, 1992. The Department has not reassigned any of the duties performed by Grievant to any other person.

51. During the period from Grievant's reinstatement in January of 1992 to May 15, 1992, Grievant worked a total of 59

grievance procedure. AFSCME, Local 490, Bennington Department of Public Works and Police Units v. Town of Bennington, 9 VLRB 195 (1986). Here, the employees have recourse to binding arbitration to resolve the underlying disputes and grievances are now pending. Thus, it is apparent the employees have an adequate redress for the alleged wrongs through the grievance procedure.

We recognize that the Union is not disputing that the underlying issues in this matter can be resolved through the grievance procedure, and that the gravamen of the Union's charge is that the City is seeking to undermine the effectiveness of the Union by forcing the Union to continually grieve and arbitrate issues which have already been decided through the arbitration process. We concur with the Union that an employer can violate its duty to bargain in good faith in such circumstances since this may undermine the union by making it economically difficult for the union to adequately represent employees. Burlington, 1 VLRB at 343.

Nonetheless, we are not prepared at this point, absent fuller exploration of the underlying issues which the grievance procedure will provide, to conclude that the City does not have a bona fide contract interpretation disagreement with the Union with respect to the underlying issues. As a consequence, we believe it is appropriate for the grievance procedure to run its course. Thus, we defer to the grievance procedure and do not rule on the unfair labor practice charge at this time. The contractual remedies should be exhausted before issuance of an unfair labor practice complaint.

Such deferral does not necessarily end our consideration of this matter. The Board retains jurisdiction for the purpose of

OPINION

The drama has changed in its particulars but not in its fundamentals. The events since Ben Day's reinstatement following our previous decision have stirred an agonizing echo of the previous malfeasance and misfeasance. Our previous judgment carried a message of serious reproach, a message which senior management of the Department of Fish and Wildlife has chosen to ignore.

Along with *mismanagement*, the *Commissioner of Fish and Wildlife* has displayed a wanton and willful disregard of the basic requirements of good faith, fair dealing and civility owed to all state employees. Such conduct and attitudes as displayed in this case are intolerable and should forever be out of bounds.

Grievant contends that he was subject to discrimination for political reasons, and was also retaliated against for filing his earlier grievance in Docket No. 90-48. Grievant contends that, following reinstatement, he was subject to a variety of discriminatory and retaliatory actions, involving, among other things, assignment of inadequate office space, assignment of insufficient duties, exclusion from meetings, untimely delivery of mail and reclassification of his position. Grievant alleges that the actions of the Employer furthered a continuing pattern of discrimination and retaliation against him.

At the outset, we reject the Employer's claim that Grievant failed to grieve these actions in a timely manner. Grievant did not know of the reclassification of his position until well after his reinstatement, and then grieved that issue in a timely

manner. Also, Grievant acted reasonably by waiting to grieve his assignment of duties until it became evident to him over time that management was not going to provide him with substantial duties. The other issues, including assignment of office space, are significant as contributing to a continuing pattern of discrimination and retaliatory action, as opposed to necessarily indicating discriminatory and retaliatory actions by themselves. By not grieving each of these individual actions immediately, Grievant did not waive his right to contest the actions as part of his comprehensive and continuing grievance.

In addressing Grievant's claims that he was subject to discrimination for political reasons, and was also retaliated against for filing his earlier grievance in Docket No. 90-48, we analyze each of these claims separately. In so doing, however, we do not mean to imply that the motivation behind management's various actions in this matter can be neatly placed in one category as opposed to the other. In fact, we ultimately conclude that management's actions in this matter resulted from a combination of discrimination for political reasons and retaliation against Grievant due to the filing of, and his prevailing in, his earlier grievance.

Discrimination for Political Reasons

In our previous decision involving Grievant, we concluded that Grievant was protected against discrimination for non-partisan, as well as partisan, political reasons pursuant to Article 5 of the Contract and 3 VSA §312. 14 VLRB at 281-85, 293. In that decision, the Board concluded that Commissioner Van Zandt

improperly laid off Grievant due to discrimination based on Grievant's involvement and visible identification with the political issue of antlerless deer seasons. Id. at 293-301. The Board was persuaded that Van Zandt terminated the employment of an employee who was closely identified with the support of a deer herd management position recommending antlerless deer seasons which Van Zandt, and a vocal segment of the Department's constituency, had publicly opposed Id. In the grievance now before us, Grievant contends that the actions of the Employer upon his reinstatement, following the earlier grievance, constitute a continuing pattern of discrimination for political reasons.

The analysis to be applied in determining whether discrimination occurred for political reasons generally is the same as that applied when discrimination based on sex, race, national origin, or age is alleged. Id. at 293. Only those modifications are made which are consistent with the nature of the alleged discrimination. Id.

In cases such as this one, where the employee alleges that the reasons articulated by the employer for actions taken against the employee are a pretext for discrimination, the analysis used is that which is set forth in Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981). Id. at 286-87, 293. First, the complainant carries the initial burden of establishing by a preponderance of the evidence a prima facie case of discrimination. Id. If the employee succeeds in proving a prima facie case, then the burden is shifted to the employer to

articulate a legitimate non-discriminatory reason for the employer's actions. Id. Finally, if the employer carries this burden, the employee must then prove by a preponderance of the evidence that the legitimate reasons offered by the employer were not its true reasons, but were a pretext for discrimination. Id. The ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the employee remains at all times with the employee. Id.

Thus, we first must determine whether Grievant has made out a prima facie case of discrimination for political reasons. In order to make out a prima facie case, Grievant must demonstrate that he was involved in activities with political implications, that he was treated less favorably than employees not involved or visibly identified with the activity involving political implications, and that the Employer's treatment of him occurred in circumstances giving rise to an inference of discrimination. Day, 14 VLRB at 293.

In applying that analysis here, Grievant has made out a prima facie case. As discussed at length in our decision in Docket No. 90-48, Grievant was actively involved and visibly identified with the political issue of deer herd management. Day, 14 VLRB at 293-94. Further, the evidence before us demonstrates that Grievant was treated less favorably than employees not so visibly identified with this issue, and that the Employer's treatment of him gives rise to an inference of the continuance of the proscribed discrimination.

The most significant and striking indication of this is the reclassification of Grievant's position and the assignment of job

duties to Grievant upon his reinstatement. In making Grievant whole as a result of his discriminatory layoff, the Board ordered that Grievant "be reinstated to the position which he occupied . . . at the time of his layoff." Id. at 301-02, 304. The position which Grievant occupied at the time of his layoff on January 4, 1991, was entitled Director of Wildlife, and the pay grade for the position was 27. The duties which Grievant was performing at the time of his layoff on January 4, 1991 involved land acquisition and management. He also assisted the wildlife staff by answering correspondence and performing biological work on projects and performing other duties on an ad hoc basis. These were not duties formerly assigned to the Director of Wildlife prior to the July 1990 Department of Fish and Wildlife reorganization.

The Employer contends that the Board decision in this regard was ambiguous, since the pay grade and position title did not match Grievant's job duties at the time of his layoff. The Employer contends that this justified reinstating Grievant at a pay grade 21 Impact Assessment Specialist position. We do not believe any objective reading of the Board order could come to such a conclusion. The position which Grievant occupied at the time of his layoff was a pay grade 27 position, not a pay grade 21 position, and no classification action had been instituted at the time of his layoff to change this pay grade.

Although Grievant was not performing Director of Wildlife duties at the time of his layoff, no classification action had been instituted to change the classification position to reflect

such change. In issuing the earlier decision, the Board recognized that Grievant's duties changed after the reorganization. However, the Board also made it clear that its intent was to make Grievant "whole" due to management's discriminatory action. Id. at 301-02. In such circumstances, the action of reinstating Grievant to a position which was six pay grades lower with substantially reduced duties upon his reinstatement raises an unmistakable inference of continuing discrimination for political reasons.

A consideration of the duties actually performed by Grievant upon his reinstatement further support this conclusion on our part. The duties assigned him were insignificant and limited, which raises an inference of discrimination particularly given Grievant's qualifications and experience. Grievant was a manager with 27 years of service in the Department, during which his performance was exemplary. Id. at 294. He was well respected by professional colleagues not only in the Department and Vermont, but was held in high esteem on a national and international level. Id. There could be few management actions raising a stronger inference of discrimination than providing such an employee with almost nothing of substance to do.

The inference of discrimination is even stronger when the realities of the situation in the Department are considered. An obvious weakness in the Department's 1990 reorganized structure is the lack of an individual in central office who is responsive to the needs of the Department's wildlife professionals. The evidence before us indicates that this is a central problem with

respect to the management of the Department. Management cannot credibly claim ignorance of this fact given extensive requests, discussions and proposals within the Department with respect to creating a position in central office to address this fundamental problem. Under these circumstances, to give Grievant, the ideal person to address these problems, no duties of substance to actually help address these problems raises an unmistakable inference of discrimination against Grievant based on political reasons.

There is no evidence of any other employee being given insufficient and insubstantial work to do given their experience. The only other impact assessment specialist in the Department, Rod Wentworth, had a great deal of substantive work to do. Wentworth was included in coordinators meetings, while Grievant was not, and the evidence indicates no legitimate basis to distinguish between Wentworth and Grievant in this regard. Every other professional in the Department was assigned to at least one team, most of them to more than one team, while Grievant was assigned to none.

The insufficient and insubstantial nature of Grievant's duties is so striking as to cast a long shadow over all other actions with respect to Grievant. The assignment of inadequate office space in a far corner of the Department's central office raises an unmistakable inference of continuing discrimination for political reasons, particularly when accompanied by the assignment of insufficient duties. At the time management knew Grievant was to be reinstated, Grievant's old office was

available. Yet, management assigned Grievant's old office to the hunter education coordinators, rather than Grievant. This was particularly suspect given that management had indicated to the supervisor of hunter education coordinators previously, before deciding to reinstate Grievant, that the coordinators could not be assigned to the central office at that time because there was not enough room.

Also, under all the circumstances, an inference of discrimination exists with respect to the failure to provide Grievant with a computer or a bookcase, and the diversion and delay of Grievant's mail. Grievant had made legitimate requests for the computer and bookcase, and it is suspect that he never received them. The diversion and delay of Grievant's mail was suspect given that the mail of other employees was not being delayed.

Grievant having established a prima facie case, the Employer is then required to articulate legitimate, non-discriminatory reasons for its actions. Day, 14 VLRB at 296. The burden that shifts to the Employer is to rebut the presumption of discrimination by producing evidence that actions taken against Grievant were for legitimate, nondiscriminatory reasons. Burdine, 450 U.S. at 254. The Employer need not persuade us that it was actually motivated by the proffered reasons. Id. It is sufficient if the Employer's evidence raises a genuine issue of fact as to whether it discriminated against Grievant. Id. To accomplish this, the Employer must clearly set forth, through the introduction of admissible evidence, the reasons for its actions.

Id. at 255. The explanation provided must be legally sufficient to justify a judgment for the Employer. Id. The Employer must produce admissible evidence which would allow us rationally to conclude that the Employer's actions had not been motivated by discriminatory animus. Id. at 257. If the Employer fails to meet its burden of production, then Grievant prevails on his claim of discrimination as a matter of law. St. Mary's Honor Center v. Hicks, 61 LW 4782, 4784 (1993).

The Employer has articulated no legitimate, non-discriminatory reason for reinstating Grievant to a pay grade 21 position. The Employer cannot do so given the Board decision ordering reinstatement of Grievant to the pay grade 27 position which he occupied at the time of his layoff.

The Employer justifies its assignment of insufficient and insubstantial duties to Grievant on the grounds that Grievant did not make management aware that he did not have enough work to do until his March 6, 1992, letter to Van Zandt, which was two months after he was reinstated. The Employer justifies the failure to address the assignment of duties problem after receiving this letter on the grounds that Grievant took a significant amount of leave after March 6, and began long term sick leave by mid-May, 1992. The Employer's evidence with respect to this area at least raises a genuine issue of fact as to whether it discriminated against Grievant.

The Employer justifies its assignment of office space to Grievant on the basis that the hunter education coordinators needed Grievant's old office space, and the only space which the

Employer could assign Grievant was the space ultimately assigned him. Management apparently justifies the failure to provide Grievant with a bookcase and computer, and the delay and diversion of his mail, on the grounds of these things just "falling through the cracks" in a busy office. The Employer's evidence with respect to these areas at least raises a genuine issue of fact as to whether it discriminated against Grievant.

The Employer having sustained its burden of production in part in articulating legitimate, non-discriminatory reasons for its actions, Grievant must prove by a preponderance of the evidence that the legitimate reasons offered by the Employer were not its true reasons, but were a pretext for discrimination for political reasons. Id. Our "disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination," as stated by the Court in Hicks, 61 LW at 4784.

Management's justifications for assigning insignificant and limited duties are not supported by the weight of the evidence. The Employer's claim that Grievant did not make management aware until March 6, 1992, that he did not have enough work to do is belied by the entirety of the evidence. On January 7, 1992, Grievant told Incerpi that there was not enough work to keep him busy. In February, during a staff meeting at which Incerpi was present, Grievant stated that he had very little work to do and was willing to help anyone handle their heavy workload. Also, Grievant tried on different occasions prior to March 6 to have

Incerpi assign him to Department teams, but Incerpi did not respond to such requests. Under these circumstances, the Employer cannot credibly claim ignorance of Grievant's lack of work.

The Employer's justification for not assigning Grievant more work of a substantial nature after March 6 similarly is belied by the entirety of the evidence. The Employer had more than two months to assign additional duties to Grievant before he went on sick leave, yet Van Zandt and Incerpi never met to discuss supplemental assignments for Grievant, even though Grievant was informed that would happen, and never provided Grievant with any supplemental assignments.

In sum, we do not believe the Employer's proffered reasons concerning the assignment of duties to Grievant. Our disbelief of the reasons put forward, together with the elements of the prima facie case previously discussed, suffice under the circumstances to convince us that the proffered reasons constitute discrimination against Grievant for political reasons. The duties which the Employer assigned Grievant during the period of his reinstatement were so insignificant and limited as to be nothing short of grossly insulting and outrageous given Grievant's qualifications and experience. There could be few management actions more insulting, and demonstrating more discrimination, than providing such an employee with almost nothing of substance to do.

Management's actions are exacerbated by the realities of the situation in the Department. The evidence shows that there was a great deal of substantive work crying to be done. Staff was overworked and, due to the reorganization, tasks previously performed were no longer being performed. Also, as discussed

previously, a central problem which management was well aware of was a lack of an individual in central office who was responsive to the needs of the Department's wildlife professionals. There is no legitimate way for the Employer to justify its discriminatory and vexatious treatment of Grievant in this regard.

Under these circumstances, to give Grievant, the ideal person to address these problems, no duties of substance to actually help address these problems is glaring and a gross dereliction of management's responsibilities. There is something drastically wrong in the Department of Fish and Wildlife. In our earlier decision, we relied on Van Zandt's statement to the president of a statewide group of sportsmen and sportswomen that he "got rid" of Grievant as contributing to the strong inference of discrimination based on political reasons. Id. at 296. In this case, Van Zandt essentially "got rid" of Grievant for all intents and purposes by hiding him in a far corner with little of substance to do.

Management's actions with respect to assignment of duties is not only grossly insulting and discriminatory towards Grievant, it constitutes an indefensible and reprehensible use of public monies. Upon his reinstatement, Grievant was paid an annual salary of approximately \$50,000 to do little of substance when a great deal of substance needed to be done. How can Commissioner Van Zandt possibly justify such a situation? The short answer is he cannot.

Other management actions must be examined in light of the outrageous management actions with respect to assignment of duties to Grievant. Contrary to the Employer's assertion, the

evidence indicates other office space was available than the space Grievant was assigned. In addition to Grievant's old office, which was available at the time the Employer knew Grievant was to be reinstated, the business manager's former office was available. Also, the Employer's claim of a need for the hunter education coordinators to occupy Grievant's old office space is belied by the entirety of the evidence. Incerpi had indicated only a short time previously that there was not enough room in the central office for the coordinators, and the Employer's evidence does not indicate what had changed in the interim to suddenly create this pressing need.

Under the circumstances, we conclude that the assignment of inadequate office space to Grievant was a very visible indication that Van Zandt continued to discriminate against Grievant for political reasons. Van Zandt seeks to avoid the blame for this assignment of office space, and with respect to other areas, by claiming that he delegated responsibility to Angelo Incerpi, Director of Operations. We are not blind to this transparent attempt to avoid fault.

We similarly conclude with respect to the computer, bookcase and mail issues. Although standing by themselves these incidents could be construed as "things falling through the cracks" in a busy office, given all the circumstances we conclude that they indicate part of the continuing pattern of discrimination against Grievant for political reasons.

In sum, we conclude that the Employer's actions in this matter constituted continuing discrimination against Grievant for

political reasons. In the Board's earlier decision concluding that the layoff of Grievant was due to discrimination against Grievant for political reasons, the Board stated at 14 VLRB 300:

. . . (W)e conclude that the Employer's articulated reasons of reorganization and lack of funds for Grievant's ultimate termination of employment were not the real reasons for such action. Also, it is evident that there is an absence of any reasonable basis under the circumstances for the termination of Grievant's employment. We are struck by the fact that the only Department employee whose employment was involuntarily terminated as a result of the reorganization and budget restrictions was Grievant, a politically unpopular employee with a vocal segment of the Department's constituency. It stretches credibility that Van Zandt could find no place in the Department for an internationally recognized, 27-year manager of the Department with a superlative performance record, but could find employment for all other Department employees.

Similarly here, we conclude that the Employer's articulated reasons for its actions are not the real reasons. Also, there is no reasonable basis under the circumstances for these actions. We are struck here too by the fact that the only employee who was treated so disgracefully was Grievant, a politically unpopular employee. It is not at all credible that Van Zandt could find no meaningful employment for Grievant, given his background and the serious problems in the Department. Van Zandt's treatment of Grievant, either directly or under his "management", was calculated and highly improper. Van Zandt's approach of essentially putting Grievant in a corner and ignoring him is no less reprehensible than aggressive discriminatory conduct. There is no place under any employment setting, never mind a civil service system explicitly based on merit, for such disgraceful management actions.

Retaliation for Grievance Activity

We turn to addressing Grievant's claim that he was retaliated against due to his filing of, and prevailing in, his earlier grievance before the Board. This claim can only fairly be considered under the circumstances as inextricably intertwined with Grievant's claim of discrimination for political reasons. In several previous grievances, where employees claimed management took action against them for engaging in protected activities, the Board has determined that it will employ the analysis used by the U.S. Supreme Court. Grievance of Sypher, 5 VLRB 102 (1982).

Once the employee has demonstrated his or her conduct was protected, the employee must then show the conduct was a motivating factor in the decision to take action against him or her. Then the burden shifts to the employer to show by a preponderance of the evidence it would have taken the same action even in the absence of the protected conduct. Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977). Sypher, 5 VLRB at 129. Among the protected activity cases where the Board has employed the so-called Mt. Healthy analysis have been cases involving grievance activity. Grievance of Cronin, 6 VLRB 37 (1983). Affirmed, Unpublished Decision, Supreme Court Docket No. 83-210 (February 4, 1987). Grievance of McCort, 16 VLRB 70 (1993).

The first step in the analysis is to determine whether Grievant actually was engaged in protected activity. Grievance activity is protected pursuant to Article 5 of the Contract, which prohibits the employer discriminating against employees for

filing grievances. Grievant was protected by this provision at the time of his reinstatement by his earlier filing of, and prevailing in, the grievance in Docket No. 90-48. Thus, he fulfills the first step in the Mt. Healthy analysis.

The second step in the analysis is that Grievant must show his protected conduct was a motivating factor in management's treatment of him upon his reinstatement. In Sypher, 5 VLRB at 131, the Board noted the guidelines it would follow in determining whether protected activity was a motivating factor in an employer's actions:

- whether the employer knew of the employee's activities;
- whether the timing of management's actions was suspect;
- whether there was a climate of coercion;
- whether the employer gave as a reason for the actions a protected activity;
- whether the employer interrogated the employee about the protected activity;
- whether the employer discriminated between employees engaged in protected activities and employees not so engaged; and
- whether the employer warned the employee not to engage in protected activities.

In considering these elements here, we first indicate that the Employer did not give as a reason for its actions the grievance activity of Grievant, did not interrogate Grievant about such activity and did not explicitly warn him not to engage in such activities. However, this is not of great significance. Employers rarely act so blatantly as to advertise their discriminatory conduct. An examination of the other elements set

forth in Sypher persuades us that the grievance activity of Grievant was a motivating factor in the various actions the Employer took against Grievant.

We need not elaborate on the obvious fact that the Employer knew of the grievance activities of Grievant. Also, the timing of management's actions was suspect. All the adverse actions previously discussed - reinstatement to a position six pay grades lower, insufficient and insubstantial assignment of duties, inadequate assignment of office space, failure to provide a computer and bookcase, and diversion and delay of Grievant's mail - all came on the heels of his reinstatement immediately following his successful grievance.

We also conclude that there was a climate of coercion. The insufficient and insubstantial assignment of duties, the assignment of inadequate office space in the far corner of the central office, and the exclusion of Grievant from meetings particularly sent a clear message to Grievant and other employees that prevailing against management in a grievance may severely impact working conditions and careers. It also sent a clear message to other employees that they too may be in disfavor if Van Zandt viewed them as aligning themselves with Grievant. The coercive effect on Grievant and other employees with respect to challenging management through filing grievances is evident.

Further, the Employer discriminated between Grievant and other employees not engaged in protected activities. As earlier discussed, no other employee was treated anywhere near as disgracefully as Grievant. In sum, recognizing that the

discrimination against Grievant for his grievance activity is intertwined with the discrimination against him for political reasons, we conclude that the grievance activities of Grievant were a motivating factor in the Employer's various adverse actions taken against him.

Thus, under the Mt. Healthy analysis, the burden is on the Employer to show by a preponderance of the evidence that it would have taken the same actions even in the absence of the protected conduct. The Employer must establish legitimate, non-discriminatory reasons for the actions. McCort, 16 VLRB at 114.

The Employer has woefully failed to meet such burden here. The actions of the Employer were not based on any legitimate reasons. The motivation for all of the adverse actions by the Employer were the intertwined reasons of discrimination for political reasons and discrimination for grievance activity.

We note that the blame in this disgraceful matter lies in part with the Department of Personnel. Personnel appears to have a blind faith in rationalism - if something happens there is a reason that automatically establishes the truth. At early stages, there is better reason to find out what is wrong, rather than to later justify, sometimes on a very narrow ground and on an adversarial basis, predetermined results. Personnel should be digging and asking the necessary questions, and that did not occur here.

Remedy

We turn to determining what remedy to apply for the egregious actions of the Employer. Grievant is entitled to be made "whole"; to make him whole is to place him in the position he would have been had the adverse actions not been taken against him. Grievance of Benoir, 8 VLRB 165, 168 (1985). We recognize that, in a very real sense, we can never make Grievant whole for the malfeasance of Van Zandt. However, it is our task to do whatever we can within our authority to make Grievant as whole as is possible.

Grievant has made various specific remedial requests, and we will discuss each of them in turn. Grievant requests that we order Van Zandt to cease and desist from retaliatory and discriminatory actions against Grievant. We conclude that this is appropriate in light of Van Zandt's egregious misconduct in this matter.

Grievant also requests that the Board order Van Zandt to assign Grievant to appropriate office space. We conclude that this is an appropriate remedy. Specifically, we conclude that it is appropriate to order Van Zandt to assign Grievant to the office space which he occupied at the time of his 1991 layoff, with appropriate equipment and amenities.

Grievant next requests that the Board order Van Zandt to recreate the position of Director of Wildlife, and assign Grievant to that position, with full managerial responsibility and authority over the Wildlife Division. In the alternative, Grievant requests that we order the Department to maintain Grievant in a leave of absence status until such time as an

appropriate supervisory or managerial job opportunity arises within the Department, at which time Grievant will be placed in the position.

The primary request by Grievant in this regard would result in the Board invalidating the entire 1990 Department reorganization if we were to order the recreation of the Wildlife Division. This would affect not only Grievant's position but presumably most of the professional positions in the Department. As serious as we find Van Zandt's conduct, we are not prepared to order such a result despite grave misgivings concerning the legitimacy of the reorganization. The alternative request by Grievant strikes us as inadequate to remedy the wrongs committed.

Instead, we conclude that it is appropriate to order the Employer to reinstate Grievant to a pay grade 27 position which appropriately matches Grievant's experience and background with the needs of the wildlife component of the Department. We believe that it is necessary to reinstate Grievant to a Pay Grade 27 position to make him "whole" for the Employer's egregious actions. We recognize that Grievant's pay was not reduced when his position was reclassified to Pay Grade 21. However, that does not mean that the action came without negative pay implications to Grievant. This is because such downward classification of his position affects the pay increases which he would be entitled to as his time in service progresses. This impacts not only the pay he would receive on a regular basis but also his retirement entitlement.

Also, to allow the Employer to design a position which consists of duties below a pay grade 27 level of responsibilities

very well could set into motion a scenario much like the one that has caused this grievance to come before us. This would do not only a grave disservice to Grievant, but also to the Department as a whole, and its constituency. The desirability of allowing a person of Grievant's qualifications and experience to apply himself to the obvious needs of the Department is evident.

We will not take it upon ourselves to specify the specific duties which Grievant should perform. However, we will require the Employer to design a job at a pay grade 27 level which appropriately matches Grievant's experience and background with the needs of the wildlife component of the Department, have it approved through the classification process, and place Grievant in the position. Once the classification process is completed, and a pay grade 27 position is established, the Board will conduct compliance proceedings to ensure the position makes Grievant whole for the Employer's discriminatory action.

Grievant further requests that we reinstate all the sick leave he has used to date as a result of the actions of the Employer which caused him to leave work after May 15, 1992. We note that the evidence now before us indicates that Grievant went on extended sick leave effective May 18, 1992, as a result of incapacitating stress syndrome due to his work environment. However, at the January 29 hearing, the Board indicated that it would defer this issue until the compliance proceedings in this matter.

Finally, Grievant requests that we order the Employer to post and publish a copy of the Board's order in appropriate places at all Department offices. Given the nature of the Employer's conduct, we agree that this is an appropriate remedy.

ORDER

NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the Grievance of Benjamin Day, Jr. is SUSTAINED, and:

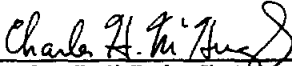
1. Department of Fish and Wildlife Commissioner Timothy Van Zandt and his agents shall cease and desist from retaliatory and discriminatory actions against Grievant Benjamin Day, Jr;
2. The Employer shall assign Grievant to the office space which he occupied at the time of Grievant's 1991 layoff, with appropriate equipment and amenities;
3. The Employer shall place Grievant in a pay grade 27 position which appropriately matches Grievant's experience and background with the needs of the wildlife component of the Department of Fish and Wildlife. By August 25, 1993, the Employer shall design a position which fulfills these requirements, and submit it for approval through the classification process. The classification process establishing a pay grade 27 position shall be completed by September 1, 1993;
4. The Labor Relations Board shall conduct compliance proceedings on September 9, 1993, at 9:30 a.m., at the Board hearing room, 13 Baldwin Street, Montpelier, to allow the parties to present evidence and argument as to whether the pay grade 27 position which is established makes Grievant whole for the Employer's discriminatory action. At the compliance proceeding, the parties also shall be prepared to present evidence and argument relating to Grievant's Motion to Amend concerning restoration of his sick leave;
5. Grievant shall be awarded back pay and benefits from the date of his January 6, 1992, reinstatement until the date he is placed in a pay grade 27 position pursuant to this order. Such back pay and benefits shall be computed based on the difference between entitlements for a pay grade 27 position and a pay grade 21 position during that period. The interest due Grievant on back pay shall be computed on gross pay and shall be at the rate of 12 percent per annum and shall run from the date each paycheck was due during the period commencing with his January 6, 1992, reinstatement, and ending on the date he is placed into a pay grade 27 position. At the compliance proceeding, the parties shall be prepared to present all relevant evidence on this issue if they are unable to agree on the amounts due Grievant;

6. Grievant shall continue to receive full pay and benefits pending the issuance of a final order by the Board in this matter; and

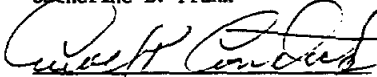
7. The Employer shall have available for review in Department offices a copy of the full decision of the Labor Relations Board in this matter, and shall post these Order pages of the decision in places in all offices normally used for employer-employee communications.

Dated this 24 day of August, 1993, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Charles H. McHugh, Chairman


Catherine L. Frank


Carroll P. Comstock