

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	
PAUL CARBONE)	DOCKET NO. 92-27
)	
VERMONT STATE EMPLOYEES')	
ASSOCIATION, INC. AND PAUL)	
CARBONE)	
)	
v.)	DOCKET NO. 92-54
)	
STATE OF VERMONT)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On May 29, 1992, the Vermont State Employees' Association, Inc. ("VSEA") filed an appeal with the Vermont Labor Relations Board on behalf of Paul Carbone challenging Carbone's dismissal, during his probationary period, from his position as a Fish Culturist with the State of Vermont, Department of Fish and Wildlife ("Employer"). Carbone alleged that he was dismissed for unlawful and discriminatory reasons in violation of 3 VSA §1001, 3 VSA §312(b)(5) and Article 5 of the collective bargaining agreement between VSEA and the State effective for the period July 1, 1990 to June 30, 1992 ("Contract"), and in violation of his constitutionally protected rights of free speech. Carbone alleged that he was dismissed for refusal to drop a housing discrimination suit, and his participation in protected free speech and union activities.

On October 23, 1992, VSEA and Carbone filed an unfair labor practice charge, claiming that Carbone's dismissal was an unfair labor practice under 3 VSA §961(1) and §961(3) because: 1) the Employer had interfered with, restrained and coerced Carbone in

the exercise of his right to assist employee organizations and his right to litigate claims of housing discrimination; and 2) the Employer sought to discourage membership in an employee organization by firing Carbone for being active in such an organization.

The cases were consolidated for hearing. Hearings were conducted before Board members Charles McHugh, Chairman; Leslie Seaver and Carroll Comstock on February 12, 19 and 25, 1993, in the Board hearing room in Montpelier. VSEA Counsel Jonathan Sokolow represented Carbone and VSEA. Assistant Attorney General Michael Seibert represented the Employer.

The parties filed briefs on March 19, 1993.

FINDINGS OF FACT

1. In May, 1991, Paul Carbone received a Bachelor of Science Degree in Environmental Science, with an emphasis in Aquaculture, from Unity College in Maine. After a two-month internship in fish disease treatment in Kennebec, Maine, Carbone was hired as a seasonal resource assistant by the Connecticut Marine Fisheries Department. Carbone's duties included general hatchery maintenance, disease diagnosis and treatment, fish care and cleaning of fish "rearing" units. Carbone performed his work in a satisfactory manner and left after two and one-half months of employment when he was hired by the State of Vermont (Grievant's Exhibit 14).

2. In the fall of 1991, Daniel Merchant was hired as the fish culture station supervisor for the soon-to-be opened Grand Isle Fish Hatchery. Merchant's supervisor was Thomas Wiggins,

Fish Culture Operations Chief, who oversees the State's hatcheries from his office in Waterbury. Monty Walker was hired to be assistant manager of the Grand Isle facility, and he reported to Marchant. After being interviewed by Marchant and Wiggins, Carbone was hired as a fish culturist, to begin on November 18, 1991. In addition to Carbone, five other fish culturists were ultimately hired: Jim Balligheri, Greg Bosart, Lila Lumbra, Dave Zadrosne and Sean Hipple (Grievant's Exhibit 1).

3. Because Carbone was unable to immediately find housing in Grand Isle, Marchant offered to allow Carbone to live in Marchant's home. Carbone lived with Marchant, and Marchant's wife and child, for two weeks in November, 1991. On December 1, 1991, Carbone, along with his fiancée and their child, moved into a rented apartment.

4. During the early part of Carbone's employment, he spent much of his time receiving training and observing the operation of the hatchery. In November or December, 1991, the hatchery received its first shipment of eggs. Carbone's duties included counting the eggs, picking out dead eggs and placing live eggs in incubation trays. By January, 1991, the eggs delivered to the hatchery had hatched into "fry. Carbone's duties at that point included picking out dead fry. He also was assigned to "walk throughs" of the facility to check on equipment and to receive ongoing training. Prior to January 9, 1991, Carbone had received no negative feedback regarding his performance.

5. On Christmas Day, 1991, Marchant invited Walker, Carbone and their families to his house for Christmas dinner.

While at Marchant's house, Carbone and his fiancée indicated their interest in finding less expensive housing. Walker informed Carbone that the apartment above his was vacant. Carbone asked Walker about the details, such as the amount of rent. In the course of their conversation, Walker indicated that when he first contacted the landlord, Andre Champagne, about renting the apartment, Champagne refused to rent to Walker because he had children and pets. Walker indicated further that, after he met with Champagne, Champagne did agree to rent to Walker. Marchant overheard this conversation between Walter and Carbone.

6. Within the next few days, Carbone spoke with Andre Champagne, Walker's landlord, who refused to rent to Carbone and his fiancée because they had a child. In late December or early January, 1992, Carbone filed a housing discrimination complaint, naming Champagne as defendant, with the United States Department of Housing and Urban Development ("HUD")

7. In late December, 1991, Carbone raised an issue as to whether the Employer's policy regarding payment for overtime work violated the Contract. Marchant had implemented from the outset an overtime policy which provided that management asked for volunteers to work overtime for compensation in the form of compensatory time rather than for cash.

8. Carbone contacted VSEA, which provided him with a copy of the Contract and informed him that the fish culturists were entitled to demand cash payment for overtime. Carbone raised the issue during morning staff meetings approximately three times in December and early January. Marchant informed staff he would seek further information on the Employer's policy from his superiors. In addition, Carbone discussed the issue with Walker.

9. By January 8, 1992, as a result of Marchant's inquiries, Sue McBride, an employee of the Agency's personnel office, called the Hatchery and spoke to Walker regarding the questions Marchant had regarding the overtime policy. McBride read to Walker Article 29(a), Section 6(a), of the Contract, which states that "(e)mmployees entitled to be paid cash for overtime may request compensatory time off at the applicable rate". McBride indicated that this meant that employees were entitled to be paid cash for overtime if they so desired.

10. Immediately after receiving the call from McBride, Walker spoke to Carbone and other employees about the issue. Walker told staff that McBride said employees could demand cash for overtime, but Walker said he preferred that employees take compensatory time. Walker also said he would have to talk further to Marchant on the issue. Walker informed Marchant of his phone conversation with McBride prior to January 9.

11. After Walker spoke to staff on the overtime issue, Carbone called the Agency payroll office and spoke to an employee named Barb. Carbone demanded that payroll compensate him in cash for overtime he had already worked. Carbone was adamant during this conversation.

12. On January 8, 1991, Barb spoke to Marchant regarding the issue Carbone had raised. She also spoke to Wiggins. After she described the situation, Wiggins authorized the payment of cash to Carbone. However, Wiggins was concerned that Carbone should have gone through his line authority and made his request through Marchant. In addition, Wiggins understood Barb to have been upset by Carbone's behavior during the call. Wiggins then

called Marchant to tell him that he would pursue the cash payment for overtime issue. Wiggins told Marchant that Carbone should not have gone outside the line authority and upset another employee.

13. Neither Marchant nor Walker knew prior to January 9, 1992, that Carbone had filed the HUD complaint.

14. Due to his concerns and those of Wiggins regarding Carbone's call to the Agency payroll office, Marchant decided to talk to Carbone after the morning staff meeting on January 9, 1992. In that meeting, Marchant told Carbone that he wanted all staff to use Marchant to pursue issues of Contract administration or interpretation. Marchant said that Carbone had stepped on his toes as his supervisor by not going through the chain of command on his demand for cash overtime compensation and his call to the Agency payroll office. Marchant did not request that Carbone abandon his demand for cash payment of overtime which he had made to Barb in the Agency payroll office. He told Carbone that Wiggins was pursuing the issue. Marchant was upset during the meeting with Carbone. At one point, he referred to Carbone as "hon". Marchant expressed to Carbone his concern that Carbone's failure to go through the chain of command on his request for cash overtime compensation might indicate that Carbone was impetuous by nature and that this could indicate problems on how Carbone would handle emergencies at the facility. Marchant told Carbone that he would be evaluating Carbone's performance during the probationary period and that he was concerned about the way Carbone was handling the overtime issue.

15. After the discussion on the overtime issue at the January 9 meeting, Carbone then asked Marchant if he was aware that he had filed a complaint with HUD against Champagne. Marchant indicated he had not been aware of that fact. Carbone then asked Marchant how he felt about that fact. Marchant replied by asking Carbone whether he had considered the implications of the complaint prior to filing it, including how it may affect Walker. Marchant referred to the fact that Grand Isle was a small town, and that this suit could alienate the community. Marchant stated that Champagne, who also owns A&B Beverage in Grand Isle, was well known and could create problems for the new hatchery. Marchant once again called Carbone impetuous for having filed the suit without thinking of the potential consequences. Marchant told Carbone that being impetuous may affect his ability to perform if the staff had to respond to an emergency regarding the fish. Carbone asked Marchant whether the HUD complaint would affect the evaluation of his performance, and Marchant said it would not affect such evaluation.

16. After he met with Marchant on January 9, Carbone told Walker that day that he had filed a HUD complaint, and asked Walker what he thought. Walker told Carbone that he had some concerns because he did not know whether Champagne would respond by taking action against Walker, but Walker told Carbone that it sounded like discrimination to him and Carbone should do what he needed to do. Walker was interviewed later in January by a HUD investigator as part of the HUD investigation into Carbone's complaint. He expressed his concerns to the investigator, and

was assured that he was protected by the law from retaliation by Champagne. Walker's concerns were alleviated by the investigator's assurances, and he cooperated fully with the HUD investigation. Walker never again said anything to Carbone concerning the HUD complaint.

17. Marchant followed up the January 9 meeting with a January 10 memorandum to Carbone. The memorandum provided as follows:

Regarding our discussion the other day, I wish to reiterate a few things.

First, I am requesting that you go through me, as your supervisor, regarding any questions you might have concerning State employment. As I stated, we are all unfamiliar with the State employment regulations and any question you might have is likely to be asked by other fish culture station staff as well. This request does not preclude you from investigating on your own.

Secondly, the allowance of overtime hours is at the discretion of the supervisors. The start-up of this facility poses a situation in which the use of overtime is desirable to allow for maximum exposure of employees to training opportunities. However, this facility is not budgeted for cash compensation of overtime, except for holidays. This necessitates the use of volunteers willing to be compensated with compensatory hours for any overtime work which does occur.

Any question you have concerning the operation of this facility of State employment should be referred to Monty or me. We will endeavor to provide a satisfactory response if we are able. When we are unable to respond, we will pursue the issue through the appropriate channels. I hope we will be able to resolve any questions which arise in the future to everyone's satisfaction

(Grievant's Exhibit 4).

18. After the January 9, 1992, meeting with Marchant, Carbone did not relinquish his demand for cash compensation for overtime. Wiggins told Carbone that he had authorized cash payment, but in the future no cash overtime would be authorized. After Carbone made an issue of compensation, the hatchery

authorized overtime only in emergencies. On days when training was conducted, Carbone left work at 4:00 p.m., the time his shift ended. Since training sessions often went shortly beyond 4:00 p.m., Carbone missed some training.

19. Carbone did not file a grievance as a result of Marchant's conduct during the January 9, 1992 meeting, although he contacted VSEA's Field Representative Richard Lednicky after the meeting, and Lednicky offered to file one on his behalf.

20. Carbone complained to Marchant in January 1992 that the hatchery was changing work schedules by cancelling regular days and bringing in employees on off days to avoid paying overtime. Carbone believed that this violated the Contract. Carbone also raised the issue at a labor-management meeting on March 26, 1992. Subsequently, the practice changed. Employees who were required to fill in for other employees could volunteer to take another day off, as opposed to being required to do so.

21. After January 9, 1992, Walker and Carbone continued to talk with each other when they were on work breaks together, and their families continued to babysit for one another after January. That babysitting practice continued until April, 1992. Marchant babysat for Carbone's child at least once after January, but he socialized less with Carbone after January. Marchant was working long hours at the Hatchery, his wife had a child in March, and they were trying to find a house to buy. As a result, Marchant did little socializing in the spring of 1992.

22. During February, March and April, 1992, Carbone repeatedly told Marchant and Walker that there was an ongoing problem with fish feed on the floor. In addition to creating a safety hazard, feed on the floor is a potential cause of disease

transmission to the fish. Bacteria grows in the feed and can contaminate employees' boots as well as cleaning instruments or anything else dropped on the floor. Although Marchant and Walker spoke with other culturists, the problem continued.

23. In early March, 1992, Carbone told Walker that several employees were taking fish weight sample incorrectly. Instead of crowding the fish and taking three quick netfulls consistent with their training, these employees were not crowding the fish and were taking netfulls slowly. This resulted in an inaccurate weight sample. Marchant agreed that Carbone had identified the proper procedure.

24. On March 6, 1992, Marchant and Walker met with Carbone to discuss his performance to date. For this meeting, as well as for similar meetings with other fish culturists, Marchant used a form, setting forth various areas of performance based on the job description. Marchant's form listed 11 specific areas: eggs/incubation, fry/feeding, inventory/transfer, cleaning rearing units, disease treatment, safety, cleaning/janitorial, mechanical aptitude, direction under supervision, response to emergency, and response to training. Marchant and Walker told Carbone that his overall performance was satisfactory. In eight of 11 areas evaluated by Marchant, Carbone's performance was rated either as satisfactory or the area was said not to be applicable. In three areas, safety, cleaning/janitorial and direction under supervision, Marchant indicated that Carbone needed improvement. Marchant expressed concern in the area of safety based on one incident where Carbone fell on ice while performing equipment checks. Carbone's performance concerning

cleaning the rearing units was discussed at this meeting. While Marchant was unaware of any problems and considered Carbone's performance good in this area, Walker told Carbone that Carbone needed to improve his cleaning and his consistency in clearing of these fish tanks. In the area of "direction under supervision", Marchant told Carbone that he needed to get his work assignments from Walker. This related to the time Grievant had spent going to the lab to examine fish without Walker's permission to do so. Marchant told Carbone that he needed improvement in the area to ensure that priority tasks were accomplished. Marchant and Walker also told Carbone that he needed to return from lunch in a timely manner, as this had been a problem prior to March 6. Further, Marchant told Carbone that his judgment was being reviewed regarding his work and response to situations (Grievant's Exhibit 5).

25. In mid-March, 1992, a hatchery employee entered the wet chemical storage area, where volatile chemicals are kept, and experienced shortness of breath and watering eyes. He saw that the cap was left off the container of Formulan, which contains Formaldehyde. He asked Walker for guidance, and was told to turn on the ventilation fan and plug the opening with a rag. Carbone had left the cap off the Formulan container. On the following day, Walker instructed Carbone to replace the cap on that container in an effort to make an impression on Carbone. Carbone should have been aware from his training that leaving the cap off the Formulan container constituted a health problem for employees.

26. On March 23 or 24, 1992, some of the fish at the Hatchery were found standing on their tails, gasping for air, in a condition referred to as oxygen distress. Such behavior by the fish indicated the hatchery water was seriously deficient in its oxygen content. Walker discovered the problem and responded by immediately opening the gates and flooding the area to get more oxygen to the fish. He later described the situation to staff and asked what they would have done in response. Carbone said that he would get the oxygen meter and take a reading. Walker found Carbone's response to be incorrect because, by the time one got the meter out and took a reading, the fish would be dead. The oxygen meter is generally kept in the laboratory, and needs to be warmed up and calibrated before it can be used. It is generally at least 15 minutes before a reading can be taken. Carbone previously had been trained properly in how to respond to such a situation, and his response indicated a problem in using his training to respond to an emergency.

27. On March 19, 1992, Walker conducted training on the rotary drum, which is a primary processing unit which filters and supplies water to the fish. There had been an almost daily problem with the rotary drum failing. Walker conducted the training, which Carbone attended, to ensure all staff were familiar with the appropriate response to a rotary drum failure. Walker told the employees that the first thing to do if the drum failed was to turn off the power, open the door to the control panel and push the reset buttons, then to turn the power back on and set switches to automatic to see if the drum would restart. This procedure was not in the operation manual.

28. On March 23, 1992, the rotary drum failed again. Carbone was near the unit when it failed. Walker heard the alarm, went to the computer room to locate the problem, and arrived at the rotary drum two to three minutes after the alarm had gone off. When he arrived, he saw Carbone standing by the rotary drum, reading the operation manual, and not otherwise responding. Walker followed the reset procedure which had been the subject of training four days before, and got the drum started again. Walker concluded that Carbone's response was unsatisfactory, and told him so. This demonstrated to Walker that Carbone was unable to properly use his judgment in an emergency situation to implement training he had just received.

29. On March 23, 1992, a plumber contractor was brought into the Hatchery to conduct a training session. Carbone and Hipple attended this session, during which time the plumber pointed out that there was some "black slime" in the bottom of the chlorine reservoir for the potable water system. Neither Carbone nor Hipple repeated the plumber's comments to a supervisor. Carbone assumed that the plumber would either remedy the problem or inform management. Carbone's assumptions were reasonable. However, the plumber did not report the problem or remedy it.

30. On March 26, 1992, a labor-management meeting was held at the Grand Isle Hatchery. Present for the meeting were Thomas Ball, Employee Relations Director for the State of Vermont; Wiggins, Marchant, Walker, Richard Lednický, VSEA Field Representative; and all of the fish culturists. The meeting was intended to focus on three issues: the cash for overtime

dispute, changing of schedules to avoid overtime and the policy regarding training sessions. On the issue of training sessions, Carbone asked how he could take the tests on the training sessions if he missed the training sessions due to the cancellation of overtime. Wiggins responded that the tests were not mandatory. Ball and Lednicky discussed the overtime policy of the Department, but did not reach any resolution. Lednicky indicated that VSEA would file a grievance over that issue, which VSEA subsequently did. Lednicky also claimed that management was violating the Contract by assigning first shift workers to work at night. There was no resolution reached on that issue at that time, although subsequently the issue was resolved. Lednicky next expressed his concern that the water at the Hatchery was unsafe for drinking. Such a statement was a surprise to Hatchery supervisors and Wiggins. Carbone then explained that a plumbing contractor had conducted some training of staff several days before, and he had seen some paint or other matter floating in the chlorine tank. Marchant responded by asking Carbone whether he had told anyone about the problem, and Carbone said he had not reported the problem because he thought the contract would fix the system or report the problem. Marchant viewed this incident as a further instance of Carbone's tendency not to report issues of concern to the Hatchery to his supervisors.

31. On April 6, 1992, it took Carbone and a helper approximately twice the amount of time to clean raceways as it had taken Walker and a helper the previous day.

32. On April 13, 1992, Walker was looking for the only pair of Size 12 waders in the Hatchery in preparation to do some work. After failing to find them, he began to ask staff where they might be. Carbone told him that he had the waders in his car, and that he would get them. When Carbone came back with the waders, he told Walker that he had intended to use them for an upcoming fishing trip. Marchant told Carbone that he was concerned not only with the fact that Carbone intended to use State property for personal use, but also that bringing back into the Hatchery boots which had been in rivers could result in disease transmission to the fish.

33. Marchant reiterated the Hatchery policy prohibiting the personal use of State property to the first shift staff the next day. In late January or early February, 1992, Marchant had also spoken to staff regarding the personal use of State property. He had become aware that Walker had used the Hatchery garage and lift to change the oil or do other work on his vehicle. Other employees also had used the garage for similar work. Marchant had not given anyone permission to use the Hatchery garage in that manner. He made it very clear at that time that staff were not permitted to use State property for personal use. Neither Marchant nor Walker were aware of any use of State property for personal use after late January or early February, 1992, other than Carbone's planned use of the waders.

34. After March 6, 1992, Carbone's performance regarding the cleaning of rearing units was inconsistent. On some days, Carbone would do an excellent job, and would do a poor job on other days. Walker complimented Carbone when he did a good job,

and pointed out deficient work when it occurred. There were also occasions when Carbone did not complete his assigned duties prior to the completion of the shift, and when he was not consistent in doing routine feeding when time permitted. Further, at times Carbone left the work area without telling Walker he was leaving.

35. Around April 20, 1992, Marchant asked Walker for his input on Carbone's performance. Walker gave Marchant his supervisory notes reflecting incidents of concern regarding Carbone's performance. Walker indicated that he found Carbone's judgment to be poor. He identified his biggest concern to be lack of confidence in the dependability of Carbone. Walker told Marchant that he did not know whether Carbone would be there to react to problems and whether he would react properly. Several times prior to April 20, Walker spoke to Carbone about leaving assignments without telling anyone where he was going. Marchant told Walker that he was going to initiate dismissal proceedings against Carbone.

36. Marchant and Wiggins met thereafter to discuss the recommendation of Marchant that Carbone be dismissed. Prior to that time, Marchant had spoken with Tom Ball so that he understood what process should be followed in conducting the dismissal of a probationary employee. Marchant and Wiggins consulted with Department Commissioner Timothy Van Zandt regarding Carbone's dismissal. As a result of those meetings, a meeting with Carbone was scheduled for May 1, 1992.

37. A few days prior to May 1, 1992, Marchant told Carbone that he would be receiving an evaluation and that he had the right to bring a VSEA representative to a meeting on May 1 on his performance. This worried Carbone. The day before the May 1

meeting, Carbone asked Walker how he was performing. Walker said Carbone's performance had been improving. While that statement was accurate as to some areas, Walker did not disclose to Carbone that he would be dismissed because he was concerned that giving Carbone advance notice of his dismissal could jeopardize the fish at the Hatchery.

38. On May 1, 1992, Carbone met with Wiggins and Marchant. Carbone was presented with his end of probation performance evaluation and with a dismissal letter. The dismissal letter, signed by Commissioner Van Zandt, stated that Carbone's "performance during the original probation period...had not met our expectations for the position of fish culturist", and indicated that Carbone's dismissal was effective May 1, 1992. The performance evaluation, signed by Marchant, Wiggins and Van Zandt, rated Carbone's overall performance as unsatisfactory. The evaluation provided in pertinent part as follows:

General Comments:

- 1) Displayed poor judgment in performance of task, jeopardizing personal safety.
- 2) Attitude and actions reflect lack of respect for, or adherence to chain or command.
- 3) Punctual adherence to work schedule is not followed. Job duties are left incomplete in anticipation of departure from work site.
- 4) Attempted to utilize State equipment for personal use.

SUPERVISOR COMMENTS

A) Quality and efficiency of work is not consistent. Quantity of work is not consistent. Fails to perform routine tasks thoroughly. Erratic performance continued after supervisory direction and guidance, specifically the clearing of rearing units.

- B) Failed to report equipment problems in a timely

manner to supervisor, causing potential safety risks to the public and other employees.

C) Displays poor judgment which requires supervisory review and corrective action. Fails to apply training to job performance. Tasks which should be performed under general supervision are neglected, such as routine feeding when time allows.

(State's Exhibit 3)

39. During the May 1 meeting, Marchant went over the evaluation, line by line, to explain the basis for dismissal. Among the issues discussed during the meeting by Marchant and Wiggins as deficiencies of Carbone were his handling of the overtime compensation issue, the potable water incident, the waders incident, the Formalun cap incident, and not completing assignments before leaving for the day. Marchant and Wiggins told Carbone that going to the payroll office on the overtime compensation issue and not reporting the potable water problem were an indication of Carbone not going through the chain of command. Marchant indicated that Carbone did not appear to be inclined to use the chain of command. Carbone replied that supervisors in past jobs had not been truthful with him, and this caused him to lack respect for supervisors. Marchant told Carbone that his performance had improved in certain areas, but that his performance in other areas was inconsistent. At the meeting, Carbone suggested that his "making waves" or "problems" was the basis for his unsatisfactory performance evaluation. Marchant and Wiggins indicated that was not the case.

40. The other fish culturists at the Hatchery successfully completed their probationary periods. Carbone has not established by a preponderance of the evidence that the overall performance deficiencies of these employees were equal to or greater than his own deficiencies.

OPINION

In his grievance and in the unfair labor practice charge, Paul Carbone alleges that he was dismissed at the conclusion of his probationary period because of his advocacy of union issues, the filing of a housing discrimination complaint against his supervisor's landlord and his repeated complaints regarding the operation of the hatchery. The Employer contends that Carbone was dismissed for performance reasons.

In determining whether action was taken against an employee for engaging in protected activities, the Board employs the analysis used by the U.S. Supreme Court and the National Labor Relations Board in such cases. Once an employee demonstrates protected conduct, he or she must show the conduct was a motivating factor in the decision to take action against the employee. Then, the burden shifts to the employer to show by a preponderance of the evidence that it would have taken the same action even in the absence of the protected conduct. Horn of the Moon Workers Union v. Horn of the Moon Cafe, 12 VLRB 110 (1988). Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977). NLRB v. Transportation Management Corp., 462 U.S. 393 (1983). Wright Line, 251 NLRB No. 150 (1988).

The first step in the analysis is to determine whether Carbone and VSEA have established that Carbone actually was engaged in protected activity. Carbone and VSEA contend that the unfair labor practice provisions of the State Employees Labor Relations Act, 3 VSA §901 et seq. ("SELRA"), the Contract and 3 VSA §312 all protect his conduct, and also that his conduct is constitutionally protected as free speech.

We first address whether Carbone, as a probationary employee, is protected under SELRA's unfair labor practice provisions. Carbone and VSEA contend that Carbone's advocacy of union issues and complaints about the operations of the hatchery are protected by 3 VSA §961(1) and (3). §961(1) makes it an unfair labor practice for an employer to "interfere with, restrain or coerce employees in the exercise of their rights guaranteed by section 903 of this title, or by any other law, rule or regulation." §903 provides in pertinent part that "(e)mployees shall have the right to self-organization; to form, join or assist employee organizations; to bargain collectively through representatives of their own choice, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection." §961(3) provides that it is an unfair labor practice for an employer "by discrimination in regard to hire and tenure of employment or any term or condition of employment to encourage or discourage membership in an employee organization."

We agree with VSEA and Carbone that these unfair labor practice provisions protect Carbone's advocacy of union issues and complaints about the operations of the hatchery. In Grievance of Peplowski, 6 VLRB 16, 26-28 (1983), and Mailhiot v. Brandon Training School, 7 VLRB 67, 68 (1984), the Board recognized that probationary employees have some protection under SELRA's unfair labor practice provisions, and that protection extends to this case.

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

4) "Employee" means a state employee as defined by subdivision (5) of this section except as the context requires otherwise.

(5) "State employee" means any individual employed on a permanent or limited status basis by the State of Vermont . . . and an individual whose work as ceased as a consequence of, or in connection with . . . any unfair labor practice . . ."

We conclude that in this case the "context requires otherwise". In Peplowski, the Board concluded that §961(4), which makes it an unfair labor practice to discharge or otherwise discriminate against an employee because he or she gives testimony under SELRA, covers testimony given by probationary employees. 6 VLRB at 27. Otherwise, the Board reasoned, the intent of SELRA to ensure that employees engaged in concerted activity were not discriminated against could be frustrated if a probationary employee could not testify to knowledge she or he had without fear of reprisal. Id.

Similarly, probationary employees have a right to engage in concerted activity. This was made clear by the Vermont Supreme Court decision in VSEA v. State of Vermont, 151 Vt. 491 (1989). Therein, the Court interpreted SELRA to protect the right of probationary employees to bargain collectively with respect to conditions of employment. Id. at 496. This right to engage in collective bargaining would be frustrated, like the right recognized in Peplowski, if a probationary employee could not engage in concerted activity, and assist employee organizations, without fear of reprisal. Carbone's complaints to his supervisors that the denial of cash compensation for overtime and the

changing of regular shifts to avoid overtime pay violated the Contract, and his participation in the labor-management committee, are sufficient to constitute engaging in concerted activity and assisting employee organizations within the meaning of SELRA. Accordingly, the Employer could take no action to discourage Carbone's participation in such issues and in the VSEA. Thus, we conclude that these activities of Carbone were protected under §961(1) and (3) of SELRA.

Carbone and VSEA further contend that his filing of a federal housing discrimination complaint is protected conduct under §961(1), which provides in pertinent part that it is an unfair labor practice for an employer to "interfere with, restrain or coerce employees in the exercise of their rights guaranteed by section 903 of this title, or by any other law, rule or regulation." Carbone and VSEA contend that, since Carbone has a guaranteed right under federal and state law to litigate claims of housing discrimination, his filing of a housing discrimination complaint was protected by §961(1).

Again, we agree with VSEA and Carbone, and conclude that the "context requires" that Carbone is entitled to protection under SELRA's unfair labor practice provisions in this regard. In Mailhiot, supra, the Board concluded that an employee was engaged in conduct protected by §961(1) by filing a workers' compensation claim, and reviewed whether she was discharged for filing such a claim. 7 VLRB at 68. The Board reasoned that to review the case under the Board's labor practice jurisdiction provided a

meaningful administrative remedy to an employee for exercising rights under workers' compensation laws. Id. Similarly, here, to review Carbone's claim of the Employer discriminating against him for filing a housing discrimination complaint provides a meaningful administrative remedy to him as an employee for exercising his statutory rights to file a housing discrimination complaint. Thus, we conclude that Carbone's filing of a housing discrimination complaint was protected by 961(1), and the Employer could take no action against him for filing such complaint.

Since the conduct which Carbone seeks protection for is protected under SELRA's unfair labor practice provisions, it is unnecessary for us to determine whether such conduct also is protected under the Contract and 3 VSA §312, and whether it is constitutionally protected.

Carbone having established that he was engaged in protected activity, the next step in the analysis is that Grievant must show that his protected conduct was a motivating factor in his dismissal. At the heart of any employment action allegedly linked with discrimination based on protected conduct is the question of employer motivation. Ohland v. Dubay, 133 Vt. 300, 302 (1975). The guidelines the Board follows in determining whether protected conduct was a motivating factor in an employer's decision to take action against an employee are: 1) whether the employer knew of the employee's protected activities, 2) whether there was a climate of coercion, 3) whether the timing of the action was suspect, 4) whether the employer gave as a reason for the decision a protected activity, 5) whether the employer

interrogated the employee about protected activity, 6) whether the employer discriminated between employees engaged in protected activities and employees not so engaged, and 7) whether the employer warned the employee not to engage in protected activity. Id. at 302-33. Horn of the Moon, supra, 12 VLRB at 126-27.

In considering these elements here, we first indicate that it is clear that Carbone's union activity and housing complaint were known to the Employer. The timing of the Employer's action to dismiss Carbone was not suspect, given that it came at the end of his probationary period, rather than on the heels of the visible protected conduct of Carbone.

We discuss the elements of coercion, interrogation and warning together, given how interrelated they are in this case. A climate of coercion exists if the employer takes actions compelling employees by pressure or threats to limit their protected activities. Id. at 127.

We conclude that such a climate of coercion was created to some extent by the conduct of Carbone's supervisor, Daniel Marchant, at his January 9 meeting with Carbone. While Marchant had a legitimate reason to question Carbone's actions of calling the payroll office and adamantly demanding cash payment for overtime, Marchant overreacted to the situation during the meeting with Carbone. This is indicated by calling Carbone "impetuous" as a result of his actions and becoming quite upset over the issue. Although Marchant did not demand that Carbone withdraw his request for cash overtime and did not warn him to drop the issue, Marchant made it evident to Carbone that he would prefer that Carbone drop the issue.

Also, while Carbone brought up the housing complaint at the January 9 meeting and Marchant did not warn him to drop the complaint, again it was evident by Marchant's comments on this issue, including that Carbone was "impetuous" again for filing the complaint, that he considered it prudent for Carbone to have not brought the complaint.

Marchant's conduct was sufficient to put pressure on Carbone to limit his protected activities, and thus was sufficient to create a climate of coercion to some extent. Our conclusion in this regard is tempered by the fact that this meeting was the only time that one of Grievant's superiors engaged in conduct which would have the effect of compelling him to limit his protected activities. Nonetheless, Carbone was engaged in the protected conduct of pursuing his rights to enforce the Contract and housing laws, and Marchant's conduct at the January 9 meeting put pressure on Carbone to limit such activities.

Another relevant issue is whether the Employer gave as a reason for the dismissal a protected activity. Marchant and his supervisor, Thomas Wiggins, relied on Carbone's handling of the overtime compensation issue as evidence of Carbone not going through the chain of command to resolve issues. Although Carbone could have handled this issue better by formerly requesting payment for overtime from his supervisor and grieving any denial of such request, rather than demanding payment from the payroll office, the response of Marchant particularly indicates he was motivated in part by concern for an employee aggressively

asserting rights. Marchant's motivation in this regard is also indicated by his conclusion that Carbone's filing of a housing complaint indicated that Carbone had a judgment problem. This, Marchant concluded, was because Carbone would have problems responding to emergencies given how the housing complaint indicated how impetuous , or reactive, Carbone was in responding to situations. We fail to see how filing a housing complaint indicates that an employee would have trouble responding to emergencies which come up at work. Thus, the Employer's criticism of Carbone with respect to not following the chain of command and showing bad judgment was motivated in part by the reason of Carbone's protected conduct.

Another issue in this regard is the Employer relying on Carbone's failure to immediately report the problem the plumber had discovered with respect to the hatchery's water system, and instead bringing the issue up at the labor-management committee meeting, as an indication of his failure to properly respect the chain of command. Carbone and VSEA contend that this constituted using a protected activity as a basis for dismissal.

We disagree with Carbone and VSEA. The Employer was understandably surprised in finding out about this important health issue three days after it had been discovered. Although Carbone initially reasonably assumed that the plumber would remedy the problem or report it to the Employer, his bringing the issue up at the meeting indicated that he still viewed it as a problem. In such circumstances, he would have showed better judgment in bringing the problem quickly to his supervisor's attention to ensure that there would be no health problems for

employees, rather than waiting to bring it up at the labor-management committee meeting. The Employer reasonably concluded that this failure to quickly report problems to the chain of command showed some bad judgment given the potential health problems.

The final element to discuss in determining whether protected activity was motivating factor in Carbone's dismissal was whether the Employer discriminated between Carbone and employees not engaged in protected activities. The evidence indicates that Carbone was the only fish culturist who did not successfully complete the original probationary period. However, Carbone has not established by a preponderance of the evidence that the overall performance deficiencies of the other employees were equal to or greater than his own deficiencies. Thus, we cannot conclude that the Employer discriminated between employees engaged in protected activities and employees not so engaged.

In sum, we conclude that a climate of coercion existed to some extent, and the Employer gave Carbone's protected activities as part of the reasons for his dismissal. This is sufficient for us to conclude that Carbone's protected activities were at least a motivating factor in his dismissal.

Thus, the burden shifts to the Employer to show by a preponderance of the evidence that it would have taken the same action even in the absence of the protected conduct. This case involves the dismissal of a probationary employee who generally can be dismissed for any non-discriminatory reason. Under such circumstances, we require the Employer to show that it had a

substantial basis to conclude that Carbone would not make a satisfactory permanent employee, and persuade us by a preponderance of the evidence that Carbone would have been dismissed on this basis absent his protected activity.

The evidence indicates that Carbone had substantial performance deficiencies during his original probationary period. His failure to consistently clean rearing units adequately demonstrates inconsistency of satisfactory work. Carbone demonstrated a problem with punctuality in reporting to duty, and at times being away from his work area without telling his supervisor where he was going. This understandably lead his supervisors to question his reliability in responding to situations. Also relevant in this regard was Carbone performing some tasks without his supervisor's permission, completing an insufficient quantity of work and not completing certain duties before leaving for the day. This lead his supervisors to question his ability to complete duties as assigned.

A significant performance deficiency of Carbone was not being able to apply his training in certain instances. This was indicated by not applying the proper procedure to start up the rotary drum after it failed even though he had been trained on the matter a few days previously, and failing to know the correct procedure when fish were showing signs of oxygen distress after being trained. His failure to apply his training properly understandably lead his supervisors to question whether he would handle emergencies properly. Carbone demonstrated sloppiness, thus potentially jeopardizing employees' health, when he failed to put the cap back on the container of Formulan.

Further, Carbone showed bad judgment when he attempted to take waders from the hatchery on a fishing trip since Marchant had specifically warned employees a few months earlier not to make personal use of state property. Carbone's judgment also was deficient, to a lesser extent, as already discussed with regard to how he handled the overtime compensation issue and the potable water incident. These incidents also showed in part some lack of adherence to the chain of command by Carbone.

In sum, it is evident that these performance deficiencies of Carbone constitute a substantial basis for the Employer to conclude that Carbone would not make a satisfactory employee. He had substantial deficiencies in dependability, job knowledge, work quantity, work quality, working under supervision and judgment. It is relevant in this regard that Carbone has not established by a preponderance of the evidence that any of the other fish culturists had overall deficiencies equal to or greater than his own deficiencies. Accordingly, legitimate, non-discriminatory reasons existed which warranted Carbone's dismissal.

This is a dual motive case, where the employment decision involves two factors - a legitimate business reason and an illegitimate employer reaction to its employees engaging in protected activities. In such cases, we will weigh the interests of the employees in engaging in protected activities and the interests of management in protecting the efficiency of the public services it performs through its employees and strike a

balance between competing interests. Grievance of Roy, 6 VLRB 163, 195 (1983). Mt. Healthy, supra, 429 U.S. at 284. Wright Line, supra.

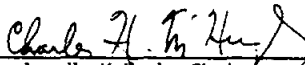
In weighing these competing interests here, we conclude based on a preponderance of the evidence that Carbone's performance deficiencies warranted his dismissal at the conclusion of his original probationary period, and the Employer would have dismissed him in the absence of his protected activities.

ORDER

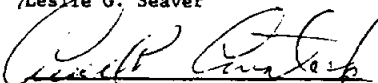
NOW THEREFORE, based on the foregoing findings of fact and the foregoing reasons, it is hereby ORDERED that the Grievance of Paul Carbone in Docket No. 92-27 and the unfair labor practice charge filed by the Vermont State Employees Association and Carbone in Docket No. 92-54 is DISMISSED.

Dated this 1st day of July, 1993, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Charles H. McHugh, Chairman


Leslie G. Seaver


Carroll P. Comstock