

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 94-58
GENE MCCORT	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

Involved herein are four grievances filed under one docket number on October 10, 1994, by Gene McCort ("Grievant") against the State of Vermont, Agency of Transportation ("Employer") in which he alleged that the Employer violated various provisions of the collective bargaining agreement between the State of Vermont and the Vermont State Employees' Association ("VSEA") for the Non-Management Unit, effective for the period July 1, 1994 to June 30, 1996 ("Contract"). Specifically, Grievant alleged that the Employer's personnel section discriminated against him because of grievance activity and whistleblowing activity, and violated Articles 5, 11, 12, 14, 15, 16 and 71 of the Contract. Grievant alleged in his first grievance that his supervisor issued a directive on July 7, 1994, that changed his job functions. He alleged in his second grievance that the Employer's personnel section maintained a secret file on him and placed information in his personnel file without his knowledge or consent. He alleged in his third and fourth grievances that his supervisor issued disciplinary letters on July 14, 1994, and August 3, 1994, and that there was no just cause for discipline.

Hearings were held on July 13, 1995, and September 11, 1995, at the Labor Relations Board hearing room in Montpelier before Board Members Charles McHugh, Chairman; Louis Toefper and Carroll Comstock. Assistant Attorney

General David Herlihy represented the Employer. Grievant represented himself.

On August 17, 1995, attorney David Putter entered a limited appearance on behalf of Grievant. On September 11, 1995, attorney Putter filed a Motion to Withdraw as Grievant's Counsel; the Employer did not object and the Board granted the motion. On September 11, 1995, Grievant withdrew the third and fourth grievances. The Employer filed a post hearing brief on September 18, 1995. Grievant did not file a post hearing brief.

### FINDINGS OF FACT

1. Grievant is an Auditor C in the Agency of Transportation. He was hired by the Employer in July, 1989, as an Auditor B, Pay Grade 19. Grievant had many years of auditing experience prior to his hire by the Employer, including, but not limited to, a position in the Internal Audit Division of the Arizona Department of Economic Security from 1979 to 1980 and a position as an Internal Auditor/Accountant for Swensen's Ice Cream from 1980 to 1981. Grievant included his work history in Arizona and at Swensen's Ice Cream on his initial application and resume filed with the Vermont Department of Personnel (State's Exhibit 9).

2. Article 16 of the Contract provides an exclusive procedure for employees or management to request classification reviews by filing a request for review, called a PER-10, with the Department of Personnel. Grievant filed a reclassification request in 1990 and the Department of Personnel upgraded his position to Auditor C, Pay Grade 21, effective January 6, 1991 (Grievant's Exhibits 3, 4).

3. Auditor C is a broadly defined class of employees in State government

who work in a number of different auditor positions in State service. The duties of Auditor C are set forth in a “class specification” prepared by the Department of Personnel. The current class specification for Auditor C was prepared by the Department of Personnel in 1986.

4. The Employer has traditionally referred to “internal auditing” as auditing financial records of State governmental units. It has referred to “external auditing” as auditing financial records of external entities. Employees working for the Employer as Auditor C’s have traditionally, but incorrectly, described themselves as “external auditors” because they conduct more external audits than internal audits each year. For example, Elaine Gilleo, an Auditor C in Grievant’s division, performed an internal audit of a governmental unit in 1989 and used the title “external auditor” in her report to the Director of Transportation regarding such audit (State’s Exhibits 2, 4, 8).

5. The practices and standards for internal and external audits are similar and both are encompassed within the broad Auditor C class specification. The Auditor C class specification indirectly refers to internal and external auditing in setting forth the “Definition” of the class:

Complex auditing and supervisory work conducting or directing examination of financial statements, accounts, and records of state and local governmental units and private businesses . . .

(State’s Exhibit 1).

6. Internal auditors have created their own professional organizations to set standards and criteria for certification. The Employer joined the Green Mountain Chapter of Internal Auditors in 1988 or 1989. Employees working as Auditor C’s,

including Grievant, maintain their certification by attending continuing professional education courses sponsored by the Green Mountain Chapter of Internal Auditors at the Employer's expense (State's Exhibit 7).

7. The Employer took various actions against Grievant in 1991 and 1992 which culminated in his dismissal on May 22, 1992. Grievant filed three grievances as a result of these actions. The Board dismissed one grievance, sustained the other two, and reduced the dismissal to a 30 day suspension. Specifically, by decision dated March 8, 1993, the Board ordered the Employer to reinstate Grievant "as Auditor C with the State of Vermont, Agency of Transportation". The Board also ordered the Employer to award Grievant back pay and benefits. Grievance of McCort, 16 VLRB 70 (1993) . *Affirmed*, \_\_Vt.\_\_(1994).

8. The Employer appealed the Board's decision to the Vermont Supreme Court. The Employer also filed a Request for Stay Pending Appeal with the Board, requesting the Board to stay both Grievant's back pay award and his reinstatement. By decision dated June 24, 1993, the Board granted a stay of the back pay award and denied the stay for reinstatement. On April 8, 1994, the Vermont Supreme Court affirmed the Board decision concerning the stay pending appeal in its entirety. Grievance of McCort, 16 VLRB 248 (1993). *Affirmed*, \_\_ Vt. \_\_ (1994).

9. Grievant's position number prior to his dismissal was TA0295. A position number is primarily a budget tracking device. The position number has no special significance to the duties or responsibilities associated with a position. If an employee leaves State government, the employee's position number is generally assigned to the individual hired to fill the vacated position. It also may be assigned to

another position in the agency or department if another position is created and the employer has not filled the vacated position.

10. After Grievant was dismissed, the Employer hired Paul Perry to fill Grievant's vacated position, and assigned Grievant's former position number, TA0295, to Perry.

11. As a result of the Vermont Supreme Court affirming the Board order to reinstate Grievant to his former position pending appeal, the Employer had to create a new position for Grievant prior to his return. Grievant's former position had been filled by Perry and there were no vacant Auditor C positions in the division. In order to create a new position, the Employer was required to prepare a job description, or PER-10, and send it to the Department of Personnel. The Employer uses PER-10's to set forth job descriptions of positions in its Agency.

12. Chief Auditor Michael Pollica completed the PER-10 and set forth the job duties of the Auditor C position. The PER-10 was not identical to the one that Grievant had earlier completed in 1990, but it reflected the current duties and responsibilities of Auditor C's in the division. The PER-10 was signed by Pollica, Personnel Officer Vicki Cassell and Director of Human Resources William Laferriere on April 12, 1994, the day before Grievant returned to work. Pollica used the Department of Personnel Auditor C class specification in preparing the PER-10 (Grievant's Exhibit 5).

13. Supervisors in State government are required to maintain updated job descriptions for employees under their supervision. In preparing the PER-10 for Grievant's return, Pollica realized that the Auditor C position descriptions for the

incumbent Auditor C's were out of date and did not adequately reflect Auditor C current duties; one auditor's job description was over nine years old. Pollica intended that the new PER-10 would also serve as an updated job description for all Auditor C's in the division. He did not give the other Auditor C's in the division a copy of the PER-10 at that time.

14. The Department of Personnel assigned the position number TA0537 to the new Auditor C position created for Grievant. In order to assign Grievant his old position number, the Employer would have been required to go through a lengthy administrative procedure with the Department of Personnel which would have involved reassigning Perry a new position number.

15. Pollica met with Grievant on his return to work on April 13, 1994. Pollica did not mention the updated PER-10 job description he had signed the previous day.

16. Grievant worked as an Auditor C under Pollica's supervision for approximately three months without apparent incident.

17. It is standard practice for the Employer to maintain files that contain PER-10 job descriptions of all the positions in the Agency. Such files are maintained in a separate location from employee personnel files. At some point, Pollica placed the new PER-10 job description for Auditor C in files containing job descriptions, which are located in the division secretary's office (Grievant's Exhibit 2).

18. The Employer maintains personnel files in its administrative offices. Included in a personnel file are an employee's employment application, training records and copies of personnel actions, such as pay rate and pay grade changes. The

Employer does not routinely maintain a PER-10 in an employee's personnel file, but would do so if an employee requested that a current PER-10 be placed in his or her personnel file.

19. At some point after Grievant returned to work in the auditing division, Pollica requested that Grievant perform internal audits. Grievant did not think that he should be asked to perform internal audits because he did not believe he had the qualifications to perform such audits. He also did not think that the auditing division should be performing such audits or that performing such audits was in his job description.

20. On July 7, 1994, Pollica issued a memorandum to all auditors with three documents attached to it: 1) list of functional operating procedures; 2) list of functions, internal interaction and external interaction, and; 3) Vermont Agency of Transportation Vision and Mission Statement. The memorandum and attachments provided auditors with a guide or summary of types of audits performed in the division and a quick reference to regulations and manual for standards. The attachments included references to internal auditing (Grievant's Exhibit 1).

21. On July 8, 1994, Director of Administration William Conway attended the audit division's weekly staff meeting. He was invited because questions had arisen about internal auditing and auditors' independence (Grievant's Exhibit 28).

22. On July 8, 1995, Grievant discovered an updated PER-10 in a file in the division secretary's office and asked Pollica about the document. Pollica told Grievant that the Auditor C position description had been updated and rewritten while Grievant was away. Later that day, Pollica issued the updated PER-10 Auditor

C job description to all four auditors in the division with a cover memorandum that stated in pertinent part:

As a update, the attached document is an outline of the job duties,

In combination with the Personnell (sic) class description, an auditor is expected to accept these duties as well as related work as required (Grievant's Exhibit 2).

23. The PER-10 that Pollica gave Grievant was attached to the Auditor C class specification. The PER-10 was not signed by Pollica or any other Agency official (Grievant's Exhibit 2).

24. Grievant then went to the Employer's administrative offices and reviewed his personnel file. He did not find a copy of the updated PER-10, nor did he find a copy of the 1990 PER-10 he had completed for his earlier reclassification request. The only document related to Grievant's 1990 PER-10 classification request was the Department of Personnel's Notice of Action that changed Grievant's pay rate and pay grade, effective January 6, 1991. Grievant also discovered that the Employer had assigned Perry his old position number.

25. On July 25, 1994, Pollica handed Grievant a copy of the PER-10 he had completed on April 12, 1994. This PER-10 is similar to the one Grievant discovered in the division secretary's files on July 8, 1994, but it is not identical. Any differences between the PER-10's are not significant to the issues before us (Grievant's Exhibits 2, 5).

26. During the period July 1, 1994 through June 30, 1995, the auditing division conducted 61 external audits and 6 internal audits. Perry conducted four of the six internal audits. Although all four auditors in the division generally perform



the same duties, Pollica assigned Perry the internal audits during that particular period because he was available and because he did not object to conducting internal audits. Pollica did not assign Grievant any internal audits during this period (State's Exhibit 8).

### OPINION

At issue is whether the State violated various contractual provisions after reinstating Grievant to the Auditor C position in April, 1994. Specifically, Grievant contended that the Employer discriminated against him because of grievance and whistleblowing activity, and violated Articles 5, 11, 12, 14, 15, 16 and 71 of the Contract. Grievant withdrew his grievances over two of the Employer's alleged actions - the issuing of disciplinary letters on July 14, 1994 and August 3, 1994 - thereby withdrawing allegations that the Employer violated Articles 12, 14 and 15 of the Contract.

#### Grievance of Supervisor's Conduct

Grievant contends that his supervisor violated various provisions of the Contract by not reinstating Grievant to his former position as ordered by the Board and the Vermont Supreme Court, by changing his job duties and position description, and by updating his job description without Grievant's knowledge. Grievant contends that his supervisor, in taking these actions, discriminated against Grievant in violation of Article 5 and 71 of the Contract because he was involved in grievance and whistleblowing activities. Grievant also contends that the Employer changed his job description without informing Grievant and VSEA, in violation of Article 16.

In previous grievances, where employees claimed that 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. Once the employee has demonstrated his or her conduct was protected, she or he must then show the conduct was a motivating factor in the decision to take action against him or her. The burden then 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 US 274 (1977). Grievance of Sypher, 5 VLRB 102 (1982). Among the protected activity cases where the Board has employed the so-called Mt. Healthy analysis have been cases involving “whistleblowing” and grievance activity. Grievance of McCort, 16 VLRB 70 (1993). *Affirmed*, \_\_ Vt. \_\_ (1994).

The first step in the analysis is to determine whether Grievant actually was engaged in these protected activities. Grievant first contends that he was engaging in protected grievance activities, due to his having filed and prevailed in grievances he filed with the Board in 1991 and 1992, which resulted in his reinstatement. Discrimination against employees for their grievance activity is prohibited by Article 5. We conclude that Grievant was protected by this provision through his grievance activities.

Grievant next contends that the Employer took adverse action against him due to those grievance activities by not reinstating him to his former position, as ordered by the Board and the Vermont Supreme Court, and also through changing his job duties and position description.

Before proceeding any further in the Mt. Healthy analysis, in examining

Grievant's claims we conclude that Grievant has presented insufficient evidence that the job he returned to on April 13, 1994, was sufficiently different from the one he was dismissed from in May, 1992, to rise to the level of an adverse action.

Grievant's complaint appears to be that the Employer changed his job description after he was reinstated as an Auditor C because his supervisor asked him to perform internal audits. Grievant contends that he was not qualified to perform internal audits, and that the performing of internal audits was not within the scope of the division's authority or within the job duties of an Auditor C.

To the contrary, the evidence indicates that Grievant had experience as an internal auditor prior to his hiring by the Employer. In fact, Grievant represented such experience on his application and resume. Grievant also maintained certification as an internal auditor by attending continuing professional educational courses at the Employer's expense. In addition, Auditor C's working in Grievant's division had been performing internal audits of governmental units long before Grievant filed his first grievance with this Board in 1991.

Grievant has not pointed to any specific provision of the current Auditor C job description, as set forth in the PER-10 his supervisor completed on April 12, 1994, that changed his job duties. Instead, Grievant's complaint appears to be that his supervisor did not tell him he had completed a new PER-10 in his absence from the division. Grievant points to the fact that he learned of the new PER-10 only after he and his supervisor disagreed about Grievant performing internal auditing duties, and the fact that his supervisor belatedly issued the revised PER-10 to the division only after Grievant discovered it in Agency files in the division secretary's office.

Although the supervisor's actions appear to be somewhat questionable, on closer examination we conclude that Grievant was not being subjected to any adverse action. The Employer's explanation for completing a PER-10 the day before Grievant returned to work is a credible explanation. The unrebutted evidence is that Grievant's supervisor was required to complete the PER-10 to create a new Auditor C position in the division in which to place Grievant as a result of his reinstatement. Also, the new PER-10, although not identical to one Grievant had completed in 1990, set forth the current duties of the auditing division and did not represent singling out Grievant for disparate treatment. Given these circumstances, the actions of Grievant's supervisor are more accurately described as inadequate communications, rather than imposing adverse action against Grievant.

Grievant also points to the fact that the Employer assigned his old position number to the employee who replaced him after his dismissal, apparently as further evidence that the Employer did not reinstate him to his former position. The evidence indicates that, except for budget tracking, an employee's position number has no special significance. In order to assign Grievant his original position number, the Employer would have been required to go through a lengthy administrative procedure for no substantive purpose. Accordingly, we conclude that the Employer's failure to reassign Grievant his old position number does not lend support to Grievant's claim that he was adversely treated.

In sum, although Grievant has shown that he was engaged in a protected activity, filing grievances, he has not demonstrated that he was adversely treated after he returned to the workplace. Thus, we need not proceed any further in the Mt.

Healthy analysis and analyze whether Grievant's protected conduct was a motivating factor in adverse treatment.

Grievant also contends that he was discriminated against for engaging in protected "whistleblowing" activities. "Whistleblowing" is a protected activity pursuant to Article 71 of the Contract. Article 71 defines a "whistleblower" as a person who "makes public allegations of inefficiency or impropriety in government", and provides that such person shall not be discriminated against in employment with regard to exercising such "whistleblowing" rights. We conclude that Grievant has not presented evidence separate from his grievance activities that he had made public allegations of inefficiency or impropriety in government within the meaning of Article 71. Thus, his claim in this regard is without merit.

Grievant also brings this claim under Article 16, contending that the Employer changed his job description without notifying VSEA or going through a formal classification review. Article 16 is the classification review article of the Contract that provides an exclusive procedure for employees or management to request the Department of Personnel to reclassify positions in State government. We cannot conclude that the Employer violated Article 16. Grievant has not demonstrated that his position underwent sufficient changes warranting notifying VSEA or invoking a classification review of his position.

#### Grievance of Agency Personnel Section Conduct

Grievant contends in this grievance that the Employer maintained a "secret" file on him and placed information in his personnel file without his knowledge or consent, in violation of Article 11. This grievance appears to have resulted from

Grievant discovering the April, 1994, PER-10 in Agency files in the division secretary's office on July 8, 1994, and then discovering that his 1990 PER-10 was not in his personnel file in the Employer's administrative area.

Article 11 sets forth various provisions related to the maintenance of and access to personnel records. Grievant found the PER-10 in Agency files of job descriptions. There is nothing in this article that prohibits the Employer from maintaining files of job descriptions within its Agency. In fact, the Employer has an obligation to maintain updated job descriptions for its employees. We thus reject Grievant's contention that the file in the division secretary's office was a "secret" file; it was the Agency's file of job descriptions and not a "secret" file maintained on Grievant.

Grievant also contends that the Employer violated Article 11 of the Contract because his 1990 PER-10 was not in his personnel file in July, 1994. There is nothing in Article 11 that requires that such information be maintained in an employee's personnel files. Accordingly, we find that the Employer did not violate Article 11 of the Contract in this regard.

In sum, there is insufficient evidence by which we can conclude that the Employer adversely treated Grievant because of whistleblowing or grievance activity, or that the Employer violated any other provision of the Contract.

ORDER

NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the Grievance of Gene McCort is DISMISSED.

Dated this 28th day of September, 1995, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Charles H. McHugh, Chairman  
Charles H. McHugh, Chairman

/s/ Louis A. Toepfer  
Louis A. Toepfer

/s/ Leslie G. Seaver  
Leslie G. Seaver