VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 99-34
MATTHEW GREENIA	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On May 26, 1999, the Vermont State Employees' Association, Inc. ("VSEA"), filed a grievance on behalf of Matthew Greenia ("Grievant") against the State of Vermont, Agency of Human Services, Department of Corrections ("Employer"). Grievant alleged that the Employer violated Articles 5, 14 and 15 of the collective bargaining agreement between the State of Vermont and the VSEA for the Corrections Bargaining Unit, effective for the period July 1, 1997 to June 30, 1999 ("Contract"), by restricting the areas he is allowed to work upon his reinstatement pursuant to a decision of the Labor Relations Board in Docket No. 98-23. Grievance of Greenia, 22 VLRB 18 (1999).

On October 6, 1999, a hearing was held in the Vermont Labor Relations Board hearing room in Montpelier before Board Members Catherine Frank, Chairperson; Carroll Comstock and John Zampieri. Special Assistant Attorney General David Herlihy represented the Employer. VSEA General Counsel Samuel Palmisano represented Grievant. The parties filed post-hearing briefs on October 21, 1999.

FINDINGS OF FACT

1. Article 5 of the Contract provides in pertinent part:

ARTICLE 5 – NO DISCRIMINATION OR HARASSMENT And AFFIRMATIVE ACTION

1. NO DISCRIMINATION, INTIMIDATION OR HARASSMENT
In order to achieve work relationships among employees, supervisors and managers at every level which are free of any form of discrimination, neither party shall discriminate against, intimidate, nor harass any employee because of . . . filing a complaint or grievance, or any other factor for which discrimination is prohibited by law.

2. Article 14 of the Contract provides in pertinent part:

ARTICLE 14 – DISCIPLINARY ACTION
1. No permanent . . employee covered by this agreement shall be disciplined without just cause. The parties jointly recognize the deterrent value of disciplinary action. Accordingly, the State will:
. . .
(c) impose a procedure of progressive discipline . . .
(d) In misconduct cases, the order of progressive discipline shall be:
(1) oral reprimand;
(2) written reprimand;
(3) suspension without pay;
(4) dismissal.

3. Grievant is a Correctional Officer II ("CO II") at the Chittenden Regional Correctional Facility ("CRCF"). The facility lodges both male and female inmates. During 1997, Grievant worked in both the female and male units. Grievant hoped to become a shift supervisor and had the opportunity to perform the duties of an acting shirt supervisor. He generally worked second or third shift as an acting supervisor, a float officer or as the unit officer on a male unit next to the female units. Greenia, 22 VLRB at 22.

4. On March 27, 1998, the Employer dismissed Grievant from employment. The Employer charged Grievant with engaging in an inappropriate course of conduct with female offenders while on duty as a correctional officer; the Employer also charged Grievant with being dishonest during an investigatory meeting by denying that he had a

conversation with another correctional officer about a female offender. On January 22, 1999, the Labor Relations Board found that the Employer had failed to prove by a preponderance of the evidence that Grievant had engaged in an inappropriate course of conduct with female offenders; the Board found that the Employer had proved by a preponderance of the evidence that Grievant had lied during an investigatory meeting. Id.

5. The Board did not sustain the dismissal for the singular offense of lying. The Board considered that the Employer had not pursued the lying allegation for approximately five months and only brought that charge against Grievant after it decided to pursue the other charges. Given these circumstances, the Board determined that a two week suspension was an appropriate penalty for Grievant lying during the investigatory meeting. Id. at 43 – 44. The Board ordered Grievant reinstated to his position with back pay and benefits from the date 10 working days from the effective date of his dismissal until his reinstatement. Id. at 46.

6. CRCF Superintendent John Murphy, who dismissed Grievant, continues to believe that Grievant committed the misconduct with the female offenders with which he was charged.

7. During the relevant time periods, the MC and MA units were male units adjacent to the female units.

8. On February 5, 1999, CRCF Superintendent John Murphy issued a memorandum to the security and operations supervisor that stated in part:

> Please be advised that (Grievant) will return to work commencing with the pay period beginning February 14, 1999.

Due to the allegations in the Labor Board decision, I believe that the following considerations should be adhered to regarding CO II Greenia's schedule.

(Grievant) may not be assigned to the following units:

Any female unit
MC
MA
Female visiting

The above units are not to be entered by (Grievant) while he is working or off duty.

Overtime assignments, whether voluntary or involuntary, are also covered by the above scheduling considerations. These considerations should not diminish (Grievant's) overtime opportunities. Supervisors should adjust their shift schedule as appropriate to accommodate this directive.

Be assured that all Shift Supervisors, as well as Alternative Shift Supervisors, are aware of the above (Grievant's Exhibit 2).

9. Superintendent Murphy issued this directive because he continued to believe that Grievant committed the misconduct for which he was initially charged and did not want Grievant working near female offenders. He speculated that the female offenders could "set up" Grievant and they would have the opportunity to make his life difficult. He also speculated that, if Grievant were to engage in inappropriate conduct with female offenders and the Department was sued, it would be liable because he placed Grievant in this situation believing that Grievant had committed such acts in the past.

10. It is not uncommon for inmates to make up stories about inmates and correctional officers. Many officers have been targets of such stories and rumors. Greenia, 22 VLRB at 21.

11. Grievant returned to work as a CO II on the second shift on February 14, 1999. His shift supervisor gave him the above-referenced memorandum. He has not

worked in a female unit since his return to CRCF, and he has not worked in a male unit adjacent to the female units.

12. Grievant also has not worked on third shift (11:30 p.m. to 7:30 a.m.) since his return to CRCF because the CO II working on third shift also acts as the acting shift supervisor and is required to supervise and have access to the entire facility, including the female units. He also has not worked as a float officer because the float officer must be available to go into all units, including the female units.

13. If Grievant is called upon to "book" a female offender, an available officer, usually the float officer, must assist him.

14. Training newly hired correctional officers is one of the duties of a CO II. Grievant must explain to any new employee he is training why he is not allowed to work in certain areas and why he must have an officer assist him when he books a female offender. Such explanation requires Grievant to tell new recruits about the earlier allegations against him, the Department's decision to dismiss him, the Board's decision reinstating him, and the restrictions Murphy placed on his employment when he reinstated him because Murphy continues to believe that he engaged in inappropriate conduct with female inmates. This is embarrassing to Grievant.

15. Inmates also are aware of the earlier allegations against Grievant, the Department's decision to dismiss him, the Board's decision reinstating him, and the restrictions Murphy placed on his employment upon Grievant's return to CRCF. Grievant feels that inmates take him less seriously because they know he has had such restrictions placed on his employment because Murphy continues to believe that he engaged in

misconduct with female inmates. This also is embarrassing to Grievant and puts him in a difficult position in carrying out his duties of supervising inmates.

16. Grievant is not the first male correctional officer to be accused by female inmates of engaging in inappropriate conduct. In such situations, the practice at CRCF has been to temporarily ban the accused officer from the female units, or place the officer on administrative leave, until the Department has completed an investigation of the matter. The evidence indicates there have been two situations in which employees have mutually agreed with the Employer not to return to the female units after the completion of the investigation when charges were not substantiated. Grievant is the only Department employee who has been involuntarily banned from working in or near the female units after having been cleared of accusations of inappropriate conduct with female inmates.

17. Grievant has not lost any overtime as a result of Murphy's February 5, 1999, memorandum restricting his employment

MAJORITY OPINION

Grievant contends that the Employer violated Articles 5 and 14 of the Contract when it restricted the areas he was allowed to work after reinstating him to his CO II position pursuant to an order of the Labor Relations Board in Docket No. 98-23. Grievance of Greenia, 22 VLRB 23 (1999). Grievant contends that the Employer discriminated and retaliated against him for filing a successful grievance. He also maintains that the Employer's actions were disciplinary actions and there was no just cause for such discipline. The Employer contends that restricting Grievant's work areas was a valid management act and did not constitute disciplinary action.

We first look to Grievant's claim that he was discriminated against for filing a grievance. In past cases, where employees claim management took action against them for engaging in protected activities such as filing a grievance, the Board has indicated that it will employ the analysis used by the United States Supreme Court. Once the employee has demonstrated protected conduct, he must then show the conduct was a motivating factor in the decision to take action against him. 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). Grievance of McCort, 16 VLRB 70 (1993); *Affirmed,* (Unpublished Decision, 1994). The Board has employed the so-called Mt. Healthy analysis in protected activity grievance cases specifically involving filing grievances. Grievance of Cronin, 6 VLRB 37 (1983); *Affirmed,* (Unpublished Decision, Supreme Court Docket 83-210, 1987). Grievance of McCort, 16 VLRB 70 (1993); *Affirmed* (Unpublished Decision, Supreme Court Docket No. 93-237, 1994). Grievance of Day, 16 VLRB 312 (1993).

The first step in the analysis is to determine whether Grievant was involved in the protected activity of filing grievances. Grievance activity is protected pursuant to Article 5 of the Contract. Grievant was protected by this provision as a result of filing his earlier grievance in Docket No. 98-23. Thus, he fulfills the first step in the Mt. Healthy analysis.

Grievant having demonstrated protected conduct, he then must show the conduct was a motivating factor in the decision to take action against him. A threshold issue is whether an adverse action actually has occurred. An employee must demonstrate that an adverse action was taken to prevail on a discrimination for protected activities claim.

Grievance of McCort, 18 VLRB 446, 455-58 (1995). Grievant contends that Superintendent Murphy took adverse action against him by restricting the areas he was permitted to work.

We conclude that Murphy's restrictions on the areas Grievant was allowed to work was an adverse action. Prior to his discharge, Grievant hoped to become a shift supervisor and had the opportunity to work as an acting shift supervisor on second and third shift. Murphy's restrictions resulted in the adverse effect on Grievant of not being able to work as an acting shift supervisor on third shift, or as a float officer, positions he routinely held prior to his discharge. Further, the adverse effect on Grievant is reflected in his being embarrassed that inmates and officers are aware of Murphy's restrictions on his work and his belief that the inmates take him less seriously because they know Murphy continues to believe that he engaged in misconduct. It also has a deleterious effect for Grievant to be put in the position of having to explain these restrictions to new officers he trains who come to the facility without knowledge of the accusations against him.

In determining whether protected activity was a motivating factor in the Employer's adverse treatment of Grievant upon his reinstatement, we look to the following guidelines: whether the employer knew of the employee's protected activities; whether the timing of the adverse action was suspect; whether there was a climate of coercion; whether the employer gave protected activities as a reason for the decision; whether the employer interrogated the employee about protected activities; 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. Grievance of Sypher, 5 VLRB 102, 131 (1982).

The Employer did not give as a reason for its actions the filing of a grievance, did not interrogate Grievant about such filing and did not explicitly warn him not to engage in such activity. The Board noted in Day, 16 VLRB at 351, however, that such lack of overt discrimination is not of great significance, as employers rarely act so blatantly as to advertise their conduct. Id. An examination of other elements persuades us that grievance activity was a motivating factor in the restrictions placed on Grievant.

It is obvious that the Employer had knowledge of Grievant's grievance activity. The Employer defended the dismissal of Grievant in two days of hearings before the Board. Murphy was keenly aware of the results of the grievance activity as reflected in his continuing belief expressed at the hearing that the Board incorrectly reversed his conclusions that Grievant had engaged in inappropriate conduct with female inmates.

The timing of the restrictions imposed on Grievant's work areas was suspect. The restrictions were imposed after the Board reinstated him to his CO II position. Prior to his dismissal, Grievant fully performed the duties of a CO II. Grievant's ability to fully perform these duties did not change during his absence from the facility. Instead, the restrictions were imposed as a consequence of Murphy's disagreement with the Board's decision in the grievance over Grievant's dismissal. These restrictions resulted from Grievant's protected activities. When an employee prevails in a grievance and then is placed in a worse position subsequent to the grievance activity than the one he was in prior to the events leading to the grievance, then a conclusion is warranted that the grievance activity motivated the adverse action.

In sum, we conclude that Grievant's filing of a grievance that resulted in his reinstatement was a motivating factor in the adverse action against him. The burden now

shifts to the Employer to show by a preponderance of the evidence that the same action would have been taken even in the absence of the protected conduct. The Employer must establish legitimate, non-discriminatory reasons for the action. Day, 16 VLRB at 353.

Murphy acknowledged that he took such actions against Grievant because he continued to believe, despite the Board's ruling, that Grievant had engaged in an inappropriate course of conduct with female offenders. He speculated that female inmates could "set up" Grievant and make his life difficult if he was allowed to have contact with them. He also speculated that, if Grievant engaged in misconduct and the Employer was sued, the Employer would be liable because he placed Grievant in this situation at a time he believed Grievant had committed such acts in the past.

Murphy's disagreement with the Labor Board's order to reinstate Grievant cannot be considered a legitimate and nondiscriminatory reason to restrict Grievant's work areas. The Board has the authority under the State Employees Labor Relations Act to make final decisions on employees' grievances. 3 VSA Section 926. Although Murphy may disagree with the Board's decision, he is bound by it.

Murphy's other reasons for restricting Grievant's work areas also are not legitimate. We find Murphy's expression of concern for Grievant to protect him from female inmates disingenuous, given Murphy's belief that Grievant previously engaged in inappropriate conduct with female inmates. Murphy's other claim that the Employer would be liable if Grievant engaged in inappropriate conduct, and the Employer was sued, is speculative. Such speculation cannot override an employee's right to be placed in the position he would have been in but for the improper dismissal.

The Employer has not offered legitimate and nondiscriminatory reasons for restricting the areas in which Grievant was allowed to work. We conclude that the Employer imposed such restrictions against Grievant due to discrimination against him for filing a grievance that resulted in the Board ordering his reinstatement. Thus, the Employer violated Article 5 of the Contract.

Given our conclusion that the Employer violated Article 5, there is no need to discuss Grievant's further contention that the restrictions placed on his employment were disciplinary actions in violation of Article 14.

Carroll P. Comstock

John J. Zampieri

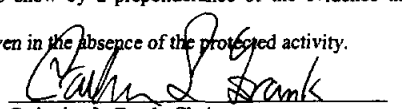
DISSENTING OPINION

I agree with my colleagues with respect to Grievant having shown that he engaged in protect conduct and that he was adversely treated. I disagree that Grievant has demonstrated that his protected conduct was a motivating factor in management's treatment of him upon his reinstatement.

I do not find the timing of the restrictions imposed on Grievant's work areas suspicious and I do no believe that the Employer's knowledge of Grievant's filing a grievance is sufficient to show that such filing motivated its actions. Grievant was not at the facility from the time he was dismissed until the time of his reinstatement. The Employer imposed the restrictions on Grievant's work areas when he returned to work because this was the first opportunity it had to impose such restrictions, not because he had filed a grievance. For that reason, I do not believe the timing of the Employer's

restrictions on Grievant's work areas is suspicious and I conclude that Grievant has failed to demonstrate that his protected activity was a motivating factor in the adverse action taken against him.

Having concluded that Grievant's protected activity was not a motivating factor in the adverse action taken against him, there is no need to proceed to the next level of analysis, requiring 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 activity.



Catherine L. Frank, Chairperson

ORDER

NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED:

1) The Grievance of Mathew Greenia is SUSTAINED with respect to his allegation that Article 5 of the Contract was violated;

2) The Vermont Department of Corrections shall immediately cease and desist from discriminating and retaliating against Grievant; and

3) The memorandum issued by Superintendent John Murphy on February 5, 1999, is rescinded and the Employer shall forthwith reinstate Matthew Greenia to his position without restrictions.

Dated this 30th day of November, 1999, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Carroll P. Comstock

John J. Zampieri