VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 99-54
NORMA BARNEY	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

At issue is whether to grant the Motion to Dismiss filed by the State of Vermont, Department of Employment and Training ("Employer") in this matter. On August 12, 1999, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Norma Barney ("Grievant"). Grievant alleged that the Employer violated Articles 5 and 65 of the collective bargaining agreement between VSEA and the State of Vermont for the Non-Management Unit, effective July 1, 1999 – June 30, 2001 ("Contract"), in separating Grievant from employment during the 90 day working test period provided for under the Reemployment Rights article of the Contract. Grievant contended that her separation from employment constituted impermissible discrimination based on union membership, complaint and grievance activities, and whistleblowing activities.

On August 20, 1999, the Employer filed a motion to dismiss the grievance on the grounds that Grievant possesses no rights to grieve her separation from employment pursuant to the Reemployment Rights article of the Contract. On September 8, 1999, Grievant filed a memorandum in opposition to the motion to dismiss.

A hearing was held on the Employer's motion to dismiss on October 7, 1999, before Labor Relations Board Members Catherine Frank, Chairperson; Carroll Comstock and John Zampieri. Samuel Palmisano, VSEA General Counsel, represented Grievant.

Assistant Attorney General William Reynolds represented the Employer. The parties filed post-hearing briefs on October 14, 1999.

FINDINGS OF FACT

1. The Contract provides in pertinent part as follows:

. . .

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 . . . membership or non-membership in the VSEA, filing a complaint or grievance, or any other factor for which discrimination is prohibited by law . . .

. . .

ARTICLE 64 – REEMPLOYMENT RIGHTS (RECALL RIGHTS)

1. MANDATORY REEMPLOYMENT RIGHTS

An employee with permanent status who has received an official notice of layoff, and who is about to be laid off under the Reduction in Force Article, shall have . . . mandatory reemployment rights . . .

2. WORKING TEST PERIOD

An employee who accepts an offer of reemployment under this Section . . . shall be placed in a ninety (90) day probationary period, without recourse to the grievance procedure.

3. SEPARATION DURING THE WORKING TEST PERIOD

An employee who is separated during the probationary period referred to in subsection 2 above shall have reemployment rights reinstated to include the number of mandatory offers and amount of time left immediately before accepting the "probationary" position, and shall not have recourse to the grievance and arbitration process as a result of such separation.

. . .

ARTICLE 65 – WHISTLEBLOWER

:. A "WHISTLEBLOWER" is defined as a person covered by this Agreement who makes public allegations of inefficiency or impropriety in government. No provision of this Agreement shall be deemed to interfere with such an employee in the exercise of his or her constitutional rights of free speech, and such person shall not be discriminated against in his employment with regard thereto.

. . .

2. The working test period provision contained in the Reemployment Rights article of the Contract was first negotiated in the 1981-1982 collective bargaining agreement between VSEA and the State. The provision was negotiated to address a problem of some managers in State government being reluctant to offer employment to laid off employees. The managers removed job postings from recruitment lists when it was learned that a job vacancy may be subject to the mandatory reemployment of an employee on the recall list. The parties agreed to the working test period as a method of encouraging managers to reemploy laid off employees.

3. During negotiations leading to the 1981-1982 agreement, there were no discussions between VSEA and the State specifically as to whether employees separated from employment during working test periods under the Reemployment Rights article would be able to file grievances alleging that the employer violated Article 5 and/or the whistleblowing article in connection with the separation from employment.

4. The State has considered employees in working test periods under the Reemployment Rights article to be covered by all articles of the Contract. The State further has considered employees to be able to grieve violations of any articles of the Contract if such violations are not in connection with a separation from employment during the working test period.

5. On or about April 19, 1999, Grievant accepted an offer of reemployment pursuant to the Reemployment Rights article, and began working for the Department of Employment and Training as a Specialist II in the Barre office of the Department.

6. On July 15, 1999, two days prior to the end of the 90 day working test period provided for under the Reemployment Rights article, the Employer dismissed Grievant from the Specialist II position.

OPINION

At issue is whether to grant the Employer's motion to dismiss this grievance. The Employer contends that the provisions of the Reemployment Rights article of the Contract clearly prohibit her from grieving her separation from employment during a working test period under the Reemployment Rights article. Section 2 of the Reemployment Rights article provides that an employee with mandatory reemployment rights who accepts an offer of reemployment "shall be placed in a ninety (90) day probationary period, without recourse to the grievance procedure." Section 4 of the article provides that an employee "who is separated during the probationary period . . . shall not have recourse to the grievance and arbitration process as a result of such separation."

Grievant contends that, notwithstanding this language, the Board must examine the bargaining history and the Contract as a whole which demonstrate that the language relied on by the Employer is not as prohibitive as it appears. Grievant maintains that there is no bargaining history indicating that the parties intended to deny employees protections from impermissible discrimination during the working test period under the Reemployment Rights article. Grievant further relies on the evidence indicating that the State considers all articles of the Contract - including the no discrimination provisions of

Article 5 and the whistleblower article - to apply to employees in the working test period, and that the State considers such employees to be able to grieve violations of any articles of the Contract if such violations are not in connection with a separation from employment during the working test period. Grievant contends that it would be a fair reading of the Contract as a whole to allow for challenges to separation during the working test period based on alleged violations of Article 5 and the whistleblower article. Grievant construes the Article 64 language precluding employees from the grievance process as being limited to prohibiting employees from claiming that there was no just cause for their separation during the working test period.

A contract will be interpreted by the common meaning of its words where the language is clear. In re Stacey, 138 Vt. 68, 71 (1980). If clear and unambiguous, the provisions of a contract must be given force and effect and be taken in their plain, ordinary and popular sense. Swett v. Vermont State Colleges, 141 Vt. 275 (1982). The Board will not read terms into a contract unless they arise by necessary implication. In re Stacey, 138 Vt. at 71. The law will presume that the parties meant, and intended to be bound by, the plain and express language of their undertakings; it is the duty of the Board to construe contracts; not to make or remake them for the parties, or ignore their provisions. Vermont State Colleges Faculty Federation v. Vermont State Colleges, 141 Vt. 138, 144 (1982).

In applying these standards to this case, we conclude that the Reemployment Rights article plainly and expressly prohibits the grievance filed in this case. In providing that an employee "who is separated during the probationary period . . . shall not have recourse to the grievance and arbitration process as a result of such separation", Section 3

of the Reemployment Rights article makes it clear that employees in working test periods may not file grievances over their separation from employment. Grievance of Rogers, 18 VLRB 109, 114 (1995) (contract language providing that "probationary employees may be . . . dismissed . . . solely at the discretion of management without regard to the provisions of this agreement and with no right to the grievance process" makes it clear that probationary employees may not file grievances over their dismissal). If we were to rule otherwise, we would be remaking the parties' Contract and ignoring its provisions.

Grievant's contention that bargaining history indicates that the Reemployment Rights article is not as prohibitive as it appears is not persuasive. In negotiations on the article, there were no discussions between VSEA and the State specifically as to whether employees separated from employment during working test periods under the Reemployment Rights article would be able to file grievances alleging that the employer violated Article 5 and/or the whistleblowing article in connection with the separation from employment. Given the clear and unambiguous language of the Reemployment Rights article, such bargaining history provides no aid to Grievant.

Likewise, Grievant incorrectly relies on the evidence indicating that the State considers the no discrimination provisions of Article 5 and the whistleblower article to apply to employees in the working test period, and that such employees are able to grieve violations of these articles if such violations are not in connection with a separation from employment during the working test period. The issue is whether Grievant can grieve alleged violations of Article 5 and the whistleblower article in connection with her separation from employment, not whether she is covered by those articles or whether she can grieve alleged violations of those articles during the working test period prior to her

separation. Section 3 of the Reemployment Rights article makes it clear that she possesses no such grievance rights. Rogers, 18 VLRB at 114.

We note that, although Grievant may not pursue a grievance under the Contract over her separation from employment, she has recourse to contest her dismissal before the Board. On August 30, 1999, VSEA and Grievant filed an unfair labor practice charge with the Board alleging that she was dismissed due to discrimination and retaliation against her due to her complaint and grievance activity, filing of unfair labor practice charges, union membership and testifying before the Board (VLRB Docket No. 99-59). Today, the Board has issued an unfair labor practice complaint on the charge. The Board will schedule a hearing on the complaint, which will provide Grievant with a forum to contest her dismissal. She will have an opportunity to pursue the allegations that she made in the grievance with the exception of her allegation that she was discriminated against due to whistleblowing activities.

ORDER

NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the Employer's Motion to Dismiss is GRANTED, and the Grievance of Norma Barney is DISMISSED.

Dated this 5th day of November, 1999, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Catherine L. Frank, Chairperson

Carroll P. Comstock

John J. Campbell