VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 00-7
SHERRY BREWSTER	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On February 11, 2000, the Vermont State Employees' Association, Inc. ("VSEA") filed a grievance on behalf of Sherry Brewster ("Grievant") against the State of Vermont, Department of Employment and Training ("Employer"). Grievant alleges that the Employer violated Articles 5, 15 and 65 of the collective bargaining agreement between the State of Vermont and VSEA for the Non-Management Unit, effective for the period July 1, 1999 to June 30, 2001 ("Contract"). Specifically, Grievant alleges that various actions of the Employer, including but not limited to denying her a promotion, constituted discrimination and retaliation on the basis of union membership, complaint and grievance activities, and free speech and whistleblowing activities.

On February 23, 2000, the Employer filed a motion to dismiss the grievance on the grounds that Grievant failed to file a timely Step III grievance. Grievant responded to the motion on February 29, 2000. On March 30, 2000, the Labor Relations Board issued a memorandum and order denying the Employer's motion to dismiss. 23 VLRB 96.

On October 26, 2000, a hearing was held in the Vermont Labor Relations Board hearing room in Montpelier before Board Members Catherine Frank, Chairperson; Richard Park and John Zampieri. VSEA General Counsel David Stewart and VSEA Deputy Legal Counsel Michael Casey represented Grievant. Assistant Attorney General

William Reynolds represented the Employer. Both parties filed post hearing briefs on November 13, 2000.

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

2. Article 15 of the Contract provides in pertinent part:

ARTICLE 15
GRIEVANCE PROCEDURE

1. PURPOSE

(a) The intent of the Article is to provide for a mutually satisfactory method for settlement of complaints and grievances, as defined in Section 2 of this Article, filed by an individual, unit, or the duly certified bargaining representative . . .

2. DEFINITION

(a) "Complaint" is an employee's . . . informal expression to the immediate supervisor of dissatisfaction with aspects of employment or working conditions under a collective bargaining agreement.

(b) "Grievance" is an employee's . . . expressed dissatisfaction, presented in writing, with aspects of employment or working conditions under a collective bargaining agreement . . .

3. Article 65 of the Contract provides in pertinent part:

ARTICLE 65
WHISTLEBLOWER

1. 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/her employment with regard thereto.

. . .

3. Employees who possess information about inefficiency or impropriety in State government are urged to bring that information to the attention of appropriate government officials prior to making public allegations.

4. Grievant started working as a Secretary C in the Employer's Barre Career Resources Center in August 1998, and has remained in that position during all relevant times. Grievant is the secretary to the district manager, Francis McFaun. The office primarily assists people in finding employment and filing unemployment claims. In addition to her secretarial duties, at least once a week Grievant works on the front desk directly assisting individuals in completing their employment applications and directing them to appropriate staff.

5. Prior to being hired by the Employer, Grievant worked as an assistant clerk in the Vermont District Court in Barre for 10 years. She also worked in the Employer's central office legal department from 1986 – 1988.

6. In addition to her position with the Employer, Grievant works as a part time dispatcher at the Montpelier Police Department.

7. Grievant has interacted with the public for the past 10 years in all of the positions she has held. She also has learned and used various computer programs, including the Employer's internal computer system.

8. Employment and Training Specialists ("E&T Specialist") I, II, and III work in the Employer's district offices. They primarily interview candidates for unemployment compensation claims. Two E&T Specialist II positions became available in the Barre office in April 1999 and McFaun interviewed Grievant for the position. During this interview McFaun asked Grievant how she would define "loyalty". She

replied that giving the Employer eight hours of work every day would be an expression of loyalty.

9. Barry Jones was working as a temporary E&T Specialist II in the Barre district office at the time the two positions became available. Jones had left a teaching position at a local school. He and McFaun had a personal relationship because McFaun had been involved with the school for many years as a hockey coach. McFaun hired Jones. The second vacant position was awarded to a State employee who had re-employment rights due to a reduction-in-force (State Exhibit 7).

10. Grievant was upset when she heard that McFaun had hired Jones for the E&T Specialist position. She confronted him about his decision and told him that she thought hiring Jones was unfair. Although Grievant was not a member of the VSEA, she immediately called the union and spoke with VSEA Field Representative Tenaya Lafore.

11. Lafore called McFaun and questioned him about hiring Jones for the E&T Specialist II position. McFaun was upset that someone had complained to VSEA and kept questioning Lafore to discover who had called her. Lafore would not tell McFaun who had called her.

12. McFaun confronted Grievant and asked her if she had called VSEA. Grievant admitted that she had done so. McFaun told her that he could no longer trust her as his secretary and that she would be "making a name" for herself by calling VSEA. Prior to this exchange, Grievant and McFaun had enjoyed an amicable working relationship and talked about their families and personal interests. After this exchange, McFaun was less friendly towards Grievant, did not engage in small talk with her, and confronted employees about contacting VSEA regarding workplace issues.

13. Subsequent to this exchange between Grievant and McFaun, VSEA notified employees at the Barre office about a meeting at VSEA headquarters on Monday, May 4, 1999, to talk about workplace issues at the Employer's Barre office. Jim Lucenti, a VSEA member who was working as an acting supervisor in the Barre office at the time, called McFaun over the weekend to tell him about the proposed meeting.

14. Just before the May 4 meeting at VSEA headquarters, McFaun called a general staff meeting. He told employees that he knew they were going to a meeting at VSEA. He paced around the room with a rolled up piece of paper, pointing at people as he spoke. This had the effect of intimidating some employees. McFaun told employees that he hoped they would examine their conscience and remember everything he had done for them.

15. Lucenti attended the meeting at VSEA headquarters. Some employees felt uncomfortable due to his position as an acting supervisor.

16. In April 1999, the Employer hired Norma Barney as an E&T Specialist II. Barney had previously worked for another State agency. Prior to Barney's hire, Lucenti told E&T Specialist III Anita Slayton that she would be training Barney. During this conversation, Lucenti also told Slayton that Barney had been a "whistleblower" in another department. Barney had filed an unfair labor practice charge and a grievance with the Labor Relations Board alleging various statutory and contractual violations, including discrimination based on whistleblowing. Barney v. Department of Public Safety, 21 VLRB 230 (1998). Grievance of Barney, 22 VLRB 220 (1999).

17. In early June 1999, many of the Barre office employees were scheduled to attend a two day training session in Colchester, Vermont. Initially, employees had

understood they would be entitled to spend the night in Colchester. Later they were told they could not spend the night. Some employees were displeased about not being able to spend the night in Colchester.

18. Employment and Training Specialist III Anita Slayton called the union about the Colchester issue. Ultimately the issue was resolved between VSEA and the Employer and employees were allowed to spend the night in Colchester. McFaun was angry that someone had called VSEA about this issue and confronted employees, asking them if they had called VSEA. He confronted Grievant in his office. Grievant denied that it was she who had called VSEA. Slayton walked into McFaun's office during the exchange between Grievant and McFaun and acknowledged that it was she who had called VSEA.

19. On or about July 15, 1999, McFaun sent all staff a memorandum which *stated in pertinent part:*

> . . .
>
> It also has been brought to my attention that some of my actions are causing some employees to feel harassed or intimidated regarding their contact with VSEA. I want you all to know that I was unaware of the effect of my action and that I will refrain from questioning employees concerning any contact with VSEA. I want you all to know I recognize your legal and contractual right to contact VSEA or to file complaints without fear of harassment or intimidation by myself or anyone acting in a supervisory role in this office.
>
> Having said the above, I hope we can now move on and work together as a team to serve the public (Grievant Exhibit 5).

20. Barney was terminated from her position in mid-July 1999. Many employees, including Grievant and Slayton, were upset about Barney's dismissal because it was their opinion that Barney was a good employee.

21. Grievant was leaving her house to go to work the morning after she learned that Barney had been dismissed and saw a piece of firewood. Spontaneously, Grievant decided to take the wood to her office to demonstrate her displeasure with Barney's dismissal. Grievant put the wood next to her desk, which is located in the back of the office. She told co-workers and supervisors that the Employer must like "deadwood" in the office because it terminated Barney and kept nonproductive "deadwood" employees. Thereafter, two other employees also brought pieces of firewood into their offices to demonstrate their objection to Barney's termination. Grievant told family, friends and co-workers at her part-time job about her objection to the Employer's dismissal of Barney and about her "deadwood protest".

22. At some point, McFaun asked Grievant about the firewood next to her desk. When she told him it represented deadwood in the office, he asked her to consider those employees' feeling, or words to that effect. He did not reprimand her or ask her to take the firewood home. Grievant's piece of firewood remained by her desk for several weeks, at which time Lucenti asked her to take it home because he said it was bad for office morale and insulting to other employees. Grievant complied with his request.

23. In August 1999, the Employer began the process of hiring an E&T Specialist II and an E&T Specialist III in the Barre office.

24. On or about August 26, 1999, Grievant applied for the E&T Specialist II position.

25. Judith Bourbeau also applied for the E&T Specialist positions. Bourbeau previously had worked for the Employer for approximately four years as an E&T Specialist II and E&T Specialist III in the Employer's St. Johnsbury office. She had left

that position in 1998 to take a job in the private sector as an accounts receivable/credit manager for an automobile parts company.

26. McFaun promoted Jones to the E&T Specialist III position and interviewed candidates for the E&T Specialist II position.

27. Grievant and Bourbeau took an open recruitment test at the Department of Personnel for the E&T Specialist II position. Grievant attained a score of 73 and Bourbeau attained a score of 83. McFaun interviewed both candidates (State Exhibit 1).

28. McFaun determined that Bourbeau was the most qualified candidate for the E&T Specialist II position because she had performed those duties for four years. He called the manager of the St. Johnsbury office as a reference check, and the manager provided him with a good work reference. McFaun offered Bourbeau the position and she accepted it (State Exhibits 4 and 5).

29. Grievant questioned McFaun about hiring Bourbeau. During this exchange, McFaun told Grievant she had displayed negativity by bringing the firewood into the office. McFaun told Grievant he knew that members of her family were "nice" and he hoped to see that quality in her, or words to that effect. McFaun also told Grievant he knew she was smart enough to perform the job.

30. McFaun has promoted secretaries to E&T specialist positions five or six times in the course of his approximately 18 year tenure as district manager.

31. Although McFaun stated in his July 15, 1999, memorandum that he would recognize employees' contractual and legal right to contact VSEA, he questioned Grievant's need to meet with her VSEA attorney on or about October 20, 2000, when Grievant was preparing for the hearing in this grievance.

OPINION

Grievant contends that actions of the Employer, including but not limited to denying her a promotion, constituted discrimination and retaliation on the basis of union membership, complaint and grievance activities, and free speech and whistleblowing activities, in violation of Articles 5, 15 and 65 of the Contract.

In past cases, the Board has indicated the analysis it will employ where employees claim 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 protected conduct, she must then show the conduct was a motivating factor in the decision to take action against her. Then the burden shifts to the employer to show by a preponderance of the evidence it would have taken the same action even in the absence of the protected conduct. Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977). Grievance of McCort, 16 VLRB 70 (1993); *Affirmed,* (Unpublished Decision, 1994). The Mt. Healthy analysis has been employed by the Board in protected activity grievance cases specifically involving union activity; Grievance of Roy, 6VLRB 63 (1983); Grievance of Sypher, 5 VLRB 102 (1982); Grievance of Danforth, 22 VLRB 220 (1999); filing of grievances; Grievance of Cronin, 6 VLRB 37 (1983), *Affirmed,* (Unpublished Decision, 1987) McCort, supra; whistleblowing; McCort, supra; Grievance of Choudhary, 15 VLRB 118 (1992), *Affirmed,* Unpublished Decision, 1994); Grievance of Robins, 21 VLRB 12 (1998), *Affirmed,* ___ Vt. ___ (1999); and free speech rights. Grievance of Morrissey, 7 VLRB 129 (1984); *Affirmed,* 149 Vt. 1 (1987). Robins, supra.

Article 5 Claim

Article 5 of the Contract prohibits discrimination on the basis of membership or non-membership in the union, filing a complaint or grievance or any other factor for *which discrimination is prohibited by law. Article 15 defines a complaint as "an* employee's . . . informal expression to the immediate supervisor of dissatisfaction with aspects of employment".

The first step in the analysis is to determine whether Grievant was involved in protected activities. We conclude that Grievant's informal expression of dissatisfaction to McFaun in April 1999 about his hiring Jones for the E&T Specialist II position was a "complaint" and invoked the protections of Article 5, prohibiting discrimination against her for filing such complaint. Further, her contacts with the VSEA from April 1999 forward were activities protected by Article 5. Grievant, having demonstrated protected conduct, must show the conduct was a motivating factor in adverse actions taken against her. If she succeeds in doing so, the Employer then has to show it would have taken the same action even in the absence of the protected conduct.

In Grievance of Sypher, 5 VLRB 102, 131 (1982), the Board noted the guidelines it would follow in determining whether protected activity was a motivating factor in an adverse action taken against an employee: 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 an 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.

The pertinent factors here include knowledge, timing, whether there was a climate of coercion, whether the Employer gave protected activities as a reason for its actions, whether the Employer interrogated the employee about protected activities and whether the Employer warned the employee not to engage in protected activities.

In applying these factors, we conclude that District Manager Francis McFaun created an adverse work environment for Grievant due to her protected conduct. McFaun had knowledge of her protected activities since Grievant complained to him in April 1999 about hiring Jones and he later confronted her about calling VSEA. He told Grievant that by contacting VSEA, he could no longer trust her. His reaction to Grievant and other employees contacting VSEA shows obvious anti-union animus. We also find it significant that McFaun convened a staff meeting in early May 1999 for the exclusive purpose of asking employees to examine their consciences and remember everything that he had done for them just before they left for a union meeting at VSEA headquarters. His manner during such meeting had the effect of threatening and intimidating some employees. McFaun interrogated employees about contacting VSEA and did so to Grievant on several occasions. In a July letter to his employees, McFaun addressed this concern and acknowledged that his conduct had caused some employees to feel harassed or intimidated regarding their right to contact VSEA. In sum, we conclude that McFaun adversely affected Grievant's work environment after April 1999 by his actions, which were motivated by Grievant's protected activities.

The Employer is unable to meet a burden to show that these same actions would have been taken in the absence of the protected conduct. There is no legitimate and nondiscriminatory reason for McFaun to have adversely affected Grievant's work environment. Thus, we conclude that Grievant has demonstrated discrimination against her due to protected activities.

Nonetheless, we do not believe that Grievant's protected activities were a motivating factor with respect to McFaun's decision to hire Bourbeau for the E&T Specialist II position in September 1999. We conclude that McFaun hired Bourbeau because she had superior qualifications to Grievant and that Grievant's protected conduct did not affect this decision. However, even assuming that we were to conclude that Grievant's protected activities were a motivating factor in the decision to hire Bourbeau, we conclude that the Employer has shown by a preponderance of the evidence it would have taken the same action even in the absence of the protected conduct. Bourbeau had performed the duties of an E&T Specialist for several years, provided a good work reference for the performance of those duties, and had attained a higher score in the open recruitment exam. She was a more qualified candidate than Grievant, and we conclude McFaun would have hired her even in the absence of Grievant's protected activities.

Whistleblowing and Free Speech Claims

Grievant claims that she also was denied the promotion to E&T Specialist II because of her whistleblowing and free speech activities, specifically bringing a piece of firewood into the office to protest Barney's dismissal, her so-called "deadwood protest".

Whistleblowing is a protected activity pursuant to Article 65 of the Contract, which defines a "whistleblower" as a person who makes "public allegations of

inefficiency or impropriety in government", and provides that a "whistleblower" shall not be discriminated against for exercising free speech rights.

The first step in the analysis is to determine whether Grievant was involved in the protected activity of whistleblowing. We have held that an employee is not a whistleblower if such employee only reported acts of inefficiency or impropriety within his or her department and did not make such claims public. Robins, 21 VLRB at 22. McCort at 106. In the matter before us, Grievant's deadwood protest was primarily an internal office affair. Her protest was not evident to the public since the wood was in her office and not in an area that the public frequented. Although Grievant told co-workers, family and colleagues at her part-time job that she objected to Barney's dismissal in light of the Employer's retention of nonproductive "deadwood" employees, this does not constitute making public allegations of inefficiency or impropriety invoking the protections of Article 65.

With respect to Grievant's free speech claim, constitutional claims concerning free speech rights are properly encompassed within the definition of a "grievance". Grievance of Morrissey, supra. The problem in any case is to arrive at a balance between the interests of the employee, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. Morrissey, 149 Vt. at 14; *citing* Pickering v. Board of Education, 391 U.S. 563 (1968).

The threshold inquiry in free speech cases is whether the employee's speech conduct can be "fairly characterized as constituting speech on a matter of public concern". Morrissey, 149 Vt. at 15; *citing* Connick v. Myers, 461 U.S. 138 (1983).

However, when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters of a personal interest, absent the most unusual circumstances, a court is not the proper forum to review the wisdom of a personnel decision. Id. Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record. Id. The First Amendment does not require a public office to be run as a roundtable for employee complaints. Id. If the employee's speech touches upon matters of public concern, then the employee's interest in the speech activity must be balanced against the government's interest in maintaining efficiency and discipline. Morrissey, 149 Vt. at 16; *citing* Connick v. Myers, 461 U.S. at 150.

We conclude that Grievant does not meet the threshold test of speaking out as a citizen on a matter of public concern. Considering the content, form and context of her protest – placing a piece of firewood next to her desk and telling co-workers and supervisors that it represented "deadwood employees" – does not sufficiently rise to the level of a citizen speaking on a matter of public concern. We instead view Grievant's deadwood protest as an employee complaint of a management personnel decision.

Even assuming that Grievant's deadwood protest was that of a citizen speaking on a matter of public concern, we conclude that the Employer's interest in maintaining efficiency and discipline outweighs Grievant's interest in speaking on this matter of public concern. Although there was no evidence that Grievant's deadwood protest was disrupting the office, we conclude that its presence was an insulting reminder to some employees that Grievant believed they were non-productive. Asking her to remove the

firewood was a prudent and reasonable management decision to maintain employee morale and efficiency.

Moreover, even assuming that Grievant's deadwood protest was protected speech and the Employer did not have an overriding interest, she must then show the conduct was a motivating factor in the decision not to promote her to an E&T Specialist II position in September 1999. In applying the Sypher guidelines, the only pertinent factor would be McFaun's statement to Grievant that she had displayed negativity by bringing the firewood into the office. The timing of the promotion denial is not particularly significant in that it was a few months after Grievant's deadwood protest, during which time McFaun only made one remark to Grievant about her hurting other employees' feelings. Neither Grievant nor the other two employees who joined Grievant's protest were interrogated about their protest, nor was there evidence that they were singled out in any way. We conclude that Grievant's deadwood protest was not a motivating factor in denying her the E&T Specialist II position. Further, even if we were to conclude that it was a motivating factor, the Employer has shown by a preponderance of the evidence it would have taken the same action even in the absence of protected conduct. Bourbeau was a more qualified candidate than Grievant, and we conclude that she would have been hired in the absence of Grievant's deadwood protest.

In sum, we conclude that the Employer violated Article 5 because McFaun's actions towards Grievant because of her protected activities adversely affected Grievant's work environment. On the other hand, we conclude that the Employer did not discriminate and retaliate against Grievant in violation of Articles 5 and 65, and did not violate her free speech rights, by denying her a promotion to E&T Specialist II in

September 1999. While the remedy available to the Board is limited, we are concerned that continuing offenses are involved here, and we encourage the Employer to be particularly vigilant in complying with this order.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is hereby ordered:

1) The grievance of Sherrie Brewster is SUSTAINED to the extent that the Vermont Department of Employment and Training violated Article 5 of the Contract through the actions of Francis McFaun discussed in the opinion adversely affecting Grievant's work environment, and the Employer shall cease and desist from these actions; and

2) The Grievance is DENIED in all other respects.

Dated this 5th day of December, 2000, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Catherine L. Frank
Catherine L. Frank, Chairperson

/s/ Carroll P. Comstock
Carroll P. Comstock

/s/ Richard W. Park
Richard W. Park