VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 01-32
SUSANNA PALMER	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

The issue before the Labor Relations Board in this grievance contesting a 5-day suspension and removal of duties is whether to grant a motion filed by Susanna Palmer ("Grievant") to exclude evidence. On June 19, 2001, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Grievant, alleging that the State of Vermont Department of Social and Rehabilitation Services ("Employer" or "SRS") violated Articles 5, 14 and 15 of the collective bargaining agreement between the State of Vermont and VSEA for the Non-Management Unit effective July 1, 1999 to June 30, 2001 ("Contract") by suspending Grievant for five days and removing duties from her. On November 30, 2001, Grievant filed a Motion to Exclude Certain Evidence and/or For Partial Summary Judgment. Grievant sought to exclude the Employer from being permitted to introduce as evidence in this matter certain information which it directly and indirectly obtained by reading confidential e-mail communications between Grievant and her attorney. Grievant further moved for partial summary judgment in her favor on the Employer's imposition of discipline based solely on information derived from the confidential e-mail. The Employer filed a memorandum in opposition to the motion on December 19, 2001.

A hearing on the motion was held before Labor Relations Board Members Catherine Frank, Chairperson; Carroll Comstock and Richard Park on December 20,

2001 in the Board hearing room in Montpelier. Assistant Attorney General William Reynolds represented the Employer. Michael Casey, VSEA Associate General Counsel, represented Grievant. On January 17, 2002, the parties filed supplemental memoranda of law on the motion.

FINDINGS OF FACT

1. At all times relevant, the Employer employed Grievant as a Social Worker B in the Springfield District Office assigned to cases of abuse and neglect. During November and December, 2000, Grievant's immediate supervisor, Brenda Gooley, instructed Grievant to "substantiate" a case, the "TG" case, which Grievant had been investigating. To "substantiate" a case means to determine after an investigation that there is a reasonable belief that a child has been abused or neglected. Gooley told Grievant that "it was a stretch" to substantiate the case.

2. In early December, 2000, Gooley instructed Grievant to write a letter to the mother in the TG case to inform her that if her son did not get therapy by December 18, SRS would seek assistance from the State's Attorney's Office to obtain an order of protected supervision.

3. On or about December 18, 2000, Gooley instructed Grievant to write an affidavit to Robert Sand, Windsor County State's Attorney, on the TG case to obtain an order of protective supervision. At that time, Grievant informed Gooley that she was not convinced of the substantiation claim and that it would be difficult to support the evidence in an affidavit and in any court proceedings. Gooley instructed Grievant to proceed, despite Grievant's reservations. Grievant could have discussed her concerns with the SRS District Director or attorneys of the Employer. She did not do so.

4. Prior to December 24, 2000, Grievant had sought legal advice from Attorney Stephen Fine approximately half a dozen times. Fine provided legal advice to Grievant on those occasions. At all times relevant, Grievant and Fine were friends. Fine represented Grievant when she filed a grievance with the Employer over a performance evaluation she received. Fine represented her on another occasion involving her employment when the Employer conducted an investigation concerning how Grievant had handled a situation when one of her clients was burned. The investigation did not result in disciplinary action being taken against Grievant. Fine did not charge Grievant for legal services. Grievant provides photography and gardening services to Fine's family without charge.

5. On December 24, 2000, Grievant sent an e-mail from her home to Fine. In the first paragraph of the e-mail, Grievant recommended a book to Fine. In the second paragraph, Grievant made observations about relations between a family court judge and the family court staff. In the next three paragraphs, Grievant discussed the TG case. Grievant revealed the identity of the client in the e-mail. Grievant began the discussion by stating: "i wanted to ask your opinion or just tell you about this situation . . ." Grievant then relayed the historical development of the case, including Gooley's instructions to substantiate the case and Grievant's concerns about substantiation. In her last paragraph discussing the TG case, Grievant stated: "i am not really sure why i am telling you this except i thought it would interest you and show once again how fearful srs is of being complained about and being overturned . . ."

6. Fine sent Grievant an e-mail response to her e-mail. He began his response by stating: "Give me a subject, and I give you an opinion . . . ". Fine then made

suggestions to Grievant on how to proceed in the TG case. Grievant sent a e-mail replying to Fine's e-mail, stating: "thanks for the excellent advise(sic)…it sounds very good…i shall do it!"

7. From time to time, Fine has been critical of SRS policies and practices.

8. In January 2001, Grievant sent her affidavit and a letter to the State's Attorney's office concerning the TG case, as instructed by Gooley.

9. In late January 2001, Grievant had the TG case file at her home. The materials on the case were spread out on the floor in her home. She gathered materials she had on the case and placed them in the file. Included among the materials she placed in the file was the December 24 e-mail correspondence between her and Fine. Grievant did not intend to place the e-mail correspondence in the file and was unaware she had done so. Grievant then submitted the entire TG case file to Gooley. When Gooley reviewed the case file, she discovered the e-mail correspondence.

10. On February 20, 2001, Department of Social and Rehabilitation Services Commissioner William Young sent a letter to Grievant providing in pertinent part:

> This is to advise you that I am contemplating imposing discipline up to and including dismissal from your position as Social Worker B with the Department of Social and Rehabilitation Services. You have the right to respond to the specific allegations listed below, either orally or in writing, before a final decision is made. You have a right to be represented by VSEA or by private counsel during proceedings connected with this action.
>
> The reasons this discipline is contemplated are as follows:
>
> On December 24, 2000, you sent a e-mail to Stephen Fine in which you revealed the name of a client and described in some detail the circumstances which led to that client's involvement with SRS. Mr. Fine has acted as your attorney in matters involving your employment with SRS. Had you been consulting him as your attorney, it would still have been a violation of the agency policy on client confidentiality to have provided the specific information contained in this e-mail. However, your statements in the e-mail clearly indicate that you were not

requesting legal advice; rather you were simply retailing gossip which you thought would be of interest to Mr. Fine as a long-time and persistent critic of SRS.

You have thus knowingly and deliberately violated the Agency policy on the confidentiality of client records solely for the purpose of providing information potentially embarrassing to the Department, to a person who has demonstrated his hostility to your employer.

On January 5, 2001, you sent to the State's Attorney an affidavit which you had prepared at the instruction of your supervisor. You accompanied this affidavit with a cover letter, the wording of which had been suggested by Mr. Fine in his responding e-mail of December 24, 2000. The obvious intent of this wording was to circumvent the efforts of the Department, to undermine the credibility of your supervisor, and to forestall proceedings which had been determined by your superiors to be in the best interests of your client.

You thus knowingly and deliberately violated the normal expectations of you as a State employee to effectively execute the appropriate decisions of your employer.

In the interview with you on February 9, 2001, you were asked to explain your intentions in including confidential client information in your e-mail to Mr. Fine. You refused to respond despite being told of your obligations as a State employee to fully and truthfully answer questions concerning your employment and despite being warned that such a refusal could create an additional basis for discipline.

By refusing to answer this question, you have knowingly and deliberately violated the legitimate and justified instructions of your employer.

. . .

11. Grievant and her VSEA representative met with Employer representatives to discuss the contemplated discipline. Subsequently, on February 27, 2001, Commissioner Young sent Grievant a letter which provided:

I have decided to impose upon you a five-day disciplinary suspension without pay. The reasons for the discipline are as follows:

On December 24, 2000, you sent an e-mail to Stephen Fine in which you named a client of this Department and described, in some detail, the circumstances of that client, information to which you were privy only through your employment. This constituted a gross violation of the Agency of Human Services policy on client confidentiality, a policy which you have acknowledged that you were aware of.

> Your explanations for your actions, that your e-mail was intended to request legal advice from your attorney, is totally lacking in credibility. It is clearly contradicted by your own language in the e-mail where you state, "i am not really sure why i am telling you this except that i thought it would interest you…." In fact, this communication represents nothing more nor less than simply spreading gossip about a client of this Department. Even if your explanation had been credible, the communication of such client information would still be a serious violation of policy.
>
> There also are additional aggravating circumstances in this case. The text of your e-mail contains disparaging references to a judge of the Family Court, toward your supervisor, and toward another employee of this Department. The text of the e-mail and of a subsequent letter to Robert Sand, Windsor County State's Attorney, demonstrates a clear intent on your part to circumvent the legitimately determined actions of this Department and to undermine the authority and credibility of your supervisor. In addition, your responses to the Loudermill hearing showed that you have failed to acknowledge the seriousness of your actions and to take responsibility for them.
>
> Your violation of client confidentiality in itself merits significant discipline. I believe that the additional aggravating aspects listed above, justify me in bypassing progressive discipline and in imposing a five-day suspension without pay. You will serve this suspension, beginning Friday, March 2, 2001, and continuing through Friday, March 9, 2001.

OPINION

The first issue we need to decide is whether an attorney-client privilege existed between Grievant and Attorney Stephen Fine concerning the December 24, 2000, e-mail communications between them. Grievant contends that a privilege existed. The Employer maintains there was no privilege.

In deciding this issue, we consider the purpose of the privilege, the burden of showing the existence of the privilege, and the scope of the privilege. A leading treatise on evidence, *McCormick On Evidence* (5th Ed., 1999), Vol. 1, Chapter 10, Section 87); contains the following discussion on the purpose of the privilege:

> (The) justification for the lawyer's exemption from disclosing his client's secrets . . . which continues as the principal rationale of the privilege today, rests upon three propositions. First, the law is complex and in order for members of the

> society to comply with it in the management of their affairs and the settlement of their disputes they require the assistance of expert lawyers. Second, lawyers are unable to discharge this function without the fullest possible knowledge of the facts of the client's situation. And last, the client cannot be expected to place the lawyer in full possession of the facts without the assurance that the lawyer cannot be compelled, over the client's objection, to reveal the confidences in court. The consequent loss to justice of the power to bring all pertinent facts before the court is, according to the theory, outweighed by the benefits to justice (not to the individual client) of a franker disclosure in the lawyer's office.
>
> This clearly utilitarian justification, premised on the power of the privilege to elicit certain behavior on the part of clients, has a compelling common sense appeal . . . Nevertheless, none can deny the privilege's unfortunate tendency to suppress the truth, and it has commonly been urged that it is only the greater benefit of increased candor which justifies the continuation of the privilege . . .
>
> At the present time it seems most realistic to portray the attorney-client privilege as supported in part by its traditional utilitarian justification, and in part by the integral role it is perceived to play in the adversary system itself. Our system of litigation casts the lawyer in the role of fighter for the party whom he represents. A strong tradition of loyalty attaches to the relationship of attorney and client, and this tradition would be outraged by routine examination of the lawyer as to the client's confidential disclosures regarding professional business . . .

The burden of establishing the existence of an attorney-client privilege rests on the claimant of the privilege. State v. Kennison, 149 Vt. 643, 648 1987). In order for a claimant to succeed on a claim of privilege, he or she is obliged to prove that he or she falls within the scope of that privilege. Id. Vermont Rule of Evidence 502(b), which sets forth the general rule of privilege in Vermont, states in part:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between himself or his representative and his lawyer or his lawyer's representative, . . .

The meaning of "client" is a central consideration in deciding the scope of the privilege. A "client" is defined in Section 502(a) as "a person . . . who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him". The meaning of "professional legal services" also

is a key consideration in deciding the scope of the privilege. The Reporter's Notes to Rule 502 contain the following discussion on that issue:

> The rule does not define "professional legal services". Generally the privilege does not exist when consultation is held with a lawyer as a friend or in some business capacity not involving the rendering of legal advice or services. See McCormick, Evidence Section 88 at 179-80 (2d ed. 1972); Coon v. Swan, 30 Vt. 6, 11 (1856).

In following the guidance of these sources, we conclude that Grievant has met her burden of demonstrating that she was a client who was consulting with a lawyer with a view to obtaining professional legal services from him through her December 24, 2000, e-mail communications with Fine. In reaching this conclusion, we find significant the context in which her e-mail communications with Fine occurred. Fine had previously represented Grievant on employment issues when she grieved a performance evaluation that she had received and when the Employer conducted an investigation of her handling of a case. Given this history, when Grievant sent Fine an e-mail indicating she wanted to ask his "opinion" on handling the TG case, it is evident she was consulting with Fine with a view to obtaining professional legal advice from him concerning another employment issue that had arisen. The benefits to justice that result from the attorney-client privilege of promoting frank disclosure between client and attorney applies here.

We recognize that Grievant also stated in the e-mail that "i am not really sure why i am telling you this except i thought it would interest you and show once again how fearful srs is of being complained about and being overturned". Nonetheless, we are persuaded by the weight of the evidence that Grievant was seeking legal advice from Fine through asking his "opinion" on handling the TG case. Our conclusion in this regard is bolstered by Fine responding to Grievant's e-mail by stating he was giving her "an

opinion", and then making suggestions to Grievant on how to proceed in the TG case. Our conclusion also is reinforced by Grievant sending an e-mail replying to Fine's e-mail, thanking him for his advice and indicating she would follow it. Grievant sought legal advice from Fine, received it, and then acknowledged it.

The fact that Grievant did not pay Fine for the legal consultation she received on December 24, 2001, does not affect our conclusion. Neither V.R.E. 502 nor case law in Vermont imposes such a requirement, and it does not follow that such a requirement should be imposed. The notion of attorneys providing professional legal services without receiving a fee from a client is well-recognized, such as in attorneys doing *pro bono* work or persons using the services of the Vermont Defender General or Vermont Legal Aid without paying a fee.

The fact that Grievant's e-mail communication with Fine contained some content not pertaining to her seeking legal advice in the TG case does not affect our conclusion. The attorney-client privilege was triggered by her seeking legal advice in the TG case, and Grievant's mentioning of some other matters does not negate that privilege. In the normal course of human interaction, it is not unusual for discussion to include more than just the business at hand. Further, the privilege is not defeated because Grievant and Fine were friends. When a person consults a friend as a lawyer, as happened in this case, the privilege applies.

Given our conclusion that an attorney-client privilege existed between Grievant and Fine, we next need to decide whether Grievant waived that privilege. Vermont Rule of Evidence 510 provides in pertinent part that a "person upon whom these rules confer a

privilege against disclosure waives the privilege if he . . . voluntarily discloses or consents to disclosure of any significant part of the privileged matter".

There are no Vermont cases directly interpreting this provision with respect to the attorney-client privilege. However, there is a Vermont Supreme Court decision on whether an attorney's work product privilege was waived. In Hartnett v. Medical Center Hospital of Vermont, 146 Vt. 297, 299-300 (1985), the Court held that, where an abstract of medical records concerning treatment of a patient prepared by a resident of a hospital at the request of the hospital's attorney was accidentally included in a patient's radiology files which were delivered into the plaintiff's possession in response to a request for production of the patient's x-rays, and the abstract constituted the work product of the hospital's attorney, it was not error for the trial court to find that the work product privilege was not waived by the way the abstract was handled. By analogy, it is appropriate to reach a conclusion that accidental disclosure in the context of an attorney-client privilege does not constitute the waiver of that privilege.

The general meaning of "waiver" also provides guidance to the Board in determining whether a waiver occurred in this case. In another labor relations context, the Vermont Supreme Court has defined a waiver as "the intentional relinquishment of a known right". Grievance of Guttman and Minaert, 139 Vt. 574, 578 (1981) (state college faculty member did not waive the right to retire at age 70 where there was no evidence that she knew she would lose the right to retire at age 70 by joining a new retirement plan). The burden of establishing a waiver is on the person asserting it. Id.

The common legal meaning of the word "voluntary" provides further guidance as to whether a voluntary disclosure occurred in this case. *Black's Law Dictionary* (6th

Edition, 1990) defines "voluntary" in pertinent part as follows: "Done by design or intention. Proceeding from the free and unrestrained will of the person. Produced in or by an act of choice."

In applying the guidance from these sources, we conclude that Grievant did not waive the attorney-client privilege by inadvertently including her e-mail communications with Fine in the TG case file when she gave the file to her supervisor. Such accidental disclosure does not result in a waiver of the privilege. The Employer has not demonstrated that Grievant intentionally relinquished her entitlement to the privilege. Her disclosure was not done by design or intention, but simply by mistake.

In sum, an attorney-client privilege existed between Grievant and Fine concerning the December 24, 2000, e-mail communications between them, and Grievant has not waived that privilege. The e-mail communications are protected by disclosure, and cannot be used by the Employer in imposing discipline against Grievant. Thus, we grant Grievant's motion to exclude from evidence in this grievance the e-mail correspondence between Grievant and Fine, and all information obtained by the Employer directly or indirectly from the e-mail correspondence.

ORDER

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

1) Grievant's motion to exclude from evidence in this grievance the e-mail correspondence between Grievant and Fine, and all information obtained by the Employer directly or indirectly from the e-mail correspondence, is granted; and

2) To the extent that Grievant's motion constitutes a partial motion for summary judgment, the record is insufficient to grant it and, therefore, the motion is denied.

Dated this ____ day of March, 2002, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

_____
Catherine L. Frank, Chairperson

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Carroll P. Comstock

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Richard W. Park