VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 08-29
JOEL DAVIDSON	)	

MEMORANDUM AND ORDER

The issue before the Labor Relations Board is whether to admit testimony which Grievant Joel Davidson seeks to offer into evidence in this matter. In this grievance, Grievant contends that the State of Vermont Department of Public Safety ("Employer") has discriminated against him due to his successful pursuit of a grievance which resulted in his reinstatement to employment pursuant to a decision of the Labor Relations Board. 29 VLRB 105 (2007). Grievant asserts that the Employer has discriminated against him by the following improper actions: 1) failing to reinstate him to his pre-dismissal position as Curriculum Coordinator, 2) failing to allow him to attend professional career development trainings, 3) refusing to promote him; 4) failing to provide him overtime opportunities and pay commensurate with his pre-termination levels and/or commensurate with other employees; 5) failing to assign him to the Employer's lab team, even though he worked on a similar team prior to his termination; and 6) failing to properly compensate him in a manner that makes him whole for his wrongful discharge.

The Labor Relations Board conducted a hearing on the merits of this grievance on March 26, 2009. During the hearing, Grievant's attorney, VSEA Chief Counsel Michael Casey, called Susan Edward as a witness. Edwards had served as Grievant's attorney in the grievance contesting Grievant's dismissal. Casey asked Edwards during her testimony at the March 26, 2009, hearing about a conversation that she had with Howard Kalfus and William Reynolds, attorneys for the Employer, on June 25, 2007.

Edwards, Kalfus and Reynolds were at Board offices on June 25, 2007, to attend a Board hearing on the appropriate amount of back pay and benefits due Grievant as a result of the Board decision ordering that Grievant be reinstated with back pay and benefits. As of that date, the Employer had not yet reinstated Grievant to employment. Immediately prior to the back pay hearing, the attorneys, along with Grievant and State Department of Human Resources employee John Berard, met with Board Executive Director Timothy Noonan in the library at Board offices to stipulate to admission of exhibits and certain facts, and to attempt to narrow the issues in dispute between the parties. At some point, a break was taken during the pre-hearing meeting and Noonan left the room.

During the break, Edwards asked Kalfus and Reynolds in Noonan's absence when Grievant could expect to go back to work. When Casey asked Edwards during the March 26, 2009, hearing what response she received to that question, the Employer raised an objection to the response made by Kalfus being admitted into evidence. The Employer objected on the grounds that the conversation among Edwards, Kalfus and Reynolds occurred during settlement negotiations between the parties, and that it would be improper for the Board to admit into evidence the content of settlement negotiations.

The Board deferred ruling on the objection until providing the parties with an opportunity to file briefs on the issue. The Board continued the hearing and set a briefing schedule. The parties filed memoranda of law on April 16, 2009

The determination concerning the admissibility into evidence of the testimony Grievant seeks to introduce is governed by 3 V.S.A. 924(b), a provision of the State

Employees Labor Relations Act which applies to Board proceedings. Section 924(b) provides:

> In all proceedings under this chapter, no evidence shall be admitted or considered that relates to conduct or statements made in compromise negotiations, including mediation, unless otherwise agreed to by the parties. This subsection does not require exclusion of evidence otherwise obtainable from independent sources because it was presented in the course of compromise negotiations nor does it require exclusion of evidence offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct an investigation.

We first must decide whether the offered testimony relates to statements made in compromise negotiations. Grievant contends that the statements were not made in compromise negotiations. The Employer asserts that they were made during such negotiations.

We need to examine the context in which the statements were made to decide whether they were made in compromise negotiations. Edwards indicated during her March 26, 2009, testimony that prior to June 25, 2007, the parties had engaged in settlement discussions regarding attempting to ascertain whether agreement could be reached on Grievant receiving a monetary payment and retiring in lieu of retuning to work. Subsequent to June 25, 2007, these financial settlement discussions continued. On July 11, 2007, Edwards sent an e-mail message to Reynolds indicating that Grievant would agree to retire early if he received a certain cash payment and specified retirement contributions from the Employer (Attachment 6 to Employer's April 16, 2009, Memorandum of Law).

The fact that settlement discussions took place both prior to and subsequent to the June 25, 2007, conversation leads us to conclude that the statements made on June 25, 2007, are most appropriately considered as occurring during compromise negotiations

between the parties. The question by Edwards concerning when Grievant could expect to go back to work did not occur in a vacuum. Instead, it was presented during a period when the parties were in the midst of discussing whether Grievant would return to work at all. If the parties were successful in negotiating terms whereby Grievant would retire early, Grievant would not return to work.

The response which the Employer's attorney gave to the question posed by Edwards occurred in the context of ongoing compromise negotiations between the parties on the very issue which Edwards raised. There was no reason for the Employer's attorney not to believe that Edwards was asking about Grievant's reinstatement as part of the parties' ongoing discussions with respect to settling the case.

Nonetheless, Grievant contends that, even if the discussion can be considered as relating to compromise negotiations, the evidence would only be considered inadmissible if: 1) it was offered to show the Employer's liability, and 2) it was offered in the back pay hearing itself. Grievant asserts that the evidence is admissible because it is being offered in a subsequent grievance to demonstrate the Employer's retaliatory conduct against Grievant, rather than to show the Employer's liability.

We disagree that evidence can be considered inadmissible under Section 924(b) only if it is offered to show the Employer's liability. Grievant relies on specific wording in Vermont Rule of Evidence 408 providing for inadmissibility of evidence to prove liability for a claim. However, while Section 924(b) includes much of the language contained in Rule 408, it omits the sentence in the rule discussing inadmissibility of evidence to prove liability for a claim. Instead, Section 924(b) contains the broader prohibition that "no evidence shall be admitted or considered that relates to conduct or

statements made in compromise negotiations, including mediation, unless otherwise agreed to by the parties." There are exceptions to this general rule stated in Section 924(b), but it is not specified in the section that evidence is inadmissible only if it is offered to show liability for a claim. We will not infer the legislature intended such a result absent specific language so providing.

We also disagree with Grievant that the evidence can be considered inadmissible only if it was offered in the back pay hearing which took place in 2007. Grievant contends that the statute is meant to exclude compromise evidence at the hearing of the grievance which was being negotiated, in this case the back pay hearing. However, the question posed by Edwards concerning when Grievant was to be reinstated was not an issue being negotiated as part of the back pay hearing. The Board had previously ordered that Grievant be reinstated, and the issues at the back pay hearing were limited to the back pay and benefits to which Grievant was entitled.

The question raised by Edwards implicated the larger, overriding issue between the parties as to whether the parties could agree to terms resulting in Grievant retiring rather than being reinstated, thereby settling the entire case. The fact that the parties were unable to reach such an agreement, and Grievant ultimately was reinstated, makes the grievance now before us connected with the question raised by Edwards concerning Grievant's reinstatement. The grievance now before us contends that the Employer took various actions against Grievant upon his reinstatement, issues that never would have arisen had the parties' settlement discussions resulted in Grievant's retirement.

It is evident that, in enacting Section 924(b), the Vermont General Assembly acted consistent with the strong public policy encouraging parties to settle their labor

relations disputes. By generally prohibiting settlement negotiations from being admitted into evidence, full and frank discussion by the parties is encouraged. This allows the parties to act creatively to resolve issues that separate them, and furthers the policy promoting settlement. This is consistent with the mission of the Board to promote and maintain harmonious and productive labor relations.

This does not mean that conduct and statements related to compromise negotiations may never be admitted into evidence pursuant to Section 924(b). Notwithstanding the general prohibition, section 924(b) does not require the exclusion of evidence relating to conduct or statements made in compromise negotiations for certain reasons. One reason is if the evidence is offered for the purpose of "proving bias or prejudice of a witness".

Grievant contends that he is offering the evidence at issue herein to prove the Employer's bias and prejudice against Grievant due to his successful grievance concerning his wrongful dismissal. We concur that the "proving bias or prejudice of a witness" provision of Section 924 is properly invoked in cases where employees claim discrimination against them for grievance activities, just as it would be if employees contended that employers were discriminating against them for union activities or other reasons prohibited by statute or contract. Employers cannot use compromise negotiations as a shield to protect against conduct or statements which violate central rights provided by labor relations laws and contracts.

However, Grievant has not made a sufficient showing that the evidence is relevant to demonstrating bias or prejudice of "a witness". The Employer contends that there is nothing in the record indicating that that the response by the Employer's attorney to the

question posed by Edwards, concerning when Grievant could expect to be reinstated, reflected the views of anyone other than Kerry Sleeper, the Department of Public Safety Commissioner at the time. The Employer has indicated that it does not intend to call Sleeper as a witness in this case, and Grievant has expressed no such intention. Since there is no indication that Sleeper will be a witness, the proferred evidence will not prove the bias or prejudice of a witness pursuant to Section 924(b).

Further, Sleeper retired two weeks before Grievant was reinstated to employment (Attachments 3 and 4 to Employer's April 16, 2009, Memorandum of Law). Grievant has not demonstrated how any bias or prejudice of former Commissioner Sleeper may have affected actions taken by the Employer after he had retired.

Grievant has identified no other specific witness whose bias or prejudice against Grievant will be demonstrated by the offered evidence. We conclude that it is not appropriate to override the general prohibition against admissibility of conduct or statements made in compromise negotiations absent identification of such a specific witness.

Based on the foregoing reasons, it is ordered that the Employer's objection to the admissibility of evidence on the response of Attorney Howard Kalfus, to the question of Attorney Susan Edwards when Grievant could expect to go back to work, is sustained.

Dated this 30th day of April, 2009, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

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Richard W. Park, Acting Chairperson

/s/ Leonard J. Berliner

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Leonard J. Berliner

/s/ James C. Kiehle

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James C. Kiehle