VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 10-33
THOMAS BENOIT	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On August 27, 2010, Thomas Benoit ("Grievant") filed a grievance with the Vermont Labor Relations Board. Therein, Grievant alleged that the Department of Environmental Conservation of the State Agency of Natural Resources ("Employer") violated Article 5, Section 1; Article 17, Section 1(c), and Section 2(b); of the collective bargaining agreement between the State of Vermont and the Vermont State Employees' Association ("VSEA") for the Non-Management Unit, effective July 1, 2008–June 30, 2010 ("Contract"); and Personnel Policies and Procedures 4.0 and 5.2 in connection with not selecting Grievant for a vacancy on the Employer's Spill Team.

The Labor Relations Board conducted a hearing on April 14, 2011, in the Board hearing room in Montpelier. Gary Karnedy, Acting Chairperson; Louis Lacroix and Linda McIntire constituted the Board panel hearing the case. Grievant represented himself. Assistant Attorney General Marie Salem represented the Employer. The parties filed post-hearing briefs on May 24, 2011.

FINDINGS OF FACT

1. The Contract provides in pertinent part as follows:

. . .

ARTICLE 2
MANAGEMENT RIGHTS

1. Subject to laws, rules and regulations, . . . and subject to terms set forth in this Agreement, nothing in this Agreement shall be construed to interfere with the

right of the Employer to carry out the statutory mandate and goals of the agency, to restrict the State in its reserved and retained lawful and customary management rights, powers and prerogatives, including the right to utilize personnel, methods and means in the most appropriate manner possible . . .

. . .

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 . . .

. . .

ARTICLE 15
GRIEVANCE PROCEDURE

1. **PURPOSE**

(a) The intent of this 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. It is expected that employees and supervisors will make a sincere effort to reconcile their differences as quickly as possible at the lowest possible organization level.

. . .

2. **DEFINITION**

(a) "Complaint" is an employee's or group of employees' informal expression to the immediate supervisor of dissatisfaction with aspects of employment or working conditions under a collective bargaining agreement that are clearly identified to the supervisor as a grievance complaint.

(b) "Grievance" is an employee's, group of employees' or the employee's collective bargaining representative's expressed dissatisfaction, presented in writing, with aspects of employment or working conditions under a collective bargaining agreement or the discriminatory application of a rule or regulation.

(c) A grievance shall contain the following information:

. . .

(4) Specific references to the pertinent section(s) of the contract or of the rules and regulations alleged to have been violated;

. . .

3. **GRIEVANCE PROCEDURE**

The following procedures are established for settlement of complaints and grievances.

(a) **STEP 1 (Immediate Supervisor Level)**

(1) The employee, or his/her representative, or both, shall notify his/her immediate supervisor of a complaint within fifteen (15) days of the date upon which the employee could have reasonably been aware of the occurrence of the matter which gave rise to the complaint. The notice shall clearly identify the matter as a Step 1 grievance complaint. This is not a required first step of the grievance procedure.
(2) An employee may opt to bypass the Step 1 process and file his/her complaint directly to the Step II (department) level. If bypassing Step I, an employee must file a written grievance, in accordance with Section 2(c) above, to the head of the employee's department, within fifteen (15) workdays of the date upon which the employee could have reasonably been aware of the occurrence of the matter which gave rise to the complaint.

. . .

(b) **STEP II (Department Head Level)**

(1) If no satisfactory settlement is reached at Step 1, or if the Step 1 is bypassed, the complaint shall be reduced to writing, in accordance with Section 2(c) above, and shall be submitted for action by the aggrieved party or representative to the administrative head of the department . . .

. . .

Step III (Department of Human Resources Level)

(1) A grievance conforming to Section 2(c) above shall be submitted to the Department of Human Resources within ten (10) workdays of receipt of the Step II decision if the employee wishes to pursue a matter not resolved at Step II. . .

. . .

ARTICLE 17
AGENCY, DEPARTMENT AND INSTITUTION WORK RULES

1. **ESTABLISHMENT OF RULES**

(a) Each agency, department or institution shall put into writing those rules of conduct and procedure it deems necessary for its efficient operation. All changes to these rules must be in writing.
(b) Agency, department and institution work rules shall not be in conflict with existing law, contract provisions, or with the Rules and Regulations for Personnel Administration.
(c) Work rules shall relate to aspects of employment (such as Public Safety work rules outlining proper maintenance schedules for cruisers, AOT rules for use of State-owned property and equipment), and not to fundamental conditions of work which give rise to a statutory bargaining obligation.

2. **NOTIFICATION AND DISTRIBUTION OF RULES**

(a) All employees affected by the agency, department or institution work rules must be notified in writing, by posting or otherwise, of those rules and changes to those rules at least fifteen (15) days prior to the date they become effective . . .

(b) The State shall provide written notice to the VSEA of all new rules and changes to existing rules concurrent with the notice to employees.

. . .

3. **REASONABLENESS AND APPLICATION OF RULES**

(a) An employee or the VSEA may grieve the reasonableness of any rule promulgated under this Article and, further, may grieve any action taken against an employee based upon any such rule. In either case, the grievance may include a claim that the rule is unreasonable in its application to the employee or group of employees so aggrieved. The time limits for any claim that the rule is inherently unreasonable shall run from the date the rule becomes effective.

. . .

APPENDIX A
DEFINITIONS

. . .

CLASSIFICATION PLAN–the arrangement of positions into separate classes and the ranking of the classes in relative order.

CLASSIFIED POSITION–a position in the State classified service which is assigned to a class and appointment to which is made in accordance with merit principles.

. . .

POSITION–a group of current duties and responsibilities normally requiring the full-time or part-time employment of only one (1) person.

. . .

(State's Exhibit 28; Grievant's Exhibit B, pages 10, 15 - 18)

2. The State Personnel Policies and Procedures provide in pertinent part as follows:

. . .

Section 4

RECRUITMENT AND POSTING OF VACANCIES

Number 4.0

. . .

Applicable To: All applicants for employment with the Executive Branch of the State of Vermont. NOTE: Although this policy generally applies to all recruitment, certain aspects of it are specific to recruitment of classified positions only.

. . .

It is the policy of the State of Vermont to meet its workforce needs through systematic recruitment, selection, and career support programs that identify, attract, and select from the most qualified applicants for State employment . . .

The hiring of applicants for classified positions shall be carried out with consideration of the balance of skills needed to maintain the State's ability to meet the demand for services, including the need to plan for future leadership. The State's programs and practices shall foster internal advancement opportunities for current employees, as the State recognizes the value of tenure and experience.

Concurrently, programs and practices should allow for inclusion of applicants from outside the organization who may offer a new source of talent, alternative perspectives, or the latest academic knowledge. This will be accomplished through targeted recruitment efforts that bear a logical and systematic relationship to staffing needs to be met, and afford equal opportunity for all applicants within the limits of these goals. Through a planned integration of experience, perspective, and vitality, the State will best meet its mission of service to the public.

. . .

Each classified position to be filled must be posted online on the DHR website in the HCM database and include reference to the position number being filled. . .

. . .

CONFLICTS OF INTEREST ARISING AMONG EMPLOYMENT
Number 5.2

. . .

POLICY STATEMENT

It is the State's responsibility to conduct employment matters in a manner that avoids not only conflicts of interest, but also any appearance of a conflict of interest. Conflicts of interest may arise in: hiring employees, their employment by the State in more than one capacity; outside employment or activities engaged in by employees; and the award of contracts to employees. This policy is intended to promote avoidance of conflicts of interest and the appearance thereof that arise through the employment in the same governmental unit of people who share certain familial or other close relationships. The primary goal is to avoid instances in which the hiring process or any term or condition of employment is inappropriately influenced by such familial or other relationships, or the perception among members of the public or other employees of such impropriety.

It is the general policy of the State that no one will be employed in the same department, institution, or organizational unit that employs a relative. In addition, it is the general policy of the State that no one will be employed in the same department, institution, or organizational unit as a person with whom he or she resides. It is important to note that the definition of "relative", for purposes of this Policy, includes spouses, civil union partners, and domestic partners, in addition to the other familial relationships listed in the definition. (*emphasis in original)*

> This policy applies to <u>all</u> employment decisions including, but not limited to, those concerning new hires, promotions, demotions, transfers within State government, and changes in categories of employment (such as moving from temporary to classified service). Hiring managers must ask prospective candidates if they have any relatives, a civil union partner, a domestic partner, other person with whom they reside, or relative of any of the foregoing currently working for the State of Vermont.
> . . .
> (Grievant's Exhibit B, pages 4–9; State's Exhibits 29, 30)

3. Grievant has worked as an Environmental Analyst IV in the Water Quality Division of the Department of Environmental Conservation ("DEC") since June 2009. He moved into that position after being subject to a reduction in force in June 2009 from a position he had in the hazardous waste section of the Waste Management Division of the DEC (State's Exhibits 33b, 33c).

4. The Hazardous Spill Response Team ("Spill Team") is a team within DEC responsible for responding to releases of hazardous materials into the environment. The Spill Team responds to reports of spills, many of which occur outside of normal working hours. The team assesses the environmental impact of spills, oversees their cleanup, and enforces environmental regulations triggered by them (Grievant's Exhibit F, page 7).

5. Spill Team duties always have been assigned to employees in the Waste Management Division ("WMD") of DEC. The duties performed by members of the Spill Team are in addition to the responsibilities they have in their regular WMD positions. George Desch, WMD Director, has oversight of the Spill Team within his scope of responsibilities. The Spill Team has at least one member who serves as the coordinator of the team.

6. Membership on the eight-member Spill Team was stable in the 10 years prior to January 2010; there were no team vacancies during this period requiring

appointment of a new team member. In January 2010, the team needed a new member due to the resignation of Marc Roy from the team. Also, there was a possibility of an additional opening on the team due to two of the current team members, Chuck Schwer and Ted Unkles, exceeding the standby pay cap of $5,000 set forth in the collective bargaining agreement covering members of the Supervisory Bargaining Unit. As of January 2010, the Employer was awaiting the Commissioner of Human Resource's decision on whether to grant a waiver of this cap to allow Schwer and Unkles to continue performing Spill Team duties.

7. Richard Spiese, a team member who was serving as coordinator of the team, sent an e-mail on January 25, 2010, to WMD, stating:

> The WMD Spill Team has at least one opening due to unforeseen circumstances. If you think you may be interested in joining the team please send me an email telling me why you are interested in joining the team and what skills you bring that can assist the team. Submittals are due before February 14 and once we receive them the team will look them over and make a recommendation to the Director. We'd like to have any new member on the team by 3/1/10. If you have any questions about the team you can speak with me or any of the Spill Team members.
> . . .
> (Grievant's Exhibit G, page 23; State's Exhibit 6)

8. Grievant became aware of this e-mail, and asked Spiese in an e-mail: "Is this just for people in Waste Management? I'd be interested and worked for several years as an emergency response technician, site manager and project manager for contaminated sites." Spiese sent Grievant's e-mail to WMD Director George Desch, and asked "What do you think? Desch responded with a January 25 e-mail providing:

> I've thought about this question more than once, and it always seemed to resolve with a conclusion that it is just plain more efficient to operate the team out of one division, and historically that be us . . .

> That said, there is no reason why the team couldn't work, and work well, with participation of qualified staff from other divisions. Of course, I assume that the other division directors might not view it as a benefit to their operation, and I would assume that would require some coordination and outreach to sell.
>
> My two cents . . .
> (Grievant's Exhibit G, page 23; State's Exhibit 6)

9. On January 26, 2010, Tim Cropley, a member of the Spill Team, sent an e-mail to other members of the team, stating:

> Hey all. Considering the apparent need to bring at least one additional team member on board, I thought now would be a good time to review the qualifications document that had been developed some time ago. This details what sort of experience is required to become a member, what additional training they will need to have once on the team, and performance expectations. Perhaps we'll need to discuss this prior to reviewing any candidates for inclusion in the team. Something else to discuss at the mtg on Fri 2/5.
>
> It should be noted that only people who are in one of the Haz Mat programs in the WMD are considered eligible because of the continuing every day experience relating to issues that are a major part of what we do as spill team members. Based on this it should be noted that personnel from Solid Waste programs would not be considered eligible.
> (Grievant's Exhibit G, page 24; State's Exhibit 5)

10. The "qualifications document" referred to by Cropley in his e-mail was a five-page draft document created in the mid-1990's by Marc Roy, Spill Team coordinator at the time. The document was entitled "Spill Response Team Qualifications and Performance Expectations. Its first sentence provided: "The Department of Environmental Conservation (DEC) Spill Response Team is made up of individuals who work full-time for the Waste Management Division, in one of the Hazardous Waste programs." The document addressed the major functions of the team, qualifications for assignment to the team, and performance expectations. It contained a signature line for approval by the WMD Director. However, the document was not finalized and it was never approved by the WMD Director. The draft document provided guidance on baseline expectations for

team applicants when there was an opening on the Spill Team. When Cropley referred to the document in his January 26, 2010, e-mail, he was unaware that it had not been finalized or approved (Grievant's Exhibit A, pages 2–5 and 10 -12; State's Exhibits 34a, 34b).

11. Spiese informed Grievant initially on January 26, 2010, that he did not think it would work to have an employee outside of the WMD serving on the Spill Team. Grievant had a discussion with Spiese on January 26 in which he questioned the validity of restricting team membership to WMD employees. After this discussion, Spiese informed Grievant that he could apply to be on the Spill Team and his application would be considered. Grievant did apply to be on the team. There were two other applicants: Jaymi Cleland and Ashley Desmond, both Environmental Analyst III's in the WMD (State's Exhibits 7, 8, 9).

12. On February 16, 2010, Tim Cropley sent Spill Team members information submitted by the three applicants for the team with an accompanying e-mail which provided:

> Hello all. Here is the info provided by those who wish to become a member of the spill team. I've also attached the Spill Team qualifications document that was finalized 10 years ago. A few minor tweaks have been made. Please consider these qualifications when reviewing each applicant's info. . .
>
> The applicants are Tom Benoit, Jaymi Cleland and Ash Desmond. Please offer your thoughts on who you think should be the next team member. If there is a consensus then perhaps no interviews will be needed. If people think we should have a sit down with each applicant regardless then we can do that. There is also the issue of Tom not being an employee of a hazardous material/waste program within the WMD anymore which is a specific requirement in the quals document. One of the reasons for this requirement was that they deal with haz mats / petroleum on a day to day basis. Another is that we are all co-located so it's easier to interact and it is easier for the switchboard to find a team member to take a call during work hours when we are all in the same office. The latter could be an issue

> with someone who isn't in the same building as the rest of us and may not have the opportunity to pull the same weight on a day-to-day basis.
>
> I'd suggest we start by just reviewing the applicants info and each of us offer our preference for who and why. Please send these to me and I'll tally the votes and comments. If the votes are split then we'll consider a score sheet, interviews or some other approach unless people think we should do this regardless.
> (Grievant's Exhibit G, pages 34–36; State's Exhibit 10)

13. Only three Spill Team members submitted written responses to this e-mail expressing their views on who should be selected for the team. The three members responding each indicated that they would not select Grievant for the team. It was decided that the Spill Team would meet on February 23 to discuss the Spill Team candidates. Spiese did not attend the meeting. Following the meeting, Cropley sent an e-mail that day to team members, stating:

> During our meeting we determined that while Tom Benoit has a bit more experience and is likely the more qualified at this time of the three candidates, he is not far enough ahead to outweigh the fact that he is not located in the WMD. His not being collocated with the rest of the team is likely to be a drain on the other team members and with us all doing a bit more within the division and to some extent spills on a day-to-day basis, having one less member within the team building is likely to result in the other team members doing a little bit more than they currently do. Basically it could be a logistical challenge to work through these issues but more importantly it is also a resource management issue.
>
> Both Jaymi Cleland and Ash Desmond bring something different to the table and both would be fine additions to the team. Jaymi has more prior spills experience from his work in the private sector while Ash has more day-to-day dealings in the sites section so his experience in this realm would benefit him if he were selected.
>
> Regardless, although we know that there is now one vacancy on the team we'd like to postpone the selection of either Jaymi or Ash until we find out the fate of Chuck and Ted as to their availability for doing stand-by spill duty. Once we know we will get back together to discuss if we need only one candidate to fill Marc's spot OR whether we will consider taking more candidates to fill more open shifts if Chuck and Ted need to drop shifts.
>
> So Richard, please let Tom know that he will not be selected for an open spot on the team at this time.
> (Grievant's Exhibit G, pages 38, 40, 42, 46; State's Exhibits 11 - 15)

14. Spiese informed Grievant by e-mail on February 26, 2010, that he had been "eliminated from consideration" for the Spill Team. Spiese also indicated that there were "personnel issues" which "pertain to current spill team members and their continued participation on the team, and until that is resolved the selection group wants to wait on final selection of a candidate" (Grievant's Exhibit G, page 49; State's Exhibit 17).

15. Spill Team member Charles Schwer agreed to meet with Grievant and John Brabant, a long-time Agency of Natural Resources employee and VSEA Steward, to discuss why Grievant was not selected for the spill team. The meeting occurred on March 4, 2010. It began in a cordial manner. Schwer indicated that it would be a challenge for Grievant to be on the team because he did not work in the Waste Management Division. Grievant expressed disagreement with this view, and indicated that he intended to pursue not being selected for the team. At some point, the discussion became heated. Schwer became angry, and said something to the effect that Grievant's expressed disagreement with not being selected was not conducive to being part of a team and that a member of the Spill Team had to be a team player. Schwer subsequently apologized to Grievant during the meeting for becoming angry.

16. Grievant sent an e-mail to WMD Director George Desch on March 4 following the meeting with Schwer. Grievant informed Desch that "I expect to schedule a Step 1 grievance should the recommendation to render me ineligible, despite my qualifications, be made." He also requested that Desch send him a copy of the "memo . . . stating that members of spill team must be staff of the Waste Management Division" which Grievant indicated that Schwer had referred to in their meeting. On March 9, Desch sent Grievant a copy of the document referenced above in Finding of Fact No. 10,

and informed him: "As far as I am aware, it was never executed" (Grievant's Exhibit G, pages 53–55, 61; State's Exhibits 18, 20).

17. On March 5, 2010, Thomas Ball, Director of Labor Relations for the Department of Human Resources, informed Judy Hurley, Human Resources Officer for the Employer, that the Commissioner of Human Resources had approved the requested waiver of the $5,000 Standby Pay Cap for Charles Schwer and Thomas Unkles (State's Exhibit 4).

18. By March 22, 2010, the Spill Team members submitted a memorandum to Desch recommending that Jaymi Cleland be selected to fill the open slot for the Spill Team. The Spill Team members indicated that the best two candidates were the two WMD employees mainly because their daily work most closely paralleled the work performed by the team, and that Cleland had the best combination of past work experience with spill response plus current work experience in a program that is directly related to the issue dealt with by the Spill Team. Desch approved the recommendation, and Cleland was placed on the team (State's Exhibits 21, 23, 24; Grievant's Exhibit D, pages 1–3; Grievant's Exhibit G, page 65).

19. On March 23, 2010, Grievant submitted a Step I complaint concerning not being selected for the Spill Team. VSEA subsequently filed Step II and Step III grievances on Grievant's behalf, which grievances were denied. In the Step III grievance, Grievant alleged that the Employer had violated Article 5 and Article 17, Sections 1 and 2, of the Contract in not selecting him for the team. Grievant did not allege a violation of Article 17, Section 3, of the Contract in the Step III grievance. Grievant did not allege

violations of Personnel Policies and Procedures 4.0 and 5.2 in the Step III grievance (State's Exhibits 22, 26).

OPINION

Grievant contends that the Employer violated Article 5, Section 1; Article 17, Section 1(c), and Section 2(b); of the Contract; and Personnel Policies and Procedures 4.0 and 5.2; in connection with not selecting him to fill a vacancy on the Employer's Spill Team.

There is a threshold issue concerning the timeliness of certain allegations made by Grievant. The Employer contends that the Board should dismiss the claims made by Grievant in his grievance filed with the Board that Personnel Policies and Procedures 4.0 and 5.2 were violated because he did not allege violations of these policies and procedures earlier in grievance procedure. The evidence indicates that Grievant did not allege violations of Personnel Policies and Procedures 4.0 and 5.2 in his Step III grievance, the grievance step preceding filing with the Board.

There must be specific and timely raising of issues at earlier steps of the grievance procedure or the right to raise the issue is waived.[1] In providing in Article 15, Section 1, of the Contract that "(i)t is expected that employees and supervisors will make a sincere effort to reconcile their differences as quickly as possible at the lowest possible organization level", the State and VSEA have made the goal of early resolution clearly paramount, and it is required that in-house resolution of problems should first be attempted.[2]

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[1] Grievance of Ulrich, 12 VLRB 230, 239 (1989); *Affirmed*, 157 Vt. 290, 293-95 (1991). Grievance of Bagley, et al, 16 VLRB 448, 464 (1993). Grievance of O'Neil, 3 VLRB 100, 103 (1980).
[2] In re Bushey, 142 Vt. 290, 294 (1982). Grievance of Mason, 16 VLRB 222, 237 (1993).

The failure of employees to grieve issues at earlier steps of a grievance procedure frustrates the desirable goal of early and in-house resolution of problems.[3] Grievant's failure to grieve the issues concerning the alleged Policy 4.0 and Policy 5.2 violations in the grievance filed at the earlier step of the grievance procedure frustrated the goal of early and in-house resolution of problems, and means he waived the right to raise the issues in the grievance filed with the Board.

We next address Grievant's contention that the Employer discriminated against him due to his complaint activities in violation of Article 5 of the Contract in not selecting him to fill the Spill Team vacancy. In cases where an employee claims that the employer took action against him or her for engaging in protected activities, the Board has determined that it will employ the analysis used by the United States Supreme Court: once the employee has demonstrated his or her conduct was protected, she or he must then show the conduct was a motivating factor in the decision to take action against him or 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.[4] This so-called *Mt. Healthy* analysis has been employed by the VLRB in protected activity grievance cases involving filing of complaints and grievances.[5] The Vermont Supreme Court has approved use of such analysis.[6]

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[3] Mason, 16 VLRB at 237.
[4] Grievance of Sypher, 5 VLRB 102 (1982). Mt. Healthy School District Board of Education v. Doyle, 429 U.S. 274 (1977). Grievance of McCort, (Unpublished decision, Supreme Ct. Docket No. 93-237, 1994).
[5] Grievances of Cray, 25 VLRB 194 (2002); *Affirmed*, Sup.Ct. Dock. No. 2002-538 (November 6, 2003); Grievance of Brewster, 23 VLRB 314 (2000); Grievance of Cronin, 6 VLRB 37 (1983); Grievances of McCort, 16 VLRB 70 (1993), *Affirmed*, (Unpublished decision, Sup.Ct. Dock. No. 93-237, 1994); Grievance of Day, 16 VLRB 312 (1993); Grievance of Danforth, 22 VLRB 220 (1999), *Affirmed*, 172 Vt. 530 (2001); Grievance of Greenia, 22 VLRB 336 (1999).
[6] Grievance of Cronin, (Unpublished decision, February 4, 1987); Morrissey, 149 Vt. 1 (1987); McCort, supra; Grievance of Robins, 169 Vt. 377 (1999).

Grievant contends that he first engaged in complaint activities when he had a discussion with Spill Team Coordinator George Spiese on January 26, 2010, in which Grievant questioned the validity of restricting team membership to Waste Management Division employees. We disagree that Grievant was engaging in complaint activities protected by Article 5 of the Contract at this time.

"Complaint" has a specific meaning under the Contract. Article 15 of the Contract defines a complaint as "an employee's . . . informal expression to the immediate supervisor of dissatisfaction with aspects of working employment or working conditions under a collective bargaining agreement that are clearly identified to the supervisor as a grievance complaint". Grievant did not inform Spiese in their January 26 that he was making a "grievance complaint". Instead, Grievant did not engage in complaint activity protected by Article 5 of the Contract until March 4, 2010, when he informed WMD Director George Desch by e-mail that "I expect to schedule a Step I grievance should the recommendation to render me ineligible, despite my qualifications be made".

We need to determine whether the Employer discriminated against Grievant due to this complaint activity. At the heart of any employment action allegedly linked with discrimination against an employee based on the employee engaging in protected activities is the question of employer motivation.[7] The Vermont Supreme Court, "because of the difficulty in proving that illegal considerations figure in the employer's subjective motivation", has approved the practice of inferring unlawful motivation from the circumstances where no direct evidence of the employer's intent exists in the record".[8] An

[7] Ohland v. Dubay, 133 Vt. 300, 302 (1975).
[8] Kelley v. The Day Care Center, Inc., 141 Vt. 608, 613 (1982). Grievance of McCort, 162 Vt. 481, 492-493 (1994). Grievance of Rosenberg and Vermont State Colleges Faculty Federation, 176 Vt. 641, 644 (2004).

employer's unlawful motive may be inferred from the circumstances where no direct evidence of the employer's intent exists in the record.[9]

Among the factors to be considered in determining whether the protected conduct of engaging in protected activities was a motivating factor in an employer's decision to take action against an employee are: 1) whether the employer knew of the protected activities, 2) whether a climate of coercion existed, 3) whether the timing of the action was suspect, 4) whether the employer gave protected activity as a reason for the decision, 5) whether the employer interrogated the employee about protected activity, 6) whether the employer discriminated between employees engaged in protected activities and employees not so engaged, and 7) whether the employer warned the employee not to engage in such activity.[10]

In applying these factors here, we conclude that Grievant has not demonstrated that his complaint activity was a motivating factor in the Employer not selecting him for the Spill Team. The timing of the Employer's action is of particular significance. Spill Team coordinator Richard Spiese informed Grievant by e-mail on February 26, 2010, that he had been "eliminated from consideration" for the Spill Team. This notification preceded Grievant's protected complaint activity by six days, and thus Grievant's protected conduct played no role in his being eliminated from consideration for the team.

Grievant contends that, although the Employer asserts that Grievant was fairly considered for the Spill Team vacancy, a climate of coercion existed ensuring that he would not be selected for the Spill Team. A climate of coercion is one in which the employer's "conduct may reasonably be said to have a tendency to interfere with the free

[9] Kelly v. The Day Care Ctr., Inc., 141 Vt. at 613.
[10] Sypher, 5 VLRB at 131.

exercise of employee rights."[11] We conclude that Grievant has not established that a climate of coercion existed in the filling of the Spill Team vacancy which was linked to his complaint activity.

The evidence indicates that the Employer allowed Grievant to apply for the Spill Team vacancy absent any discriminatory motive, and that Grievant was considered a viable candidate with strong qualifications by Spill Team members and Waste Management Division Director Desch. However, his strong qualifications were outweighed in the judgment of the Spill Team and Director Desch by the fact that he did not work in the Waste Management Division, and two qualified candidates for the team emerged from the Waste Management Division. This prevailing judgment was not connected with Grievant's complaint activity.

Grievant points to statements made to him by Charles Schwer in a March 4 discussion to support his claim of discrimination based on complaint activity. Schwer did make inappropriate comments in this discussion with Grievant to the effect that Grievant's expressed disagreement with not being selected to the team was not conducive to being part of a team and that a member of the Spill Team had to be a team player. However, this discussion occurred after Grievant already had been eliminated from consideration for the Spill Team and it does not alter our conclusion that Grievant's complaint activity was not a motivating factor in the decision not to select him for the team.

The final contention made by Grievant in his grievance filed with the Board is that the Employer violated Article 17, Section 1(c) and Section 2(b) of the Contract. Article 17, Section 1(c) provides that "(w)ork rules shall relate to aspects of employment . . ., and not to fundamental conditions of work which give rise to a statutory bargaining

[11] Grievances of McCort (Unpublished decision, Supreme Court Docket.No. 93-237, 1994)

obligation." Article 17, Section 2(b) states that the "State shall provide written notice to VSEA of all new rules and changes to existing rules concurrent with the notice to employees."

Grievant contends that the Employer violated these contract provisions by using the document entitled "Spill Response Team Qualifications and Performance Expectations" as a work rule to justify its fundamentally flawed selection process for the Spill Team. The Employer responds that Grievant's claims in this regard should be dismissed because the document is not a work rule as defined in Article 17, Section 1(c). The Employer also contends that Grievant has no standing as an individual employee to grieve an alleged failure to provide notice to VSEA pursuant to Article 17, Section 2(b).

Grievant can only prevail on his alleged violation of Article 17 if he establishes as a threshold matter that the "Spill Response Team Qualifications and Performance Expectations" document is a work rule. Employer regulations governing procedures, or guidelines mandating procedures for management, constitute binding rules.[12] The evidence indicates that the document was not a binding rule. The document was drafted approximately 15 years prior to the Spill Team vacancy at issue in this grievance. However, it was not finalized and it was never approved by the Waste Management Division Director. The draft document provided guidance on baseline expectations for team applicants when there was an opening on the spill team, but it constituted non-binding guidance. Thus, we dismiss Grievant's claimed violation of Article 17 of the Contract.

ORDER

[12] Grievance of Gobin, 158 Vt. 432, 435 (1992). Grievance of Cochran, 24 VLRB 54, 62 (2001).

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the Grievance of Thomas Benoit is dismissed.

Dated this 19th day of July, 2011, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Gary F. Karnedy

Gary F. Karnedy, Acting Chairperson

/s/ Louis P. Lacroix

Louis P. Lacroix

/s/ Linda P. McIntire

Linda P. McIntire