

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:

RALPH THURBER

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DOCKET NO. 88-26

MEMORANDUM AND ORDER

At issue is whether the Labor Relations Board should grant Grievant's motion that the Board order that the State's failure to file a timely answer to this grievance constitutes an admission of the material facts alleged in the grievance and a waiver of an evidentiary hearing.

The Vermont State Employees' Association ("VSEA") filed a grievance on May 20, 1988 on behalf of Ralph Thurber ("Grievant"). The grievance alleged that the dismissal of Grievant from his position at the Vermont Veterans' Home violated the VSEA-State Contract in that a fair and complete investigation was not undertaken prior to the decision to dismiss being made; there was no just cause for dismissal; the progressive discipline requirement was not followed, and this was not an appropriate case for bypassing same; and the penalty of dismissal was inappropriate or excessive.

Section 18.4 of the Board's Rules of Practice provides that "all parties in interest shall have the right to file an answer within 20 days after service of the grievance." The State did not file an answer within 20 days after service of the grievance. On June 29, at which time the State had not yet filed an answer, Grievant filed a Motion to Deem Failure to Answer as Admission pursuant to Section 18.6 of the Board's Rules of Practice, which provides: ...

"Failure to file a timely answer may be deemed by the Board to constitute an admission of the material facts alleged in the grievance and a waiver by the party of an evidentiary hearing, leaving a question or questions of law, alleged contract violation(s), or alleged violation(s) of a rule or regulation to be determined by the Board."

On July 6, 1988, the State filed an answer to the grievance and a motion to accept the answer without sanction. A hearing on the Motion was held on July 7, 1988, before Board Members Charles McHugh, Chairman; Louis Toepfer and William Kemsley, Sr. Michael Zimmerman, VSEA Staff Attorney, represented Grievant. Michael Seibert, Assistant Attorney General, represented the State. In ruling on this matter, the Board is treating the State's Motion to Accept Answer without sanction as a response to Grievant's motion and not as a separate motion.

Upon review and consideration of the materials on file herein, the Board's Rules of Practice, and the arguments expressed by the parties at oral argument, we have decided to deny Grievant's motion. However, we would like to address the concerns raised by Grievant at oral argument.

Grievant contends that the sanction of waiver of an evidentiary hearing should be applied given that the answer is nearly a month late, that Grievant was prejudiced, and that employees have been held to strict adherence of timeliness rules in the past.

The Board has great concern that time constraints which relate to our procedures be followed and we are dismayed that the State answer in this matter inexcusably was filed more than three weeks late. The orderly and efficient processing of a case may be frustrated by such a late filing and opposing parties may be prejudiced. Certainly, a pattern of such late filings would disrupt the timely processing of cases.

Here, however, Grievant has not demonstrated any prejudice resulting from the State's late filing. Few material facts were alleged in the grievance, and it is apparent that the lack of a State response did not affect Grievant's preparation for an evidentiary hearing. Moreover, the evidentiary hearing has not been delayed by the State's late filing. The hearing is scheduled to be held approximately two months after the filing of the grievance, an average time-frame under the present caseload of the Board, and the scheduling of the hearing was not affected by the late filing.

Grievant cites Grievance of Roy, 147 Vt. 403 (1986), to support the claim that employees have been held to strict adherence to timeliness rules in the past and that employers likewise should have timeliness rules strictly applied to them. In Roy, the Supreme Court affirmed the Board dismissal of a grievance, filed on the 31st day after receipt of a final employer action, as untimely under a Board rule which provided that the Board "shall hear and make final determination on the grievances brought before it, provided that such grievances ... are filed within thirty days after receipt of notice of final decision of the employer." Roy is distinguished from this case in that untimely filing of a grievance leaves the Board without jurisdiction under the above-cited Board rules to hear the grievance; Grievance of Baron, 8 VLRB 57, 64 (1985); while on the other hand to accept late answers to grievances is a matter of discretion under Section 18.6 of Board Rules.

We note that if we were to grant Grievant's motion and decide this case without an evidentiary hearing, we would be unable to adequately decide the merits of the grievance. In the grievance, no material facts are alleged with respect to the underlying incident to

the dismissal. We would be unable to determine whether the dismissal was in violation of the Contract without having such facts before us.

Now therefore, based on the foregoing reasons, it is hereby ORDERED that Grievant's Motion to Deem Failure to Answer As Admission is DENIED and the State's answer to the grievance is accepted.

Dated the 22nd day of July, 1988, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Charles H. McHugh, Chairman


William G. Kemsley, Sr.


Louis A. Toepfer