VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 92-5
VALVETTE MASON	)	

MEMORANDUM AND ORDER

On January 22, 1992, the Vermont Labor Relations Board received a letter from Valvette Mason ("Grievant"), in which she indicated that she wanted to "appeal the end results of (her) recent dismissal from the position of Clerk/Dispatcher" with the Vermont Department of Public Safety. As filed, Grievant's "appeal" did not conform to the Rules of Practice of the Board and the Board required that her amended appeal conforming to Board Rules be received by the Board by February 13, 1992. On February 13, 1992, the Board received an amended grievance filed by the Vermont State Employees' Association on behalf of Grievant.

On March 9, 1992, the State of Vermont, Department of Public Safety ("Employer"), filed an answer to the grievance and a motion to dismiss the grievance as untimely. On March 13, 1992, Grievant filed a response in opposition to the Motion to Dismiss.

On March 13, 1992, Grievant also filed a motion to preclude the Employer from filing an answer to the grievance, and deem the Employer's failure to file a timely answer as an admission of the material facts alleged in the grievance and a waiver of an evidentiary hearing. The Employer filed a response in opposition to the Motion to Preclude on March 18, 1982.

A hearing on the Employer's Motion to Dismiss was held on August 6, 1992, before Board Members Charles H. McHugh, Chairman; Leslie G. Seaver and Carroll P. Comstock. Assistant Attorney General Mary Lang represented the Employer. VSEA Attorney Jonathan Sokolow represented Grievant. At the hearing, the Employer presented the issue that Grievant's amended grievance raised different issues than did her original grievance filed with the Board. Grievant contended that this issue was not properly before the Board since it was not contained in the Motion to Dismiss. We agree with Grievant, and have not considered that issue in deciding the Motion to Dismiss. The parties filed Memoranda of Law on August 13, 1992.

At issue is whether the Employer's Motion to Dismiss and Grievant's Motion to Preclude should be granted.

Motion to Dismiss

We first address the State's Motion to Dismiss this grievance as untimely filed pursuant to Section 18.1 of the Board's Rules of Practice, which requires, in pertinent part, that grievances be "filed within 30 days after receipt of notice of final decision of the employer".

The underlying facts necessary to decide this matter are undisputed. On December 21, 1991, Grievant received a letter from the Employer indicating that she had been dismissed from her position. On Thursday, January 16, 1992, Grievant sent a letter by certified mail to the Labor Relations Board appealing her dismissal. The Board received that letter on January 22, 1992. The Board office was not open to receive mail on January 18 and

19, a Saturday and Sunday. The Board also received no mail through the U.S. Postal Service on Monday, January 20, which was the Martin Luther King legal holiday.

The Employer contends that the letter which the Board received from Grievant on January 22, 1992, was untimely filed, pursuant to Section 18.1 of Board Rules, because it was received by the Board 32 days after Grievant received the notice of dismissal. Grievant contends that her grievance should be considered as timely filed since she mailed it to the Board on January 16, 1992, well within the 30-day time requirement established by Board Rules. Grievant contends that she should not lose her right to grieve solely because it took six days for her letter to reach the Board.

It is necessary at the outset that we set forth the meaning of the word "filed" as used in the Board Rules. Grievant contends that the word "filed" is not defined in the Rules or elsewhere in the applicable law, and it is therefore an open question whether filing is complete upon mailing or receipt. We disagree with Grievant that this is an open question. The Board has previously indicated that the meaning of the word "file" is synonymous with "receipt"; that it indicates the receiving party actually has the submitted material in its possession. Grievance of Amidon, 6 VLRB 83, 85 (1983).

The grievance clearly would have been timely if received by the Board on January 21, 1992. Thirty days from the December 21, 1991, date upon which Grievant received notice of dismissal was January 20, 1992. However, because January 20 was a legal

holiday - Martin Luther King's Birthday - the 30-day time period actually expired on the next day, January 21. 1 VSA §371. Section 12.1, Board Rules of Practice; incorporating VRCP Rule 6(a).

The Employer contends that, because the Board received the grievance on January 22, one day after the deadline expired, the grievance is untimely. Thus, the issue squarely presented is whether the filing requirement of our Rules should be strictly construed to permit of no exceptions. Under ordinary circumstances, we would agree with the Employer that receipt of a grievance one day after the deadline warrants dismissal of a grievance. However, the circumstances of this case are not ordinary.

Grievant made a good faith effort to ensure that the grievance be received by the deadline by sending it certified mail on January 16, five days before the deadline. She was entitled to reasonably presume that the Board would receive the letter by the fifth day, January 21, even with the intervening weekend and holiday. The Vermont Rules of Civil Procedure presume that a letter should take no more than three days to deliver and thus allows an additional three days to answer a document which has been mailed to a party. VRCP Rule 6(e). Although the Board has not formally adopted Rule 6(e), we believe it sets forth a reasonable presumption upon which a person can rely.

The Board Rules of Practice do not require that grievances be hand-delivered to the Board, and in practice it is not unusual for grievances and other original process to be received by the

Board through the mail. Accordingly, the risk exists that a filing may be inordinately delayed due to events beyond the control of the person filing the action. We conclude that it would be unfair and unreasonable to construe our Rules to never excuse late receipt of a grievance by the Board. Under the circumstances, where Grievant was entitled to reasonably presume that her grievance would be received by the Board within five days of mailing it, the fact that the Board actually received the grievance on the sixth day does not result in Grievant losing her right to grieve the merits of her dismissal. Thus, we deny the State's Motion to Dismiss.

Motion to Preclude

We next consider Grievant's motion to preclude the Employer from filing an answer to the grievance. Grievant contends that the answer is untimely filed. The motion is made pursuant to Section 18.6 of the Board's Rules of Practice, which provides that "(f)ailure 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".

The underlying facts necessary to decide this motion are as follows: The amended grievance was filed with the Board by Grievant on February 13, 1992, and a copy of the grievance was mailed to the Employer on that date. However, the Employer did not receive the mailed copy until February 18, 1992. The Employer filed an answer with the Board on March 9, the 20th day after February 18.

Grievant relies on Sections 12.1 (which incorporates Rule 5(b) of the Vermont Rules of Civil Procedure) and 18.4 of the Board Rules, to support her contention that the Employer's answer was untimely. Rule 5(b) provides in part that "service by mail is complete upon mailing". Section 18.4 of the Board Rules provides that "all parties in interest shall have the right to file an answer within 20 days after service of grievance". In construing these sections together, Grievant alleges that the Employer had until March 4, 1992, to file an answer - that is, 20 days after Grievant mailed a copy of the grievance to the Employer. The Employer contends that, for at least the past 10 years, both the State and VSEA have considered an answer to be timely if filed within 20 days after actual receipt of the grievance by the State, and thus VSEA is seeking to change an established practice without any prior notice to the Employer. The Employer contends that, under such circumstances, to grant Grievant's motion would be unjust.

We decline to adopt the technical construction of the Vermont Rules of Civil Procedure and Board Rules urged on us by Grievant. The Board Rules, as administrative rules, are entitled to liberal construction to further, rather than restrict, the right of review. Grievance of Roy, 147 Vt. 403, 406 (1986) (Dissenting Opinion, Justice Gibson).

A fair reading of the V.R.C.P. Rule 5(b) provision that "service by mail is complete upon mailing" is that it is limited to providing that the obligations of the server are complete upon mailing, and is not intended to govern the response time for an

answer. Response time under the Vermont Rules of Civil Procedure, when service is made by mail, is governed by V.R.C.P. Rule 6(e). Rule 6(e) allows an additional three days to answer a document which has been mailed to a party. This limited scope and underlying purpose of V.R.C.P. Rule 5(b) should be considered when interpreting the Section 18.4 provision of Board Rules that an answer to a grievance must be "filed within 20 days after service of the grievance." Given our inclination to liberally construe our Rules to further the right of review, for the employer as well as the grievant, we interpret Section 18.4 to mean that, when service is made by mail, the time clock for answering the grievance begins running on the date that the employer receives a copy of the grievance.

Further, the technical construction of our Rules which Grievant urges on us is inconsistent with the established practice over many years to accept grievances as timely if filed within 20 days after receipt of the grievance by the State. This reinforces our determination to liberally construe our Rules to conform to this established practice. Thus, we deny Grievant's Motion to Preclude.

For the most part, the kinds of questions involved in this case arise as a consequence of the relations between attorneys, and without the knowledge or participation of the parties to the conflict. Surely, the parties ought not to be victimized by the technical and peevish wrangling of the representatives. It adds unnecessarily to the work of the Board, and wastes not only our limited resources but also those of the agencies involved. These

questions should be resolved before they come to the Board by the exercise of diligence and common sense.

NOW THEREFORE, based on the foregoing reasons, it is hereby ORDERED that the Employer's Motion to Dismiss and Grievant's Motion to Preclude are DENIED.

Dated this 22nd day of October, 1992, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh, Chairman

Leslie G. Seaver

/s/Carroll P. Comstock
Carroll P. Comstock