

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	
VERMONT STATE EMPLOYEES')	DOCKET NO. 91-66
ASSOCIATION (Re: Refusal)	
to Provide Information))	

MEMORANDUM AND ORDER

At issue are four motions in this grievance: 1) a motion by the Vermont State Employees' Association ("VSEA") to amend its grievance in this matter, 2) a motion by the State of Vermont ("State") to dismiss this grievance, 3) a motion by VSEA that the Board preclude the State from filing an answer to this matter, and deem the State's failure to file an answer as an admission of the allegations set forth in the grievance and as a waiver of an evidentiary hearing; and 4) a cross-motion for summary judgment filed by VSEA. We will discuss each of these motions in turn.

Application to Amend Grievance

VSEA has filed an application to amend this grievance to allege that "the State violated Article 11 of the Contract by refusing to provide VSEA with all materials to be used in the hearing before the Board in Docket No. 91-47". Section 12.7 of the Board's Rules of Practice permits amendment of a grievance as the Board "deems proper". We hereby deem amendment of the grievance as proper since, given the timing of the filing of the amendment, we conclude there was no prejudice to the State.

Motion to Dismiss

The State has filed a motion to dismiss this grievance on the ground that it raises the same claim in a separate grievance, Grievance of John Terrel, VLRB Docket No. 91-47 (i.e., that the

State violated the VSEA-State Contract for the Non-Management Unit, effective for the period July 1, 1990 - June 30, 1992, by refusing to provide information relating to the possible misconduct of John Terrel and other Department of Motor Vehicle employees). The State contends that a party is not permitted to file duplicate actions with the same forum.

Grievance of John Terrel was filed with the Board on July 30, 1991. Terrel was dismissed following an investigation into allegations that he and other employees in the Department of Motor Vehicles had engaged in misconduct with respect to an incident occurring at the Massachusetts State Police Academy. The grievance challenged Terrel's dismissal on several grounds, including the fact that he had been treated more harshly than the other employees who were the subject of the same investigation. The grievance also alleged that the State had prevented VSEA from properly representing Terrel in the proceedings which led to his dismissal by refusing to provide "the records of the investigation of grievant and other employees of the Department of Motor Vehicles regarding the incident".

In the grievance filed in Docket No. 91-66, VSEA makes some of the same allegations as were made in Docket No. 91-47. These allegations are with respect to the State violating the Contract by refusing to provide records of the investigation of Terrel and the other Department employees accused of misconduct concerning an incident at the Massachusetts State Police Academy.

However, the two grievances are not similar in all respects. Some of the allegations VSEA makes in the grievance in Docket No.

91-66 challenge the alleged conduct of the State following the filing of the grievance on behalf of John Terrel in Docket No. 91-47. Also, VSEA filed the grievance in Docket No. 91-66 on its own behalf, whereas the grievance in Docket No. 91-47 was filed on behalf of John Terrel. VSEA has an institutional interest in properly representing employees which goes beyond the concerns of Terrel. The allegation in Docket No. 91-66 - that the State is interfering with VSEA's duty to provide proper representation before the Board - obviously is one of institutional concern to VSEA.

As a practical matter, assuming that VSEA is correct in its allegations that the State violated the Contract in Docket No. 91-66 by refusing to provide information to VSEA, VSEA cannot properly represent Terrel in Docket No. 91-47 concerning his dismissal until it has the information it requests in Docket No. 91-66. For the foregoing reasons, we deny the State's Motion to Dismiss.

Motion to Preclude

This grievance was filed on November 1, 1991, and amended on November 5, 1991. To date, the State has failed to file an answer to the grievance. In the Motion to Dismiss which the State filed on November 22, 1991, the State indicated: "The State has filed this as a brief Motion to Dismiss to emphasize its position that even requiring the State to answer this matter would be inappropriate". VSEA has filed a motion requesting that the Board preclude the State from filing an answer in this matter, pursuant to Section 18.4 of the Board Rules of Practice, and that

it deem the State's failure to file an answer as an admission of the allegations set forth in the grievance and as a waiver of the evidentiary hearing, pursuant to Section 18.6 of the Board Rules.

Sections 18.4 and 18.6 of the Rules provide as follows:

Section 18.4 Answer: Filing: Service:

All parties in interest shall have the right to file an answer within 20 days after service of the grievance. Upon application, the Board may extend the time within which the answer shall be filed.

Section 18.6 Admission by Failure to Answer

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.

The State has waived its right to file an answer to the grievance pursuant to Section 18.4, as it has not filed an answer within 20 days after service of the grievance and has not applied for an extension of time to file an answer. Further, under the circumstances, pursuant to Section 18.6, we deem the failure to file a timely answer as an admission of the material facts alleged in the grievance and the waiver by the State of an evidentiary hearing.

In Grievance of Thurber, 11 VLRB 223 (1988), where the grievant filed a similar motion as that filed here due to the State's failure to file a timely answer, the Board expressed "great concern that time constraints which relate to our procedures be followed" and indicated that the "orderly and efficient processing of cases may be frustrated by such a late

filing and opposing parties may be prejudiced". 11 VLRB at 224. However, in Thurber, the Board denied the motion to deem failure to answer as an admission of material facts.

In denying the motion in Thurber, the Board reasoned that the grievant had not demonstrated any prejudice resulting from the State's late filing since it did not affect Grievant's preparation for an evidentiary hearing and the hearing was not delayed by the State's late filing. 11 VLRB at 225. The Board also noted that, if the motion was granted, the Board would be unable to determine whether the grievant's dismissal was in violation of the Contract because no material facts were alleged in the grievance with respect to the incident underlying the dismissal. 11 VLRB at 225-226.

Here, the circumstances are much different. Grievant has demonstrated prejudice. The State's failure to file an answer in Docket No. 91-66 clearly has affected VSEA's preparation for an evidentiary hearing in the Grievance of John Terrel, Docket No. 91-47, since the allegations in Docket No. 91-66 relate to the refusal to provide information to VSEA necessary for VSEA to adequately represent Terrel. Also, if we failed to grant the motion, the hearing in Docket No. 91-47, which is now scheduled for March 9, would be delayed pending the hearing and decision in Docket No. 91-66. Finally, we are able to determine whether the State violated the Contract in Docket No. 91-66 because VSEA has alleged sufficient material facts allowing us to do so.

Thus, we grant VSEA's motion and deem the State's failure to file an answer as an admission of the material facts alleged in

the grievance and a waiver by the State of an evidentiary hearing.

The operative material facts are as follows:

1. VSEA is the sole collective bargaining agent for classified employees of the State of Vermont.

2. The Employer herein is the State of Vermont, Department of Personnel.

3. At all times relevant herein, VSEA was entitled to all rights afforded to it by statute, by Rules and Regulations for Personnel Administration and by the Agreement between the State and VSEA for the non-management bargaining unit, in effect for the period July 1, 1990 to June 30, 1992 ("Contract").

4. Prior to July 5, 1991, John Terrel was a Highway Use Inspector in the Agency of Transportation, Motor Vehicle Department. Terrel was dismissed on July 5, 1991. On July 30, 1991, VSEA, on behalf of Terrel, filed a grievance with the Vermont Labor Relations Board challenging his dismissal. That grievance, Docket No. 91-47, currently is pending before the Board.

5. On June 10, 1991, Terrel was notified that his employer was contemplating his dismissal due to his alleged conduct in connection with an examination given at the Massachusetts Police Academy in September, 1990. Terrel was one of several employees accused of misconduct in connection with that examination. VSEA represented Terrel throughout the subsequent proceeding which led to his dismissal and continues to represent him in this matter.

6. On June 25, 1991, Gail Rushford, VSEA Field Representative, spoke with Michael Griffes, Commissioner of the

Department of Motor Vehicles and requested copies of all tape recorded interviews regarding the investigation into the conduct of Terrel and the other employees accused of misconduct at the Massachusetts Police Academy, as well as a copy of the investigator's report regarding Terrel's conduct. Rushford confirmed this request by letter, a copy of which was sent to Michael Seibert, Assistant Attorney General. No information was turned over as a result of those requests.

7. On July 19, 1991, Rushford again wrote to Seibert, requesting a record of all interviews conducted in connection with the investigation into Terrel, the report of the investigating officer and all material relied on by the State in disciplining Terrel. Rushford also asked for a record of the disciplinary action taken against the other employees as a result of the investigation.

8. On July 25, 1991, in a conversation with Rushford, Seibert denied her request for information. In his answer to Terrel's grievance in Docket No. 91-47, Seibert claimed that he only refused to provide investigative records other than those which concerned the activity of Terrel. To date, neither Seibert nor Commissioner Griffes have provided any materials to Rushford, regarding Terrel or anyone else.

9. On August 5, 1991, VSEA filed a grievance at Step III of the grievance procedure provided for in the Contract, arguing that the State was violating the Contract by withholding

information related to Grievant, as well as the other employees involved in the investigation. VSEA requested a Step III hearing on the matter.

10. Thomas Ball, Director of Employee Relations, scheduled the Step III hearing for September 13, 1991. The Step III hearing in fact took place on that date.

11. On October 3, 1991, the Step III decision was issued denying VSEA's grievance. In his Step III decision, Ball held that the Contract does not authorize or require the State to provide the information which VSEA had requested regarding the other employees involved in the investigation. Ball did indicate that the information requested concerning Terrel "would be available".

12. To date, VSEA has not received any of the information which it has requested, either concerning Terrel or any of the other employees investigated in this matter.

Cross Motion for Summary Judgment

VSEA moves for summary judgment in this matter pursuant to V.R.C.P. 56 because there is no genuine issue as to any material fact and VSEA is entitled to judgment as a matter of law. The State has filed no response to VSEA's Cross Motion for Summary Judgment. VSEA is correct that there is no genuine issue of material fact since, pursuant to Section 18.6 of Board Rules, we have deemed failure of the State to file an answer to constitute an admission of the material facts alleged in the grievance.

Thus, we now must determine whether VSEA is entitled to judgment as a matter of law. In the context of this case, that

requires a determination by the Board whether the State has violated Articles 6, 11, 14 and 15 of the Contract.

We first consider whether the State has violated Articles 6, 11 and 14 of the Contract. Article 6, Section 5, of the Contract, provides in pertinent part that "(t)he State will... provide such... information as is reasonably necessary to serve the needs of the VSEA as exclusive bargaining agent and which is neither confidential nor privileged under law". Article 11, Section 3, of the Contract provides that "(a)ny material, document, note or other tangible item which is to be entered or used in any... hearing before the Vermont Labor Relations Board, is to be provided to the employee on a one-time basis, at no cost to him/her". Article 14, Section 1(b), of the Contract, provides that the State "will... apply discipline... with a view toward uniformity and consistency".

VSEA contends that the State has violated these provisions of the Contract by failing to provide VSEA with the following materials: 1) copies of all tape recorded interviews regarding the investigation into the conduct of John Terrel and the other employees accused of misconduct at the Massachusetts Police Academy, 2) a copy of the investigator's report regarding Terrel's conduct, 3) all material relied on by the State in disciplining Terrel, and 4) a record of the disciplinary action taken against the other employees as a result of the investigation. VSEA has indicated that any concern regarding the confidentiality of the records can be accommodated through redaction of the names of the employees involved.

VSEA contends that it cannot properly present a claim before the Board that a person has been unjustly dismissed for misconduct unless it has the results of the investigation which led the State to dismiss that person. VSEA further contends that it cannot properly present a claim of disparate treatment unless it knows precisely what other employees were alleged to have done and what discipline they received.

We agree, pursuant to Articles 6, 11 and 14 of the Contract, that providing such information to VSEA is reasonably necessary to allow VSEA, as exclusive bargaining agent of employees, to properly represent employee John Terrel before the Board. Access to such information is relevant to the issues of whether the State applied discipline in an uniform and consistent manner and, ultimately, whether just cause existed for dismissal. As indicated by VSEA, any concerns regarding the confidentiality of the records can be accommodated through redaction of the names of the employees involved. Thus, we conclude that the State violated Articles 6, 11 and 14 of the Contract by refusing to provide the requested information to VSEA.

VSEA also contends that the State violated Article 15 of the Contract by failure to schedule a Step III hearing or issue a Step III decision within the time frames set forth in the Contract. VSEA is correct that the State did violate the contractual timeframes in this regard. However, we can provide no further remedy for such violations since the remedy is specifically established by Article 15, Section 3(c)(6) and (7), of the Contract, as follows:

6. In the event the employer fails to render a decision at Step I, II or III within the prescribed time, the grievant may proceed to the next step within the time limits established above.

7. If the Department of Personnel develops a pattern of not answering within the time requirements of this Section, VSEA may appeal to the Secretary of Administration. The Commissioner of Personnel shall be notified of any such appeal.

Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED:

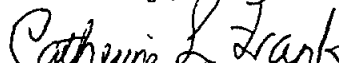
1. The Grievance of the Vermont State Employees' Association is SUSTAINED; and

2. The State of Vermont forthwith shall provide the Vermont State Employees' Association with the following materials, with the names of all involved employees other than John Terrel redacted: 1) copies of all tape recorded interviews regarding the investigation into the conduct of John Terrel and other Department of Motor Vehicle employees accused of misconduct at the Massachusetts Police Academy, 2) a copy of the investigator's report regarding Terrel's conduct, 3) all material relied on by the State in disciplining Terrel, and 4) a record of the disciplinary action taken against the other employees as a result of the investigation.

Dated this 29th day of January, 1991, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Charles H. McHugh, Chairman


Catherine L. Frank


Louis A. Toepfer