

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	
GLENN BOYDE AND THE)	DOCKET NO. 95-16
VERMONT STATE EMPLOYEES')	
ASSOCIATION)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On March 22, 1995, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Glenn Boyde ("Grievant"), a Correctional Officer II at the Chittenden Regional Correctional Facility. Therein, Grievant alleged that the State of Vermont Department of Corrections ("Employer") discriminated against Grievant on the basis of his race, union membership and grievance activity in violation of Article 5 of the collective bargaining agreement between VSEA and the State for the Corrections Bargaining Unit, effective for the period July 1, 1994, to June 30, 1996 ("Contract"). Grievant's discrimination claims were based on alleged statements made by John Murphy, Superintendent of the Chittenden facility, to Sandi Raymond, a correctional officer at the facility.

On August 11, 1995, VSEA filed a Motion to Intervene/Amend and allow VSEA to join this matter as an interested party. The Employer did not oppose VSEA's motion. On October 10, 1995, the State filed a motion to dismiss the grievance as untimely filed. Grievants filed a memorandum in opposition to the motion on October 17, 1995.

A hearing was held on October 19, 1995, in the Labor Relations Board hearing room in Montpelier, before Board Members Catherine Frank, Chairperson;

Louis Toepfer and Richard Park. VSEA Legal Counsel Samuel Palmisano represented Grievants. Assistant Attorney General David Herlihy represented the Employer. The hearing was limited to evidence and argument from the parties on the Employer's motion to dismiss this grievance on timeliness grounds. The decision herein is limited to the timeliness issue.

FINDINGS OF FACT

1. The Contract provides in pertinent part as follows:

ARTICLE 5 NO DISCRIMINATION OR HARASSMENT; and AFFIRMATIVE ACTION

SECTION 1. NO DISCRIMINATION, INTIMIDATION OR HARASSMENT

In order to achieve work relationships among employees, supervisors or managers at every level which are free of any form of discrimination, neither party shall discriminate against, intimidate, nor harass any employee because of race, . . . membership or non-membership in the VSEA, filing a complaint or grievance . . .

...

ARTICLE 15 GRIEVANCE PROCEDURE

...

SECTION 2. DEFINITION

...

A grievance shall contain the following information:

1. The full name and address of the party or parties submitting the grievance;
2. Identification of the State agency, department, or institution involved;
3. A statement of the facts concerning the grievance;
4. Specific references to the pertinent section(s) of the contract or of the rules and regulations alleged to have been violated;
5. A statement of the specific remedial action sought;

6. A request for a grievance meeting, if desired.

SECTION 3.

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

Step I (Immediate Supervisor Level)

1. The employee, or his or her representative, or both, shall notify his or her immediate supervisor of a complaint 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.

...

Step II (Department Level)

1. If no satisfactory settlement is reached at Step I, the complaint shall be reduced to writing. The complaint shall be submitted for action by the aggrieved party or representative to the administrative head of the department in which the aggrieved is employed . . .

...

SECTION 4.

- a. Complaints may be initiated at Step II if the subject matter of the complaint is clearly beyond the control of the immediate supervisor, or grievances at Step III if the subject matter of the grievance is clearly beyond the control of the agency, department, or institution head.

- b. Grievances/Complaints initially filed at Step II or III shall be submitted within fifteen (15) workdays of the date upon which the employee could reasonably have been aware of the occurrence of the matter which gave rise to the grievance.

...

2. Grievant is an African American. At all times relevant, Grievant was a Correctional Officer II at the Chittenden Regional Correctional Facility, and a VSEA Steward. Grievant has been a correctional officer for approximately nine years, and has been a VSEA Steward for approximately 7 years. As a VSEA Steward,

Grievant has received training on how to handle employee grievances. He has represented employees in many grievances.

3. On September 7, 1994, Grievant, in his role as VSEA Steward, had a conversation with Sandi Raymond, a Correctional Officer I at the Chittenden facility in an initial probationary period. Raymond had received negative feedback for leaving a door open, and Grievant expressed concern that Raymond may be receiving disparate treatment because another employee had not received negative feedback under similar circumstances. Grievant called John Murphy, Superintendent of the Chittenden facility, on the telephone and told him he wanted to discuss the Raymond situation. Murphy was abrasive during the conversation, and told Grievant he would not discuss the case with him. Grievant told Murphy he needed to talk with him about the situation. Shortly thereafter, Murphy came to speak to Grievant. Murphy was agitated, and the discussion between him and Grievant was heated. Raymond was present during this exchange (Joint Exhibit 26).

4. The following day, September 8, Murphy approached Raymond and apologized for the previous day's incident. Raymond inquired of Murphy whether there was tension between VSEA and management. Murphy indicated that there was tension, and that this derived mainly from Grievant's aversion to "authoritative figures". Murphy stated that the aversion likely was acquired when Grievant's "old man" left his mother years earlier. Murphy told Raymond that Grievant was a criminal and had spent nine days in jail. He said that Grievant had forced his wife to lie to state troopers, and that he had "terrorized" Vermont communities on his motorcycle. Murphy stated that Grievant had a "dark heart". Murphy told Raymond

that the Department of Corrections had dismissed Grievant and was forced to rehire him, leaving Grievant with the feeling that he was invincible. Murphy told Raymond that Grievant was not invincible (Joint Exhibit 26).

5. Grievant had been dismissed from his correctional officer position in late 1989 for the off duty offenses of careless and negligent motorcycle driving, attempting to elude police officers, and giving false statements to police. In a September 10, 1990, decision, the Labor Relations Board reduced Grievant's dismissal from his correctional officer position to a 30 day suspension. 13 VLRB 209.

6. On or about the day after her September 8, 1994, conversation with Murphy, Raymond told Grievant that Murphy had spoken to her about Grievant, and asked Grievant if he had spent nine days in jail. Raymond did not go into many details of her conversation with Murphy, but told Grievant that Murphy did not like him. Raymond told Grievant to "cover your ass". Grievant did not ask Raymond to provide any more details.

7. Prior to October 6, 1994, Grievant and other male correctional officers had been assigned to work in the Women's Unit at the Chittenden facility. On October 6, 1994, Murphy sent Grievant a memorandum which provided:

Please be advised that due to an emergency request from the Mental Health Treatment Team the Women's Unit will no longer be available as a regular post assignment for men. This will remain in effect until further notice.

(Grievant's Exhibit 11)

8. On or about October 8, 1994, Raymond and Grievant had a conversation in which Raymond told Grievant more details of the September 8 conversation between Murphy and Raymond.

9. On October 10, 1994, Grievant received a memorandum from Murphy which provided:

Please be advised that the Agency of Human Service's Personnel Unit will be conducting an investigation into the following allegation of misconduct on your part.

It has been alleged that you have conducted yourself in an unprofessional manner while you have been assigned to the Women's Unit on second shift. Examples of your alleged misconduct include, but are not limited to, treating the female inmates in a disparate manner as well as making inappropriate comments regarding female inmate's bodies.

...

Until further notice you are not to work or enter the female units unless there is a "59" called, or you perceive there to be an emergency that demands your immediate presence.

...

(Grievant's Exhibit 12)

10. After receiving this memorandum, Grievant spoke with Raymond on October 10. Raymond told Grievant that Murphy was "singling (Grievant) out". Raymond told Grievant during this conversation the details of her September 8 conversation with Murphy, as set forth in Finding of Fact #4.

11. After speaking with Raymond, Grievant called Richard Lednický, VSEA Field Representative. Lednický told Grievant to have Raymond write a

statement on her September 8 conversation with Murphy. Grievant then asked Raymond to write a statement, and address it to Lednicky.

12. On October 12, 1994, Raymond wrote a statement addressed to Lednicky. The statement discussed the September 7 exchange between Murphy and Grievant, and the details of Raymond's September 8 conversation with Murphy, as set forth in Findings of Fact #3 and #4. Raymond showed Grievant this statement on October 12, 1994, and Grievant read the statement in its entirety (Joint Exhibit 26).

13. On November 2, 1994, Steve Janson, VSEA Director of Field Services, sent John Gorczyk, Department of Corrections Commissioner, a copy of Raymond's October 12 statement, and stated in a letter to the Commissioner:

We regard it as a very serious charge since the Superintendent's actions and comments, as reported, are unacceptable and clearly violate both contractual and statutory protections for VSEA, as an institution, and employees representing the union's members at the worksite.

In addition, we believe that the incident referenced in the memorandum, and the following conversation between the superintendent and Ms. Raymond, clearly demonstrate an overt racial bias toward Mr. Boyd (sic).

We have recommended to Mr. Boyd (sic) that we file a contractual grievance, an unfair labor practice charge with the Vermont Labor Relations Board and a charge with the Human Rights Commission unless the Department takes immediate and forceful steps to rectify this situation. Toward that end, please consider this a formal request that the Superintendent be relieved from duty pending an investigation.

I would appreciate an expeditious response.

(Grievant's Exhibit 27)

14. In a November 7, 1994, letter to Janson, Commissioner Gorczyk stated that he agreed "that these allegations are serious and merit a serious response", and that they would be "fully investigated immediately". Gorczyk indicated that Murphy would not be relieved from duty, but that Murphy would not "act any further in any regard with respect to the recent events in the Women's Unit" (Grievant's Exhibit 20).

15. On November 10, 1994, Lednický filed a Step II grievance on Grievant's behalf, alleging that Murphy's September 8, 1994, statements to Raymond constituted discrimination against Grievant on the basis of race, membership in the VSEA and the filing of complaints and grievances (Grievant's Exhibit 22).

16. The grievance was denied at Step II on the basis that it was untimely filed. The grievance was pursued to Step III of the grievance procedure, and it was denied on timeliness grounds by Ileen McGurran, Human Resources Specialist for the State Department of Personnel.

17. An investigation by the Agency of Human Services Personnel Unit resulted in a conclusion that the allegations of misconduct against Grievant, as set forth in Murphy's October 10, 1994, memorandum, were unsubstantiated (Grievant's Exhibit 14).

OPINION

At issue is whether this grievance should be dismissed as untimely filed. The Employer contends that a grievance was not filed until a Step II grievance was filed on November 10, 1994, well after the contractual requirement that complaints or

grievances shall be submitted “within fifteen (15) workdays of the date upon which the employee could reasonably have been aware of the occurrence of the matter which gave rise” to the complaint or grievance. Article 15, Sections 3 and 4(b).

Grievant and VSEA contend that contractual timeframes for filing grievances have been followed. They reason that this grievance was initially filed at Step I via a November 2, 1994, letter of complaint from Grievant's representative, Steve Janson, to Corrections Commissioner John Gorczyk, and that this letter of complaint was within 15 workdays of the October 12, 1994, statement of Sandi Raymond, a correctional officer at the Chittenden facility.

The Board previously has dismissed grievances for failure to follow the contractual filing timeframes at the initial steps of the grievance procedure. Grievance of Giffin, 10 VLRB 204 (1987). Grievance of Dyer, 4 VLRB 306 (1981). In order for us to accept the contention of Grievant and VSEA that this grievance was timely filed, we must conclude both that Raymond's October 12 statement constituted the time upon which Grievant “could reasonably have been aware of the occurrence of the matter which gave rise” to the complaint or grievance, and that Janson's November 2, 1994, letter constituted a Step I complaint within the meaning of the Contract. We reach neither conclusion.

First, we conclude that Grievant was aware prior to Raymond's October 12 statement of the events giving rising to his grievance. The grievance here was based on statements made by Chittenden Superintendent John Murphy on September 8, 1994, to Raymond about Grievant. As indicated in our Findings of Fact, we have concluded by a preponderance of the evidence that Raymond told Grievant during

an October 10 conversation the details of her September 8 conversation with Murphy. Raymond's October 12 statement simply memorialized in writing what Raymond had verbally expressed to Grievant two days earlier. A written statement was not necessary before the grievance clock began running. Under these circumstances, Grievant reasonably became aware of the occurrence of the matter which gave rise to the grievance within the meaning of Article 15 of the Contract by October 10, not October 12.

Further, we conclude that Steve Janson's November 2, 1994, letter to Commissioner Gorczyk did not constitute a Step I complaint within the meaning of the Contract, as Grievants contend. Janson's letter is accurately characterized as notification to Commissioner Gorczyk that the contractual grievance procedure would be invoked if the Department did not take "immediate and forceful steps to rectify this situation", rather than initiating the contractual grievance procedure.

Nonetheless, Grievant and VSEA contend that this discrimination grievance is continuous in nature because Superintendent Murphy prohibited Grievant from working in the Women's Unit of the Chittenden facility, this ban was improperly based on considerations of race and union activity, and the ban continued even after Grievant filed a November 10, 1994, Step II grievance concerning Murphy's September 8 statements. This contention is without merit because the grievance as filed contains no reference to Grievant's ban from the Women's Unit as supporting a discrimination claim.

Grievant and VSEA also allege, in further support of a continuous grievance claim, that Murphy's statements to Raymond created a hostile working environment

which continued well past the time Grievant filed a Step II grievance. The Board has accepted the validity of a continuing grievance only in cases where pay practices were involved and employees initially did not grieve the alleged violations within contractual time limitations, but grieved the alleged violation during the period they were still occurring. Grievance of Reed, 12 VLRB 135, 143-44 (1989). Grievance of Cole, 6 VLRB 204, 209-210 (1983). Here, there is no pay practice involved, and the rationale for allowing continuous grievances in those cases; i.e., that there was a new occurrence of the alleged violation every time a paycheck was issued; does not apply here. Id.

Thus, we conclude that Grievant was aware by October 10, 1994, of the occurrence of the matter which gave rise to his grievance, and failed to file a grievance until November 10, 1994. This filing occurred after the contractually provided 15 workday period for filing grievances had expired, and thus the grievance was untimely filed.

ORDER

NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the Grievance of Glenn Boyde and the Vermont State Employees' Association is DISMISSED.

Dated this 17th day of November, 1995, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Catherine L. Frank
Catherine L. Frank, Chairperson

Louis A. Toepfer
Louis A. Toepfer

Richard W. Park
Richard W. Park