

VERMONT LABOR RELATIONS BOARD

GRIEVANCES OF:)	
)	DOCKET NO. 01-29, 02-12, 02-22
VALINDA SILESKE)	

Statement of Case

These cases involve a series of grievances filed by Valinda Sileski (“Grievant”), a Clerk Dispatcher with the Vermont State Police in St. Johnsbury, against the Vermont Department of Public Safety (“Employer”). On May 31, 2001, Grievant filed four grievances with the Labor Relations Board (Docket No. 01-29). In the first of these grievances, Grievant alleges that the Employer lied to her by informing her there was a complaint made against her, obtained a statement from her without providing her with the right to union or other representation, and refused to provide her with a copy of her taped statement. In the second grievance, Grievant alleges that Sergeant Fred Cornell retaliated against her for filing the first grievance through his actions concerning a shift coverage issue. In the third grievance, Grievant alleges that a memorandum on her performance issued by Lieutenant George Hacking was inaccurate and constituted retaliation against her for filing the second grievance. In the fourth grievance, Grievant alleges that Captain James Dimmick harassed and intimidated her by demanding that he meet with her on a matter that could lead to discipline without notifying her of the right to representation. Grievant contends in the first four grievances that the Employer violated Articles 5, 11, 14(7), 15, 17, 65 and 66 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, 1999 – June 30, 2001 (“1999-2001 Contract”).

On March 18, 2002, Attorney Gary McQuesten filed a fifth grievance on behalf of Grievant, alleging that the Employer violated Articles 5, Section 1; Article 14, Section 7;

Article 15, Section 2, and Article 17, Sections 1 and 3 of the collective bargaining agreement between the State and VSEA for the Non-Management Unit, effective July 1, 2001 – June 30, 2003 (“2001-2003 Contract”), by issuing Grievant a December 13, 2001, letter imposing work rules/discipline on Grievant (Docket No. 02-12).

On April 30, 2002, Attorney McQuesten filed a sixth grievance on behalf of Grievant, alleging that the Employer violated Article 5 of the Contract by discriminating against and harassing her due to her grievance activity in not selecting her for a supervisory position in Derby (Docket No. 02-22).

These cases were consolidated for hearing by agreement of the parties. Hearings were conducted in the Board hearing room in Montpelier on August 1, 2002, and September 9, 2002, before Board Members Edward Zuccaro, Acting Chairperson; Carroll Comstock and John Zampieri. Attorney McQuesten represented Grievant. David Herlihy, Department of Personnel General Counsel, represented the Employer. The Employer and Grievant filed post-hearing briefs on September 23 and 24, 2002, respectively.

FINDINGS OF FACT

1. The 1999-2001 and 2001-2003 Contracts provide in pertinent part as follows:

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 . . . filing a complaint or grievance, or any other factor for which discrimination is prohibited by law . . .

. . .

ARTICLE 12 PERFORMANCE EVALUATION

1. Timing of Evaluations: Annual performance evaluations shall normally take place near the anniversary date of completion of original probation . . .

An oral or written notice of performance deficiency (Step 1 in the order of progressive corrective action) shall not be grievable when issued, and, when issued, shall not require the presence of a union representative. However, once Step 2 of progressive corrective action has been implemented (a special or annual evaluation coupled with a prescriptive period for remediation) such notice or a written record of such notice shall be placed in the employee's personnel file and shall be fully grievable.

. . .

4. . . During the rating year, the immediate supervisor shall call the employee's attention to work deficiencies which may adversely affect a rating, and, where appropriate, to possible areas of improvement . . .

ARTICLE 14 DISCIPLINARY ACTION

1. . .

(e) In performance cases, the order of progressive corrective action shall be as follows:

(1) feedback, oral or written; (records of feedback are not to be placed in an employee's personnel file except in compliance with the Performance Evaluation Article.);

(2) written performance evaluation, special or annual, with a specified prescriptive period for remediation specified therein, normally 3 to 6 months . . .

. . .

7. Whenever an employee is required, by his or her supervisor or management, to give oral or written statements on an issue involving the employee, which may lead to discipline against the employee, or whenever an employee is called to a meeting with management where discipline is to be imposed on the employee, he or she shall be notified of his or her right to request the presence of a VSEA representative and, upon such request, the VSEA representative shall have the right to accompany the employee to any such meeting. The notification requirement shall not apply to the informal initial inquiry of the employee by his or her supervisor without knowledge or reason to believe that discipline of the employee was a likely possibility. Subject in all cases to the consent of the employee involved, in those cases where VSEA is not representing the employee, the VSEA reserves the right to attend such meetings as a non-participating observer if in its judgment the ramifications of such meetings are likely to impact on the interests of VSEA members.

(a) If the employer tapes an investigative interview of an employee against whom disciplinary action is contemplated:

- (1) a duplicate tape will be promptly provided to the interviewee;
- (2) the employer tape will be the official transcript;
- (3) the interviewee or his/her representative may also tape the proceeding and will promptly provide a duplicate tape to the employer.

(b) If the employer tapes a witness interview or other employee interview where disciplinary action is not contemplated against the interviewee, a duplicate tape will be promptly provided to the interviewee upon request. Paragraphs 7(a)2 and 3 above, will apply here as well.

...

ARTICLE 15 GRIEVANCE PROCEDURE

...

2. DEFINITION

(a) "Complaint" is an employee's . . . informal expression to the immediate supervisor of dissatisfaction with aspects of employment or working conditions under a collective bargaining agreement.

(b) "Grievance" is an employee'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:

- (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.

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) 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. This is not a required first step of the grievance procedure.

(2) An employee may opt to bypass the Step I procedure and file his/her complaint directly to the Step II (departmental) 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 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.

(3) A supervisor may elect not to meet with the employee and/or his/her representative in a Step I meeting, and if such election is made, the supervisor shall advise the employee within two (2) workdays of receiving notice of the complaint or grievance. The employee will then have ten (10) workdays to file his/her complaint or grievance, in writing, to Step II – Department head.

(4) If a Step I is initiated, the complaint shall be discussed informally by the aggrieved employee, or his/her representative, or both, and the immediate supervisor. If the issue remains unresolved, an employee must comply with the following time frames for filing to the Step II level: a) within ten (10) workdays after receipt of the Step I decision; or b) within thirty (30) workdays from when the employee first gave notice to the supervisor of his/her complaint as outlined in Section 3(a)(1) above, whichever occurs first.

(b) STEP II (Department Head Level)

(1) If no satisfactory settlement is reached at Step I, or if the Step I 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 in which the aggrieved is employed within the time frames outlined in Section 3(a) above, otherwise the matter shall be considered closed. . .

...

4. GENERAL PROVISIONS

...

(b) Grievances initially filed at Step II . . . 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.

...

6. The parties agree, subject to applicable law, that every employee may freely institute complaints and/or grievances without threats, reprisal, or harassment by the employer.

...

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 15 days prior to the date they become effective . . .

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

(c) The State shall properly maintain all work rules in a manner and location readily accessible to employees affected by them. The availability of these rules and their whereabouts shall be posted in prominent areas of the workplace and made available to employees and the VSEA upon request.

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.

ARTICLE 65
WHISTLE BLOWER

1. A “WHISTLEBLOWER” is defined as a person covered by this Agreement who makes public allegations of inefficiency or impropriety in government. No provision of this Agreement shall be deemed to interfere with such an employee

in the exercise of his or constitutional rights of free speech, and such person shall not be discriminated against in his/her employment with regard thereto.

...

APPENDIX D CLERK DISPATCHER

...

6. Short notice overtime opportunities, created by the absence of a Clerk Dispatcher, shall be offered first to on-shift classified employees and then to off-shift classified employees. Short notice overtime opportunity is defined as a Dispatcher's absence from work for which less than twenty-four hours prior notice is given. The Department shall not be required to accept on-shift or off-shift classified employee volunteers for short-notice overtime opportunities if such work would result in an employee working more than 16 hours in a workday. The Department will try to limit holdover overtime work to four hours, but may assign an employee to work up to 8 hours.

...

2. Grievant has worked as a Clerk Dispatcher at the St. Johnsbury barracks of the Vermont State Police since 1995. The St. Johnsbury barracks are within Troop B of the State Police, which covers the Northeast Kingdom. Troop B is headed by Captain James Dimmick. Lieutenant George Hacking is Station Commander of the St. Johnsbury barracks, and reports to Captain Dimmick. There are three patrol commanders in the St. Johnsbury barracks who hold the rank of Sergeant. Sergeant Fred Cornell is one of the patrol commanders. Lieutenant Hacking supervises the Clerk Dispatchers. The patrol commanders oversee the work of Clerk Dispatchers during their shifts.

3. Shortly before midnight on June 26, 2000, state police in the St. Johnsbury barracks investigated David Coutu ("Coutu") of West Danville for complaints of an alleged burglary of a neighbor's residence and an alleged attempted sexual assault by Coutu on his wife, Allysa Coutu. Several troopers responded to the scene but were unable to locate Coutu. Sergeant Cornell prepared an affidavit that night in support of an arrest warrant for Coutu (State's Exhibit 24).

4. Grievant was involved in a romantic relationship with Coutu the previous year until October. Early in the morning on June 27, at about 6:30 p.m., Grievant telephoned Coutu's mother, Sara Coutu, to see if she wanted to have lunch with her. Grievant was not working that day. Coutu's mother informed Grievant that Coutu had a domestic altercation with his wife the previous night. Coutu's mother asked Grievant to meet with Coutu because he trusted Grievant.

5. Grievant picked Coutu up in St. Johnsbury at approximately 8:00 a.m. that morning. Grievant did not know then that an arrest warrant had been issued for Coutu. Grievant and Coutu went to a motel in New Hampshire. While with Coutu, Grievant purchased a newspaper. At or shortly after midnight, Grievant read an article in the newspaper about the allegations against Coutu. The article indicated that police were searching for Coutu, and had been unsuccessful in locating him. It also reported that police expected to charge Coutu with aggravated domestic assault, unlawful restraint and two counts of burglary (Grievant's Exhibit 27).

6. Early in the morning on June 28, between 4 a.m. and 5 a.m., Grievant went to the St. Johnsbury barracks. She asked a dispatcher if there was an arrest warrant for Coutu. The dispatcher informed Grievant there was an arrest warrant. Grievant told the dispatcher that she knew where Coutu was and would get him. She returned to the barracks at approximately 10:00 a.m. with Coutu. Captain Dimmick was in the barracks that morning. He thanked Grievant for bringing in Coutu and also indicated a concern for Grievant's safety in bringing in Coutu. Dimmick was not aware then that Grievant and Coutu previously had a romantic relationship.

7. A few days after bringing Coutu into the barracks, Grievant typed witness statements on the Coutu case. Shortly after the June 26 incident, Allysa Coutu recanted her allegations that Coutu had attempted to sexually assault her.

8. Prior to July 26, 2000, the State Police became concerned about the actions of Grievant leading up to the surrender of Coutu, and decided to initiate a criminal investigation of Grievant. Detective Sergeant Dane Shortsleeve, a Bureau of Criminal Investigation investigator from the Williston barracks, was assigned to conduct the investigation. Shortsleeve interviewed Grievant at the St. Johnsbury barracks on July 26, 2000. Captain Dimmick was aware that Shortsleeve was conducting the interview. Only Shortsleeve and Grievant were present during the interview. Shortsleeve did not notify Grievant that she had a right to have a VSEA representative or attorney at the interview (State's Exhibit 3).

9. At the beginning of the interview, Shortsleeve indicated that Sarah Coutu had made a complaint about a threatening telephone call she thought had been made by Grievant. Shortsleeve understood that Sarah Coutu made the complaint to the Defender General's office after receiving information from her daughter-in-law about the phone call subsequent to the daughter-in-law receiving information on the call from a teenager. The complaint was then reported to the State Police. Shortsleeve then asked Grievant questions about her actions involving David Coutu prior to bringing him into the barracks, and her typing of matters relating to the investigation of the Coutu case. The July 26, 2000, interview was tape-recorded and Shortsleeve made a transcript of the interview (State's Exhibit 3).

10. Prior to August 21, 2000, Grievant wrote Shortsleeve, requesting a copy of the transcript of the July 26, 2000, interview. On August 21, 2000, Shortsleeve sent an e-mail message in response to Grievant's request, informing her: "The transcription of our taped interview is attached to the case. You should go through the regular channels at VCIC to receive a copy of the investigation" (Grievant's Exhibit 1).

11. On August 25, 2000, Grievant sent an e-mail message in response to Shortsleeve, stating: "I have no idea what case to look under. It is not under my name, nor is it under Sara Coutu's, who is supposedly the complainant . . . Perhaps it is locked and not viewable to me, due to the BCIC aspect". Grievant further stated: "I have every intention of placing a formal grievance with the Union in reference to how I have been and still am being treated in reference to this matter". Grievant sent a copy of this e-mail message to Captain Dimmick and Lieutenant Hacking. Dimmick and Hacking considered that it was the decision of Shortsleeve, as the investigating detective, whether to release a copy of the transcript of the interview (Grievant's Exhibit 2).

12. Shortsleeve sent an e-mail message in response to Grievant's second inquiry on August 25, 2000, stating:

There is no case number regarding the telephone call that you are concerned about. This was simply a matter of asking you if you made the call, as reported by the Coutus and then ending the matter when you said that you did not.

There is a case number regarding the interview that we had concerning David Coutu's status as a fugitive. That is 00H200333 and the case will be available in the future (Grievant's Exhibit 3).

13. Grievant understood the reference to the "case will be available in the future" to mean it would be available at the Vermont Criminal Information Center once the case was closed. After receiving this response from Shortsleeve, Grievant orally

contacted the office of Public Safety Commissioner James Walton to attempt to obtain a copy of the transcript of the interview. She was referred to a Lieutenant Harrington. She also spoke to the Governor's office. She did not succeed in obtaining a copy of the transcript of the interview.

14. On October 11, 2000, Grievant mailed a letter to Commissioner Walton.

The letter provided in pertinent part:

Whilst I was on duty at State Police in St. Johnsbury, as a dispatcher, I was relieved of my duties by a trooper and told by Lt. Hacking that Sgt. Shortsleeve . . . was down back and wanted to speak with me for a minute.

Sgt. Shortsleeve introduced himself, never advising me what the interview was about, and of course asked if he could tape me, while at the same time turning on the tape record. I asked if I had a choice and he said he was ONLY taping me so he didn't have to write things down on paper? In other words, no I did not. So he began taping me.

If you would listen to the tape you would hear that I was very confused as to what he was insinuating, and did not have a clue what he was seeking for information other than he led me to believe throughout the questioning that my employment with State Police was in jeopardy because of a complaint regarding threatening and harassing phone calls, that had been placed against me . . .

NOW, here's the problem: After the interview, I was, if you can even begin to understand, completely devastated. I had just been told that someone I considered my mother, had not only betrayed me, but had lied to do it, in an attempt to take from me something of **known importance**, that being my position as a dispatcher with the Vermont State Police.

. . .

At that time I chose to write a letter to Sara Coutu and basically tell her off for not only placing a complaint against me but a false one. I sent a copy to Sgt. Shortsleeve, along with a letter directed to him, requesting a copy of the "formal complaint", which allowed him to interview me in the first place, along with the phone records of Alyssa Coutu which would OBVIOUSLY prove that I have NEVER called her residence. And I also requested a copy of my taped statement .

..

As you will see by the attached electronic mail message from Sgt. Shortsleeve, he advised that I could VIEW my statement in the case. And for a copy of the "formal complaint", I would have to go through the appropriate channels at VCIC to obtain it . . .

As you will see by my response I was not happy with that answer or his condescending email, at which time I sent the enclosed email back to Sgt. Shortsleeve, with a copy forwarded to Lt. Hacking and Capt. Dimmick. . .

The response again, is enclosed, which states the EXACT OPPOSITE of what his prior email had stated. He was now saying: There was no case as there was no formal complaint it was simply a matter of asking me had I made the phone call or not, at which time the matter was ended!! . . .

What I want to know is WHY did that not happen just exactly like he said it was suppose to??

In the very next sentence he tells me that my interview was in a HQ case under David Coutu.

That email alone PROVES that the statement was obtained in reference to a criminal case, by leading me to believe that a complaint had been placed against me that would jeopardize my employment with State Police . . .

I was never offered Union or Legal representation prior to being interviewed, nor was I asked if I was there on my own free will, as I WAS NOT. I was there because I was on duty and the Lt. made me go there with Sgt. Shortsleeve. And as I previously stated, I only answered the questions of Sgt. Shortsleeve because he led me to believe that there had been a “formal complaint” of threatening, harassing phone calls, placed against me by Sarah Coutu, which would lead to my termination.

Did I think I was going to be disciplined? NO, I thought I was going to be fired. . .

. . . I would like to think that VSP and yourself would like to right the wrong that has occurred, therefore I request the following from the Vermont State Police at this time, as a solution and end to this matter.

1. The tape that contains my statement, along with ALL copies, and all other supplemental reports, including electronic email messages and letters of Sgt. Shortsleeve in reference to my statement.
2. Reprimand for whomever was directly responsible for assigning Sgt. Shortsleeve to this “case” and allowing him to obtain the statement, KNOWING they were deliberately obtaining it in a deceitful, coercive way, using my employment to do it.
3. Written apology to Sara Coutu, on my behalf, for VSP leading me to believe that she had placed a formal complaint against me, when in fact SHE HAD NOT!

. . .

I am seeking the above as a remedy, to what should and would be considered an “Unfair Labor Practice” by the Vermont State Police.

...
(Grievant’s Exhibit 5)

15. Grievant sent a letter dated October 1, 2000, to Bob Moran, a Correctional Services Specialist/Probation Officer at the Saint Johnsbury Community Correctional Service Center. In the letter, Grievant referenced a July 2000 encounter she had with Moran in which she was attempting to have David Coutu released from jail. She stated, among other things, that Moran had “out right lied”, that his “experience doesn’t mean shit”, that he was not a “very good judge of character”, and that he was “the biggest power tripping loser I have ever encountered within the Correctional department” (State’s Exhibit 8).

16. Gregory MacDonald, Superintendent of the St. Johnsbury Community Correctional Service Center, sent a letter dated October 25, 2000, to Lieutenant Hacking in which he stated that he was “very concerned about the threatening tone, the unprofessional language, and inappropriateness of the letter” dated October 1, 2000, from Grievant to Moran. MacDonald stated that he was “very concerned about the safety of my officers in the field when they are requesting back up assistance from your barracks through dispatcher Sileski” (State’s Additional Exhibit).

17. On the evening of December 17, 2000, there was significant flooding in Lyndonville. Sergeant Cornell was working the evening shift. While he was dealing with the flooding in Lyndonville, an on-duty dispatcher notified him that the day dispatcher for the following day would be out sick; the on-duty dispatcher indicated that she would work the last four hours of the vacant shift. Grievant was expected to report to work at 11:30 a.m. and would be working up to the time when the vacant shift would start.

18. After Grievant reported to work, Grievant indicated that she did not want to work the first four hours of the vacant shift. Cornell required Grievant to call other dispatchers to attempt to obtain coverage. Grievant was upset that she was expected to call the other dispatchers. When Grievant called the other dispatchers, she was unable to get anyone to work during the shift and so informed Cornell. When Cornell returned to the barracks, Grievant told him she did not want to work the shift. They had a discussion about whether the Contract allowed Cornell to require Grievant to work overtime. Cornell told Grievant that she would have to work the overtime. Grievant indicated that she would not work the overtime. Cornell then made a call to another dispatcher, and was able to obtain coverage for the shift. Cornell told Grievant that he was going to make a written report to Lieutenant Hacking concerning her actions on the shift coverage issue. He wrote an e-mail message to Hacking on December 18 on the issue. The e-mail message was not entered into evidence. Hacking requested that Cornell submit a memorandum with more information. On December 20, 2000, Cornell provided a memorandum to Hacking with the requested, additional information (Grievant's Exhibits 6, 8).

19. On December 18, 2000, Grievant wrote a letter to Hacking which she indicated was a "formal grievance" against Cornell concerning the shift coverage issue. Grievant complained about Cornell requiring her to obtain coverage for the shift, making her "feel guilty" for not working the shift, and sending an e-mail message to Hacking on the issue. Grievant asked to have a meeting with Hacking that Wednesday, December 20, on the issue (Grievant's Exhibit 6).

20. On December 19, Captain Dimmick sent Hacking an e-mail message concerning how to handle the shift coverage issue and Grievant's grievance concerning Cornell when Hacking and Grievant met. In the e-mail message, Dimmick also advised Hacking to inform Grievant that the State's Attorney had decided to not bring criminal charges with respect to the Cuoto matter, that the Employer was reviewing her actions in the matter, and that Hacking should prepare a document to give Grievant expressing concerns with her actions (Grievant's Exhibit 7).

21. On December 20, 2000, Lieutenant Hacking wrote a memorandum to Grievant entitled "Job Performance" which provided:

Valinda, during the month of July 1999, you became acquainted with an individual by the name of David Coutu. This relationship started out as a result of Mr. Coutu being ordered by the court to sign in at the St. Johnsbury office as one of his conditions of release. Mr. Coutu asked you out on a date and you accepted. Over the next few months you continued to see Mr. Coutu and also developed a relationship with some of his family members. Your relationship with Mr. Coutu "cooled" but due to the fact that Mr. Coutu owed you \$500.00 you still remained in contact with him as you attempted to recover your loss.

In June of this year Mr. Coutu became involved in an alleged criminal matter which was investigated by troopers from his barracks. Your involvement and actions during this matter are questionable and some areas of your job performance need to be addressed. First of all, this entire matter has been reviewed by the State's Attorneys office. I have recently been advised that the State's Attorney will not be bringing criminal charges against you for your role in this matter, specifically, transporting Mr. Coutu across state lines while members of this department were looking to arrest him on an active arrest warrant. The charge in this case could have been Harboring a Fugitive (Accessory After The Fact). The department is now reviewing your conduct during this event and will make a decision on what action if any needs to be taken against you for your role in this matter.

Some of the issues that came out during the Coutu investigation are as follow:

1. You cannot look, search, or edit any CAD documents for your own use. Looking for information in a case where you are perceived to have a conflict of interest cannot and must not occur. This is a violation of the VIBRIS user agreement and NCIC standards.

2. When or if you find yourself involved in a case which could be construed as a conflict, you have an obligation to advise your shift supervisor so that you can be excused from any typing associated with that particular case.

3. When sending notes, letters or memos which involve cases from this department and are being sent with any representation as to your employment with the Department of Public Safety, you must send these through the Chain of Command, starting with your Station Commander. This will include writings to other agencies as well as other department members.

4. In my opinion, your actions have a direct relationship with trust and your ability to be an effective and trusted dispatcher with your fellow dispatchers and sworn members of this department.

5. You must be aware that your relationship with other agencies that depend on our dispatch staff in life and death situations is critical to a good operation. The loss of confidence expressed by another state agency (Probation and Parole) based on your actions, writings, personal views and interactions with that department is not acceptable.

(Grievant Exhibit 9)

22. On January 11, 2001, Grievant wrote a letter to Hacking concerning the December 20, 2000, memorandum. Grievant stated that Hacking was “absolutely despicable” to have “made up such a fraudulent letter”. Grievant alleged that the December 20 memorandum was in retaliation for the grievance she placed against Cornell (Grievant’s Exhibit 10).

23. On January 19, 2001, Grievant mailed Commissioner Walton a letter dated December 27, 2000. Therein, Grievant requested that Commissioner Walton respond to the grievance she had submitted to him in October 2000. She also indicated she was filing grievances with him concerning Sergeant Cornell’s actions with respect to the shift coverage issue and the December 20, 2000, memorandum she received from Lieutenant Hacking (Grievant’s Exhibits 11, 12).

24. On February 5, 2001, Russell Robinson, an investigator working with State's Attorney Dale Gray, sent a memorandum to Lieutenant Hacking which stated:

On 2-5-01, State's Attorney Dale Gray reviewed the report of Sgt. Dane Shortsleeve, regarding an investigation involving dispatcher Valinda Sileski.

Upon reviewing the case Dale advised that there is technically a violation that has been committed by Sileski (that being Harboring of a Fugitive). Dale feels that, with dispatcher Sileski's knowledge of criminal offenses, she should have understood that the crimes committed by Coutu were, in fact, serious criminal felony offenses. However, Dale feels that there is not enough evidence to warrant criminal charges against Sileski.

(State's Exhibit 15)

25. On February 9, 2001, Phyllis Martin, Personnel Administrator for the Employer, requested that Grievant amend the grievances she filed with Commissioner Walton to conform to the provisions of the grievance procedure article of the Contract (Grievant's Exhibits 13, 16).

26. On February 16, 2001, Captain Dimmick sent Grievant an e-mail message which stated:

I would like to meet with you, during shift on Wednesday 21st at 10:00 a.m. The meeting will take place at the St. Johnsbury barracks.

The purpose of the meeting will be for me to talk with you, listen to you and understand all the facts and circumstances around the David Coutu arrest and your interaction during that case. I will listen, ask questions based on my concerns, and hopefully close this matter out soon with my recommendation to the Commissioner on whether or not any discipline action should occur.

I have read the report filed by Sergeant Shortsleeve and I have some questions about certain things which occurred. This time will give you the opportunity to also relate your side of this story, and let me know of any other issues relating to this matter.

Thank you and will see you on the 21st.

(Grievant's Exhibit 13)

27. On February 18, 2001, Grievant sent an e-mail message to Phyllis Martin. Grievant forwarded to Martin the e-mail message she received from Captain Dimmick and stated in pertinent part:

...

I am in the process of completeing(sic) the grievances in the format you so requested on February 9th 2001. I have absolutely NO INTENTION of meeting with Capt. Dimmick without an Attorney present prior to the completion of the grievance procedure.

I can not believe I am in the MIDDLE of a grievance based on the fact that State Police are continuously threatening me with my job and with disciplinary action, for no reason other than retaliation for placing a grievance and the CAPTAIN sends me the following email, confirming EXACTLY WHAT I AM GRIEVING !
!!!

...

(Grievant's Exhibit 14)

28. On February 20, 2001, Captain Dimmick sent Grievant an e-mail message which provided:

I am recalling my previous message which set up a meeting for tomorrow the 21st, set to discuss and better understand what occurred with the David Coutu case and your involvement as it relates to your position.

By contract, I should have notified you of your right to have V.S.E.A. representation for this meeting. Because this is your right according to contract, and it was not said, I am now recalling the previous message.

I will re-schedule this meeting A.S.A.P. and give you ample time to have a VSEA representative schedule to be with you, if you choose that option. I also will ask for a confirmation from you that indicates you were in receipt of the message and that the planned date works.

(Grievant's Exhibit 15)

29. On February 21, 2001, in response to Phyllis Martin's request that she amend the grievances she filed with Commissioner Walton to conform to the provisions of the grievance procedure article of the Contract, Grievant resubmitted the three Step II grievances she had filed with Commissioner Walton. She also submitted a fourth Step II

grievance against Captain Dimmick. In the first grievance, Grievant alleged that the Employer lied to her by informing her there was a complaint made against her by Sarah Coutu, obtained a statement from her without providing her with the right to union representation or other representation, and refused to provide her with a copy of her taped statement. In the second grievance, Grievant alleged that Sergeant Cornell retaliated against her for filing the first grievance through his actions concerning the shift coverage issue. In the third grievance, Grievant alleged that the December 20, 2000, memorandum given to her by Lieutenant Hacking constituted retaliation against her for filing the second grievance. In the fourth grievance, Grievant alleged that Captain Dimmick harassed and intimidated her by demanding that he meet with her on a matter that could lead to discipline without notifying her of the right to representation. Grievant contended in the grievances that the Employer violated Articles 5, 11, 14(7), 15, 17, 65 and 66 of the Contract. The four grievances were denied at Steps II and III of the grievance procedure. Grievant filed these grievances with the Board on May 31, 2001 (Grievant's Exhibits 16 – 20).

30. Captain Dimmick sent a letter to Grievant dated December 13, 2001, which provided:

Our mission depends upon our ability to have a trusting relationship with our public, including those who are involved with the criminal and juvenile justice system as witnesses and victims of crime or juvenile matters. Building a trusting relationship with those involved with the criminal and juvenile justice system depends upon our ability to communicate about sensitive and painful matters, maintain confidentiality and provide support and comfort. Any communication you have with those who are involved with the criminal and juvenile justice system as suspects, defendants, witnesses and victims of crime or juvenile matter, that is in conflict with our mission and your duties, cannot be tolerated.

Our mission also depends upon our ability to have a trusting relationship among every civilian and sworn member of the Department of Public Safety, as well as

employees of other agencies involved in the juvenile and criminal justice system. Any communication you have with employees of agencies involved with the criminal and juvenile justice system that is in conflict with our mission will not be tolerated.

Based upon my review of this matter, including your discussion with me, I have concluded the following:

1. Your correspondence and interaction with your Vermont State Police supervisors, other State Police employees and other State employees has, at times, been viewed as disrespectful, threatening and unprofessional.
2. The State's Attorney in Caledonia County, Dale Gray, reviewed the criminal investigation of D.C. by Sgt. Dane Shortsleeve, and determined that there is probable cause to believe that you engaged in felony criminal conduct (Harboring a Fugitive), although he has declined to charge that crime.
3. You also had a conflict of interest with our mission and your duties and failed to recognize the conflict and act appropriately.
4. You did not then and do not now appreciate that your actions were inappropriate.

Your demonstrated inability to exercise good judgment, treat others professionally and respectfully, and recognize when a conflict of interests exists warrants the imposition of these work rules:

- 1) While in the employee(sic) of the Vermont State Police, you will abide by the criminal laws of the State of Vermont and the United States.
- 2) Associating with individuals who are engaged in ongoing criminal activity or delinquent acts (juveniles), or who are the subject of ongoing criminal or civil prosecution or a juvenile proceeding may create a direct conflict with our mission and your duties. Therefore, you are required to disclose such information to your supervisor immediately. You are also required to answer any questions your supervisor has that are related to the matter of your disclosure and are permissible by law; to ensure that your supervisor can first determine if there is a conflict of interest and if so, implement measures that neutralize or eliminate the conflict.
- 3) Personal relationships with persons who have been involved with known criminal behavior or juvenile delinquency in the past may create a direct conflict with our mission and your duties, and therefore, you are required to disclose such relationships to your supervisor immediately. You are also required to answer any questions your supervisor has that are related to the matter of your disclosure and are permissible by law; to ensure that your supervisor can first determine if there

is a conflict of interest and if so, implement measures that neutralize or eliminate the conflict.

4) Contact that is unrelated to your assigned duties and is with a person who is the victim of a crime, civil matter or juvenile matter presently being investigated or prosecuted by any state agency, including the Vermont State Police, or any other Law Enforcement agency may create a direct conflict with our mission and your duties, and therefore, you are required to disclose such information to your supervisor immediately. You are also required to answer any questions your supervisor has that are related to the matter of your disclosure and are permissible by law; to ensure that your supervisor can first determine if there is a conflict of interest and if so, implement measures that neutralize or eliminate the conflict.

5) Any contact you have with the public, employees of this department or others involved with the criminal and juvenile justice system shall be professional, respectful and courteous; and anything short of this standard cannot be tolerated.

6) You will not use your position as a dispatcher to gain information for personal reasons or for personal use. You will not release information concerning matters of the Vermont State Police unless release is permitted by policy, law or by a supervisor.

7) Any other recognized conflict of interest between our mission, your duties and your personal life must be disclosed immediately to your supervisors. You are also required to answer any questions your supervisor has that are related to the matter of your disclosure and are permissible by law; to ensure that your supervisor can first determine if there is a conflict of interest and if so, implement measures that neutralize or eliminate the conflict.

I have been authorized by Commissioner Walton to issue this letter, impose these work rules and to advise you that your failure to abide by these rules may result in discipline, including dismissal.

In closing, your supervisors want you to succeed. You should retain a copy of this letter to avoid any confusion of what is expected of you by the Vermont State Police. Your supervisors are willing to answer any questions you have concerning this letter, the work rules and the possible ramifications.

(Grievant's Exhibit 23)

31. The December 13, 2001, letter was not posted in the workplace and a copy of it was not sent to VSEA.

32. Grievant filed a grievance concerning the December 13, 2001, letter through the earlier steps of the grievance procedure. The grievance was denied at each

step. On March 18, 2002, she filed a grievance with the Board (State's Exhibit 23, Grievant's Exhibit 24).

33. On December 13, 2001, the Employer announced a dispatcher supervisor job opening in Derby, Vermont. The job announcement stated that "(p)reference will be given to candidates with an Associates degree and previous supervisory experience". The announcement also stated: "If interested, contact Linda J. Willey at Extension 2210 or email to lwilley by December 27, 2001" (Grievant's Exhibit 26).

34. On December 24, Grievant sent an e-mail message to Willey and asked her how to apply for the position. On December 26, Willey responded by e-mail, and informed Grievant that she needed to complete a State of Vermont application. She stated: "The closing date is tomorrow, however I will use this email as the beginning of your application process. Send me the application . . . as soon as possible. Grievant did not work on December 26 and did not return to work until December 28. She first saw Willey's e-mail message on December 28. She submitted her application. It was initially rejected as untimely. Grievant filed a grievance on the timeliness issue. She prevailed in the grievance and her application was considered timely. The interview process had been completed, but was reopened due to Grievant's application being considered timely (State's Exhibit 22).

35. In her application for the position, Grievant indicated that she was working on three separate associate degrees from Community College of Vermont from 1991 to 1996. She listed 34 course credits pertinent to the job for which she was applying. Also, on the application, she indicated that she had approximately 10 years of

supervisory experience supervising switchboard operators and benefit analysts (State's Exhibit 20).

36. Lieutenant Real Robillard was responsible for hiring the Derby dispatch supervisor. He was the sole person interviewing candidates for the position. When Robillard became aware there was a question concerning the timeliness of Grievant's application, he recommended that Grievant's application be considered timely. When he interviewed Grievant, he questioned her about the timeliness of her application because he wanted to know why she waited to the last minute to apply for the position. In interviewing another candidate for the position who had not applied until after the application process was reopened, he asked her why she did not apply during the first round.

37. Prior to interviewing candidates for the position, Robillard prepared a list of questions which he asked all candidates. One of the questions concerned requiring dispatchers to stay over to work into the next shift. In response to this question, Grievant questioned whether dispatchers could be required to stay over. Another of the questions involved whether a dispatcher could be required to type a special team project. In response to this question, Grievant indicated she did not know where it said that dispatchers had to type such reports. Robillard thought that Grievant's responses to those two questions showed a poor attitude, and they formed a basis for him to determine that he would not hire Grievant (State's Exhibit 19).

38. Robillard was unaware of the Coutu matter and did not know there had been a criminal investigation of Grievant. He also was unaware of the grievances Grievant had filed other than her grievance about the timeliness of her application.

39. Robillard selected Jane Berry for the dispatch supervisor position. Berry had more than 16 years experience with the State Police as a dispatcher. Berry did not have prior supervisory experience and did not have credits towards an associate's degree. Robillard hired Berry because he determined that she was intelligent, she had indicated she was willing to make extra effort to get the job done, and she had excellent performance evaluations. Berry had more experience as a dispatcher than did Grievant.

40. Grievant filed a grievance concerning not being selected for the dispatch supervisor position through the earlier steps of the grievance procedure. The grievance was denied at each step. On April 30, 2002, she filed a grievance with the Board.

OPINION

Docket No. 01-29

In Docket No. 01-29, Grievant filed four grievances with the Labor Relations Board. We will discuss each grievance in turn.

In the first grievance, Grievant alleges that the Employer lied to her by informing her there was a complaint made against her by Sarah Coutu, obtained a statement from her without providing her with the right to union representation or other representation, and refused to provide her with a copy of her taped statement. Grievant contends that the Employer violated Articles 5(1), 11, 14(7), 15, 65 and 66 of the Contract.

The evidence does not support Grievant's claim that the Employer lied to her by informing her there was a complaint made against her by Sarah Coutu. When interviewing Grievant on July 26, Sergeant Dane Shortsleeve indicated that Sarah Coutu had made a complaint about a threatening telephone call she thought had been made by Grievant. Shortsleeve understood that Sarah Coutu made the complaint to the Defender

General's office after receiving information from her daughter-in-law about the phone call subsequent to the daughter-in-law receiving information on the call from a teenager. The complaint then had been reported to the State Police. This evidence does not support a conclusion that Sergeant Shortsleeve lied to Grievant since he understood that Sara Coutu had made a complaint to the Defender General's office about the telephone call.

There is a threshold issue of timeliness with respect to the other allegations made by Grievant concerning the Employer obtaining a statement from her without providing her with the right to union representation or other representation, and refusing to provide her with a copy of her taped statement. The Employer contends that these allegations were untimely raised through the grievance procedure. The Board will resolve an issue on the merits unless the collective bargaining agreement requires it to be dismissed on procedural grounds. Grievance of Kimble, 7 VLRB 96, 108 (1984). Grievance of Amidon, 6 VLRB 83, 85 (1983). Under contracts providing that grievances must be filed within specified times at earlier steps of the grievance procedure, the Board previously has dismissed grievances for failing to follow the contractual filing timeframes at an earlier step of the grievance procedure. Grievance of Adams, 23 VLRB 92, 94 (2000). Grievance of Boyde, 18 VLRB 518 (1995). Grievance of Dyer, 4 VLRB 306 (1981).

We conclude that Grievant's allegation concerning the Employer obtaining a statement from her without providing her with the right to union representation or other representation was untimely grieved. Grievant alleges that she was entitled to such representation pursuant to Article 14, Section 7, which provides that management must notify an employee of the right to request the presence of a VSEA representative

“(w)henever an employee is required . . . to give oral or written statements on an issue involving the employee, which may lead to discipline against an employee.”

There is no evidence of a Step I complaint on the issue of the right to union or other representation. The evidence does not indicate any Step I process in which a complaint was discussed informally by Grievant and an immediate supervisor to attempt to resolve the matter as contemplated by Article 15, Section 3(a)(4) of the Contract. In situations where employees bypass the Step I procedure, Article 15(3)(a)(2) of the Contract provides that “an employee must file a written grievance . . . to the head of the employee’s department, within fifteen 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”. Otherwise, the matter shall be considered closed. Article 15(3)(b) of the Contract.

Grievant believed as of the date of the July 26 interview that statements she made during the interview concerning the alleged threatening telephone call may lead to discipline against her. A review of her October 11 letter to Commissioner Walton makes it clear that she believed during the interview that she was in danger of being disciplined. Accordingly, she was required to file a Step II grievance within 15 workdays of the July 26 interview. She did not submit a grievance until October 11, well beyond 15 workdays. Thus, the matter is considered closed pursuant to the Contract.

We note that, even assuming *arguendo* that Grievant could be considered to have filed a Step I complaint on this issue, her Step II grievance could not be considered timely. This is because she would have had to file her Step I complaint pursuant to Article 15(3)(a)(1) of the Contract within 15 workdays of the July 26 interview, which

would have been by August 17. The latest she would have been able to file a Step II grievance pursuant to Article 15(3)(a)(4) of the Contract would have been 30 workdays from her Step I complaint, which would have been September 29. This was well before her October 11 submission to Commissioner Walton.

We also conclude that Grievant's allegation concerning the Employer refusing to provide her with a copy of her taped statement from the July 26 interview was untimely grieved. The evidence does not indicate that Grievant filed a Step I complaint on this issue. Step I complaints are filed with an employee's immediate supervisor. The evidence indicated that Grievant's initial attempts to obtain a copy of her taped statement from the July 26 interview were directed to Sergeant Shortsleeve, the investigator in the criminal investigation. When that proved unsuccessful, Grievant directed her efforts at obtaining a copy of the taped statement to Commissioner Walton and the Governor's office. There was no Step I process in which a complaint was discussed informally by Grievant and an immediate supervisor to attempt to resolve the matter as contemplated by Article 15, Section 3(a)(4) of the Contract.

As discussed above, in situations where a Step I complaint is not filed, an employee must file a written grievance to the head of the employee's department, within 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". Grievant knew based on August 25, 2000, exchange of e-mail messages with Sergeant Shortsleeve that she was not going to receive a copy of the taped statement. She was required to file a Step II grievance within 15 workdays of that date. She did not submit a grievance until October 11, well beyond 15 workdays.

In the second grievance, Grievant alleges that Sergeant Fred Cornell retaliated against her for filing the first grievance through his actions concerning a shift coverage issue. Grievant contends that the Employer violated Articles 5(1), 14(7), 15, 17, 65 and 66 of the Contract.

In cases where employees claim management took action against them for engaging in protected activities, the Board employs 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. Grievance of Sypher, 5 VLRB 102 (1982). Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977). The Board has used this analysis in protected activity grievance cases involving filing of complaints and grievances. Grievance of Brewster, 23 VLRB 314 (2000). Grievance of Cronin, 6 VLRB 37 (1983). Grievances of McCort, 16 VLRB 70 (1993).

Grievant was engaged in the protected activity of filing grievances. She now must show the conduct was a motivating factor in the decision to take action against her. In Sypher, 5 VLRB at 131, the Board noted the factors it would examine to determine whether protected activity was a motivating factor in an employer's decision to take adverse action against an employee: whether the employer knew of the employee's protected activities; whether the timing of the adverse action was suspect; whether there was a climate of coercion; whether the employer gave protected activities as a reason for the decision; whether an employer interrogated the employee about protected activities;

whether the employer discriminated between employees engaged in protected activities and employees not so engaged; and whether the employer warned the employee not to engage in protected activities.

In applying these factors to the evidence before us, we conclude that Grievant has not sustained her burden of demonstrating that her grievance activity was a motivating factor in Cornell's action with respect to the shift coverage issue. Other than Cornell's knowledge of Grievant's grievance activity, there are no other relevant factors present. Mere knowledge, standing alone, does not suffice to demonstrate that grievance activity was a motivating factor in Cornell's actions.

Instead, we conclude that Sergeant Cornell acted reasonably without discriminating against Grievant due to her grievance activity. On the evening in question, Sergeant Cornell was occupied attending to serious flooding. A situation arose where a shift for the following day had to be covered because an employee called in sick. Cornell had Grievant make calls to attempt to obtain coverage and attempted to get Grievant to stay and provide coverage.

Grievant complains that Sergeant Cornell failed to perform his duties when he asked her to make the calls and attempted to get her to provide coverage herself. We disagree. Given that he was otherwise occupied dealing with a serious public safety issue, his request to Grievant to attempt to obtain coverage was reasonable. He also acted reasonably concerning attempting to have Grievant provide the coverage herself. When Grievant resisted providing the coverage, Sergeant Cornell ultimately made a telephone call to obtain coverage once he had the opportunity to do so.

Grievant also contends Cornell “wrote her up” regarding the incident for no reason. The evidence on this issue is insufficient for us to conclude Sergeant Cornell was motivated by animus against Grievant due to her grievance activity. The initial e-mail message produced by Cornell on this issue which prompted Grievant’s grievance was not entered into evidence. The subsequent memorandum sent by Cornell to Lieutenant Hacking did not result in any action being taken against Grievant. It was not mentioned in a performance feedback memorandum issued around that time by Lieutenant Hacking, and there is no evidence that it was used in any way against Grievant.

Given these circumstances, we are not inclined to conclude that Cornell’s reporting of the incident was motivated by animus against Grievant due to her grievance activity. Cornell reasonably concluded the incident was worthy of sharing with his supervisor, and there is insufficient evidence of any discriminatory motive on his part. We also conclude that Grievant has not established violations of any other articles of the Contract alleged in her grievance.

In the third grievance, Grievant alleges that a December 20, 2000, memorandum on performance given to her by Lieutenant George Hacking was inaccurate and constituted retaliation against her for filing the second grievance. Grievant contends that the Employer violated Articles 5(1), 11, 14(7), 15, 65 and 66 of the Contract. The Employer contends that the December 20 performance memorandum is not subject to a grievance pursuant to Article 12, Section 1, of the Contract, which provides:

An oral or written notice of performance deficiency (Step 1 in the order of progressive corrective action) shall not be grievable when issued, and, when issued, shall not require the presence of a union representative. However, once Step 2 of progressive corrective action has been implemented (a special or annual evaluation coupled with a prescriptive period for remediation) such notice or a

written record of such notice shall be placed in the employee's personnel file and shall be fully grievable.

Article 14, Section 1(e) further provides that records of oral or written feedback are not to be placed in an employee's personnel file except in compliance with Article 12 of the Contract. These contract provisions explicitly provide that oral and written notices of performance deficiencies or feedback are not grievable, and shall not be placed in an employee's personnel file, until such time as corrective action progresses to a performance evaluation with a prescriptive period of remediation. Grievance of Penka, 19 VLRB 26, 35 (1996). Allowing the filing of grievances at the time an oral or written notice of performance deficiency is issued may impede to some extent the free flow of communication of a supervisor's expectations intended to improve an employee's performance. Id. at 37. The reason for prohibiting filing grievances over oral or written notice of performance deficiencies is a practical one. Id. at 38. If the oral or written notice serves its intended purpose – to improve performance – and the employee does not receive adverse comments or ratings on the performance evaluation, then the employee ultimately has suffered no harm. Id. If performance does not improve, and the employee receives an adverse performance evaluation, the employee has not lost his or her right to grieve the notice and substance of performance deficiencies. Id.

In applying these contract provisions here, we conclude that the February 20 memorandum from Lieutenant Hacking is not subject to a grievance. It is entitled "job performance" and provides her written feedback on areas of concern with respect to her performance. As such, it is not grievable. It would not ripen into a grievable matter until Grievant received an adverse performance evaluation.

In the fourth grievance, Grievant alleges that Captain James Dimmick harassed and intimidated her by demanding that he meet with her on a matter that could lead to discipline without notifying her of the right to representation. Grievant contends that the Employer violated Articles 5(1), 14(7), 15, 65 and 66 of the Contract. The Employer contends that this grievance should be dismissed because no actual controversy exists.

The jurisdiction of the Board in grievance proceedings is limited by the requirement that there be an “actual controversy” between the parties. In re Friel, 141 Vt. 505,506 (1982). To satisfy the actual controversy requirement, there must be an injury in fact to a protected legal interest or the threat of an injury in fact. Id. Grievance of Boocock, 150 Vt. 422, 425 (1988).

In applying these standards to the facts of this case, we conclude no actual controversy exists. On February 16, 2001, Captain Dimmick sent Grievant an e-mail informing her that he would like to meet with her concerning the David Coutu case and indicated that he would make a recommendation as to whether any disciplinary action should be taken against her. Dimmick did not inform her of the right to union representation. Once Dimmick realized he should have provided the right to union representation, he recalled his previous message on February 20, 2001, and informed Grievant of the right to union representation at the meeting. No harm to Grievant resulted from Dimmick’s initial failure as she was not required to attend a meeting without union representation. Given that there was no injury in fact to Grievant’s protected legal interests, we conclude there remains no actual controversy for us to decide.

Docket No. 02-12

In Docket No. 02-12, Grievant filed a fifth grievance which alleges that the Employer violated Article 5, Section 1; Article 14, Section 7; Article 15, Section 2, and Article 17, Sections 1 and 3 of the Contract by issuing Grievant a December 13, 2001, letter imposing work rules/discipline on Grievant (Docket No. 02-12).

In a December 13, 2001, letter Captain Dimmick sent Grievant, he indicated he was imposing “work rules” on her and proceeded to list several requirements concerning Grievant’s conduct. Grievant contends that this letter did not constitute an appropriate imposition of work rules pursuant to Article 17 of the Contract.

We agree. Article 17 provides for work rules to be posted in the workplace and for VSEA to be sent a copy of work rules. The Employer did not post the December 13 letter in the workplace and did not send VSEA a copy of the letter. Also, we do not construe Article 17 as contemplating work rules being restricted to just one employee in a multi-employee workplace as was the case here. Article 17 makes several references to work rules applying to employees, indicating that work rules have broader applicability than occurred in this case.

Nonetheless, the Employer now contends that the December 13, 2001, letter did not contain work rules, but instead constituted performance feedback which is not subject to a grievance. We disagree that the letter constituted performance feedback consistent with the provisions of the Contract. Article 12 provides for “annual” evaluations. It states: “During the rating year, the immediate supervisor shall call the employee’s attention to work deficiencies which may adversely affect, and, where appropriate, to possible areas of improvement”. These contract provisions clearly contemplate that performance

feedback on work deficiencies is properly limited to purported deficiencies of an employee during the rating year in which the employee is currently performing.

Much of the December 13, 2001, letter refers to Grievant's conduct in the David Coutu matter which occurred well over a year prior to the December 13 letter. The letter also makes an apparent reference to her behavior towards a Department of Corrections employee which also occurred well over a year prior to the December 13 letter. In sum, much of the letter addressed conduct of Grievant which fell outside the rating year in which she was currently performing, and cannot properly be considered performance feedback under Article 12 of the Contract.

Thus, neither of the bases set forth over time by the Employer to justify the December 13 letter are supported by the Contract. The letter violated Article 17 of the Contract because it did not constitute an appropriate imposition of work rules pursuant to Article 17 of the Contract, and cannot properly be considered performance feedback under Article 12 of the Contract. Accordingly, the appropriate remedy is to order that the letter be rescinded, removed from Grievant's personnel file, and have no further force and effect.

Docket No. 02-22

In Docket No. 02-22, Grievant filed a sixth grievance which alleged that the Employer violated Article 5 of the Contract by discriminating against and harassing her due to her grievance activity in not selecting her for the dispatcher supervisor position in Derby.

Lieutenant Real Robillard was responsible for hiring the dispatch supervisor, and was the sole person interviewing candidates for the position. He was unaware of the

grievances Grievant had filed other than her grievance about the timeliness of the application for the position in question. The evidence does not indicate he held this grievance against her. In fact, when he became aware there was a question concerning the timeliness of Grievant's application, he recommended that Grievant's application be considered timely. Although he did question her about the timeliness of her application, this was based on a legitimate concern of why she waited to the last minute to apply for the position. He asked a similar question of another candidate who had submitted a late application, so Grievant was not treated in a discriminatory manner in this regard.

We are persuaded that Robillard did not hire Grievant because he thought she showed a poor attitude during the interview in response to two of the questions he asked of all candidates, and because he determined the person selected, Jane Berry, was a superior candidate. Grievant contends she was the superior candidate because, unlike other candidates, she had prior supervisory experience and some credits towards an associate's degree. She relies on the job announcement stating that "(p)reference will be given to candidates with an Associates degree and previous supervisory experience". Although she did not have an associate's degree, her supervisory experience and academic work were factors in Grievant's favor.

Nonetheless, Robillard's failure to select Grievant despite her supervisory experience and academic work does not indicate discrimination against Grievant due to her grievance activity motivated his decision. Berry had significantly more experience than Grievant as a dispatcher, and impressed Robillard as intelligent. In contrast to Robillard's assessment of Grievant's attitude as poor, Berry had indicated she was willing to make extra effort to get the job done. She also had excellent performance

evaluations. Under the circumstances, it was well within the legitimate exercise of Robillard's discretion to select Berry as the superior candidate.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered:

1. The grievances of Valinda Sileski in Docket Nos. 01-29 and 02-22 are dismissed; and
2. The grievance of Valinda Sileski in Docket No. 02-12 is sustained, and the Department of Public Safety shall rescind the December 13, 2001, letter from Captain James Dimmick to Valinda Sileski, remove it from the personnel file of Valinda Sileski, and give it no further force or effect.

Dated this ____ day of December, 2002, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Edward R. Zuccaro, Acting Chairperson

Carroll P. Comstock

John J. Zampieri