VERMONT LABOR RELATIONS BOARD

KATHLEEN NELSON	)	
	)	
v.	)	
	)	
KATHLEEN LANMAN, SUPERINTENDENT, NORTHERN STATE CORRECTIONAL FACILITY, VERMONT DEPARTMENT OF CORRECTIONS	)	DOCKET NO. 04-9

MEMORANDUM AND ORDER

The issue before the Labor Relations Board is whether to issue an unfair labor practice complaint. On February 24, 2004, former Correctional Officer Kathleen Nelson filed an unfair labor practice charge against Kathleen Lanman, Superintendent of the Northern State Correctional Facility, and the Vermont Department of Corrections ("Employer"). Nelson filed an amended charge on March 10, 2004. Nelson contends that the Employer violated 3 V.S.A. §961(1), (4) and (6) by engaging in the practice of retaliatory discipline against her due to her engaging in protected grievance activities and exercising her free speech rights to make various reports and complaints. The Employer filed a response to the charge on April 8, 2004. Timothy Noonan, Board Executive Director, met with the parties on October 29, 2004, in furtherance of the Board's investigation of the charge and to explore the possibility of informally resolving the issues in dispute. The meeting did not result in resolution of the charge.

The Board has discretion whether to issue an unfair labor practice complaint and hold a hearing on an unfair labor practice charge. 3 V.S.A. §965(a). Unfair labor practice charges generally must be filed within six months of when the alleged unfair labor practice occurred. 3 V.S.A. §965. There must at a minimum be an alleged commission of an unfair labor practice within six months of when the charge was filed to support the

issuance of an unfair labor practice complaint. Miller v. University of Vermont, 23 VLRB 205, 208-209 (2000). Essex Educators Association (ESP Unit) v. Essex Town Board of School Directors, 24 VLRB 206, 207 (2001). Earlier events may be utilized to shed light on the true character of matters occurring within the six-month period where such matters in and of themselves may constitute, as a substantive matter, unfair labor practices. Id.

The unfair labor practice charge in this case was filed on February 23, 2004. This means that the Board needs to examine the period within six months of this date – August 23, 2003 to February 23, 2004 – to determine whether there are occurrences within this period in and of themselves that may constitute, as a substantive matter, unfair labor practices.

The pertinent factual background to decide this issue is as follows: On January 10, 2003, Northern State Correctional Facility Superintendent Kathleen Lanman suspended correctional officer Kathleen Nelson for 15 days for "inappropriate verbal communication" with two other officers. Lanman stated: "(O)ver the past two years your negative and inappropriate communication style with staff has been brought to your attention multiple times through several feedbacks and letters from your supervisors and myself. Although you have received both written and verbal feedback, a written reprimand, and a suspension as a result of this unacceptable behavior there continues to be no change in your behavior. . . If you again engage in inappropriate verbal communication with other staff, you will be subject to very serious discipline, up to and including dismissal."

On January 31, 2003, Vermont State Employees' Association ("VSEA") Field Representative Marty Raymond filed a Step II grievance over this suspension on behalf

of Nelson. On April 23, 2003, Peter Garon, Corrections Human Resources Administrator, denied the grievance. Raymond filed a Step III grievance on Nelson's behalf on May 13, 2003.

On August 25, 2003, Raymond sent Nelson an email attaching a draft stipulation and agreement that had been developed by Raymond and Garon. The draft stipulation and agreement provided that "(t)his agreement is a full and complete settlement of all grievances and complaints . . . including a Step III Grievance filed on behalf of Grievant dated May 13, 2003, and an incident that occurred on or about May 1, 2003." The draft agreement provided that Nelson would agree to accept referral to the employee assistance program, agree to accept a 30-day suspension that would be placed in abeyance and rescinded if Nelson engaged in no further incidents involving Department of Corrections Work Rule #6 prior to January 15, 2005, and agree to the termination of her employment if she further violated Work Rule #6. Work Rule #6 provides in pertinent part that "no employee shall, while on duty . . . engage in verbal or physical behavior towards employees, volunteers or members of the public, which is malicious, demeaning, harassing or insulting. Such behaviors include, but are not limited to: profane, indecent or vulgar language or gestures, actions or inactions which are rude . . ."

Nelson contends that she was not involved in the drafting of the stipulation and agreement, and was not aware of its existence until Raymond sent her a copy of it on August 25. She had understood from Raymond that a Step III meeting was to be scheduled on her grievance discussed above. Nelson asserts that she told Raymond on August 29, 2003, that the draft stipulation and agreement was offensive and unacceptable, and that she would draft a revised stipulation and agreement. Nelson prepared a revised stipulation and agreement containing substantially different provisions

from that drafted by Raymond and Garon, and sent it to Raymond on September 10, 2003. Nelson also requested that Raymond attempt to schedule the Step III grievance meeting.

On September 24, 2003, Raymond told Nelson that a Step III grievance meeting had been scheduled for October 1, 10 a.m., at the Department of Human Resources in Montpelier. Nelson agreed to this meeting even though she was scheduled to be on vacation on October 1.

On September 24, 2003, Superintendent Lanman sent Nelson a letter stating that she "is contemplating a serious disciplinary action up to and including your dismissal from employment". Lanman cited a history of two letters of suspension, multiple letters of feedback, and a written reprimand received by Nelson over the past two and one-half years due to "your negative and inappropriate communication style". Lanman described the "current incident" precipitating the contemplated disciplinary action as follows: "On May 2, 2003 you had an interaction with a senior staff member that was loud, demeaning, disrespectful, and in general a violation of very specific directions I have given you for interacting with staff." Lanman informed Nelson that she had the right to respond to the allegations in writing or in a meeting.

On September 29, 2003, Raymond informed Nelson that a Loudermill meeting to respond to the allegations set forth in Lanman's September 24 letter was scheduled for October 1, the same day as the Step III grievance meeting. Raymond told Nelson that he would attempt to resolve the conflict between the two meetings. On September 30, Nelson asserts that Raymond told her that the October 1 Step III grievance meeting was canceled because Nelson was on vacation that day, and that the Loudermill meeting was rescheduled to October 10.

On October 1, 2003, Nelson sent Garon a note providing in pertinent part:

I enclose the full text of the rewrite of the stipulation agreement I was asked to do by Marty Raymond. The VSEA has expressed some reservations about it and left me unsure if you had received a full copy. This copy is for the consideration of the Dept. of Personnel. If you have comments or questions about this please contact me directly . . .

On October 3, 2003, Garon sent Raymond an e-mail message stating:

Marty, today I received a note from Kathy Nelson with a copy of a 'rewrite' of the stip which she says you asked her to send to me. She also asked me to contact her directly if I have any comments. Couple of questions: 1) Did you tell her that the Department had totally rejected her reply? If not should I do so directly to her, or to her through you?

Raymond replied with the following e-mail message:

1.I told her that the department had rejected her proposal and that we would proceed through the grievance procedure. 2. I never told her to send the rewrite to you directly. The last I knew I was representing her so you need to talk to me. Please call me on Monday and we will see if we can straighten this out.

On October 6, 2003, Garon sent a letter to Nelson stating:

This is the reply to your October 1, 2003, note to me. I am constrained from talking to you directly about the grievance issues around your 15-day suspension because you are represented by Marty Raymond of VSEA. I have referred your letter to him and will leave it up to him as to what step he feels is appropriate to take next.

On October 7, 2003, Nelson sent a letter to Lanman that provided in part:

Due to the hostile work environment that you have fostered and encouraged I find it in the best interest of my health and well-being to resign from service with the Department of Corrections. Your behavior toward myself and my co-workers has been unreasonable and often irrational and has led to concerns of both safety and health for all those employed at the Northern State facility. You have been openly hostile and hateful toward me during my employment and have encourage(sic) others to treat me with contempt and prejudice.
. . .
Though I have rarely been afforded any courtesies from the NSCF management I will give the courtesy of advance notice of my resignation, primarily for the benefit of my co-workers. I will continue to serve until October 19, 2003 (0600).

The Step III grievance meeting on the 15-day suspension received by Nelson was rescheduled to November 25, 2003. This meeting was postponed, and was eventually held on March 16, 2004.

Article 15, Grievance Procedure, of the collective bargaining agreement between VSEA and the State for the Corrections Bargaining Unit ("Contract") provides in pertinent part as follows:

> 1. **PURPOSE**
> (a) The intent of this Article is to provide for a mutually satisfactory method for settlement of complaints and grievances . . . It is expected that employees and supervisors will make a sincere effort to reconcile their differences as quickly as possible at the lowest possible organizational level.
> . . .
>
> 3. **GRIEVANCE PROCEDURE**
> . . .
> (c) **Step III (Department of Personnel Level)**
> . . .
> (2) If the aggrieved employee so requests, the Department of Personnel shall hold a meeting with the aggrieved employee, his or her representative, or both, within ten (10) workdays following receipt of the Step III grievance, unless a satisfactory solution can be agreed to before that time.
> (3) The parties may mutually agree to postpone the discussion, but shall hold it as soon as practical.
> (4) The Department of Personnel shall notify the aggrieved employee and his or her representative of its decision in writing within five (5) workdays after the Step III grievance meeting.
> . . .
> (6) In the event the employer fails to render a decision at Step . . . III within the prescribed time, the grievant may proceed to the next step within the time limits established above.
> (7) If the employer fails to issue a decision at Step III of a disciplinary action grievance within the prescribed time limits specified in Subsection 3(c)(4) . . . above, the VSEA shall notify the Department of Personnel . . . and shall be entitled . . . to a written decision within five (5) workdays after the Step III hearing officer actually receives such notification. Failure to issue a written decision within the time frames specified in the subsection shall result in the automatic granting of the contractual remedy requested by and directly applicable to the grievant. . .

Discussion

Nelson contends that Lanman engaged in continuing harassment of her during the pertinent six-month time period prior to the filing of the unfair labor practice charge by sending her the September 24 letter notifying her of contemplated disciplinary action and scheduling the Loudermill meeting on the same day as the Step III grievance meeting. The Employer contends that nothing substantive occurred during the six-month period indicating that the Employer may have committed an unfair labor practice, particularly given that Nelson's VSEA representative had as much to do with scheduling issues as the Employer. Nelson responds that she did have problems with the actions of her VSEA representative concerning the delay in scheduling her Step III grievance, and that she has resolved that issue with VSEA.

In determining whether to issue an unfair labor practice complaint, we have viewed the pertinent factual background in the light most favorable to Nelson. In so doing, we decline to issue an unfair labor practice complaint. We conclude that no matters or events occurred within the six-month period prior to the filing of an unfair labor practice charge which in and of themselves may constitute unfair labor practices.

We disagree with Nelson that the September 24 letter from Superintendent Lanman notifying her of contemplated disciplinary action, and scheduling the Loudermill meeting on the same day as the Step III grievance meeting, may constitute an unfair labor practice. If we were to give credence to this claim by Nelson and issue an unfair labor practice complaint, we would be inappropriately sanctioning the short-cutting of the normal disciplinary process. Nelson did not even wait until Superintendent Lanman determined whether to take disciplinary action against her before charging her with

"retaliatory discipline". Thus, her unfair labor practice charge asserting retaliatory discipline was premature.

Further, if we were to issue an unfair labor practice complaint, we also would be improperly disregarding the primacy of the grievance procedure to resolve disputes over discipline imposed on employees. The grievance procedure set forth in the VSEA-State Contract is intended to "provide for a mutually satisfactory method for settlement of complaints and grievances", and "(i)it is expected that employees and supervisors will make a sincere effort to reconcile their differences as quickly as possible at the lowest possible organizational level". Article 15, Section 1, Contract. The VSEA and the State have established a four-step procedure to achieve "(t)hese admirable purposes". In re Bushey, 142 Vt. 290, 294 (1982). The Contract makes the goal of early resolution paramount, and requires that in-house resolution of problems should first be attempted. Bushey, 142 Vt. at 294, 297. Nelson's failure to await the completion of the disciplinary process frustrated the desirable goal of early and in-house resolution of problems as she thereby foreclosed using the grievance procedure to contest any resulting discipline.

We recognize that Nelson has expressed concerns about the timeliness of the grievance procedure given the delay in scheduling a Step III grievance meeting over her earlier grievance of a suspension. Nonetheless, this does not excuse the circumvention of the grievance procedure. It is apparent that Nelson's VSEA representative was complicit in the delay and rescheduling of the Step III grievance meeting. Given these circumstances, a conclusion that the Employer may have committed an unfair labor practice due to the delay and rescheduling would rest on weak grounds.

Moreover, Article 15 of the Contract explicitly provides the remedies for delays in acting on a Step III grievance over disciplinary action of either proceeding to the next

step of the grievance procedure – i.e., to this Board – or the automatic granting of the remedy granted by the grievant. The fact that Nelson and/or her VSEA representative failed to avail themselves of these remedies does not warrant us sanctioning their non-use by issuing an unfair labor practice complaint.

Based on the foregoing reasons, we decline to issue an unfair labor practice complaint and it is ordered that the unfair labor practice charge filed by Kathleen Nelson in this matter is dismissed.

Dated this 1st day of December, 2004, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

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Edward R. Zuccaro, Chairperson

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Carroll P. Comstock

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Richard W. Park

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John J. Zampieri

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Joan B. Wilson