VERMONT LABOR RELATIONS BOARD

GRIEVANCES OF:	)	
	)	DOCKET NOS. 02-60 & 02-61
TERRENCE SANVILLE	)	

FINDINGS OF FACT, OPINION AND ORDER

Through filings of December 23, 2002; January 29, 2003; and April 4, 2003; Terrence Sanville ("Grievant"), a correctional officer with the State of Vermont Department of Corrections ("Employer"), presented a grievance to the Labor Relations Board (Docket No. 02-60). Grievant alleges that the Employer violated State policies and Articles 5, 11, 14, 17, 38 and 67 of the collective bargaining agreement between the Employer and the Vermont State Employees' Association for the Corrections Unit, effective July 1, 2001 – June 30, 2003 ("Contract") by improperly ordering him to refrain from engaging in the protected activities of assisting a mentally ill inmate to request assistance from Vermont Protection and Advocacy, Inc., the Attorney General's Office and the media.

Through filings of December 24, 2002; January 29, 2003; and April 4, 2003; Grievant presented a second grievance (Docket No. 02-61). Grievant contends that the Employer violated State policies and Articles 5, 11, 12 and 35 of the Contract by retaliating against him, and harassing him, for engaging in the protected activities of assisting a mentally ill inmate. Specifically, Grievant contends that the Employer retaliated against him and harassed him by placing him on administrative leave and requiring him to undergo a psychological assessment.

Hearings were held on January 22 and February 19, 2004, in the Labor Relations Board hearing room in Montpelier before Board Members Richard Park, Chairperson;

Carroll Comstock and Edward Zuccaro. Grievant appeared *pro se* on January 22, and was represented by Attorney Barry Cade on February 19. David Herlihy, Special Assistant Attorney General, represented the Employer. The Employer filed a post-hearing brief on March 11, 2004. Grievant filed a brief on March 17, 2004.

FINDINGS OF FACT

1. Article 5 of the Contract prohibits the Employer from discriminating against or harassing any employee due to "any . . factor for which discrimination is prohibited by law". Article 15, Section 3(a) and (b), of the Contract provides that an employee shall submit a Step I complaint or a Step II grievance "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". A "matter shall be considered closed" if a grievance is not timely filed at Step II. Article 15, Section 3(b)(1). Article 15, Section 3(c) further provides that a Step III grievance "shall be submitted to the Department of Personnel within ten (10) workdays of receipt of the Step II decision if the employee wishes to pursue a matter not resolved at Step II. Otherwise, the matter shall be considered closed."

2. Article 35, Section 2(b)(6) provides that an "appointing authority, or designated representative, may require, when there is sufficient reason, the submission of a certificate from a physician . . . to . . . furnish evidence of good health and ability to perform work without risk to self, co-workers or the public as a condition of returning to work", and that the "State may require an employee to be examined by a physician designated by the employer, at State expense, for the purpose of determining the employee's fitness for duty".

3. At all times relevant, Grievant has been employed as a Correctional Officer II at the Northern State Correctional Facility ("NSCF") in Newport, Vermont. Vermont Protection and Advocacy is an advocacy group for inmates. On December 9, 2001, Grievant sent an email message to Commissioner of Corrections John Gorczyk that stated:

> I feel obligated to inform you that I have been asked by a developmentally disabled inmate to assist him in communicating his thoughts to all concerned. He has stated many times that he is capable of making his own decisions and interpreting information but unable to express himself adequately, due in part to his mistrust of some treatment staff members.
>
> The inmate has signed and sent release forms to Vermont Protection and Advocacy, Inc. allowing me to discuss his circumstances with them and them with me.
>
> My past experiences with the DOC indicate that there can be no conflict of interest where uniformed staff participate in groups, etc., even off hours. I am not a caseworker or treatment team member, so there can be no conflict.
>
> If you feel that any safeguards must be developed, please notify me immediately by email, or Tina Wood at VtPA, so that problems can be resolved before harm is done.
>
> (State's Exhibit 7, page 17)

4. Commissioner Gorczyk replied by return email on December 12, 2001. He stated:

> Terry, I do not believe that your position provides for you to be discussing an individual case with Vt. Protection and Advocacy. I think you need to refer to DOC policy relating to disclosure of offender info. I'll touch base with the legal folks if you would like and get back to you with a more complete response.
> (State's Exhibit 7, page 17)

5. On December 12, 2001, an article appeared in *The Chronicle*, a weekly Newport newspaper, under the headline "Prison worker is under investigation". The article addressed a complaint against a NSCF mental health worker. It included information from a facility log book on the date and time of an investigator's visit to the

facility, citing “a prison guard” as the source (State’s Exhibits 7, page 9, and 44, page 91).

6. NSCF Superintendent Kathleen Lanman sent Grievant a letter dated December 19, 2001, informing him of an investigative meeting with her on January 2, 2002, on “allegedly . . communicating with the Vermont Protection and Advocacy concerning inmate LF and providing information to the *Chronicle* Newspaper”. (State’s Exhibit 5, page 5).

7. Grievant sent Superintendent Lanman an email on December 21, 2001, stating:

> I contacted the Commissioner re assisting developmentally dissabled (sic) or less capable inmates to express themselves adequately; as you can see from his return email, the Commissioner is looking into the legal aspects and states he will get back to me. There are many offenders in the system who have fallen through DOC gaps; my assistance would meet their need for an advocate and my effort to achieve my own goals. Keep me advised as there doesn’t appear to be a conflict of interest.
> (State’s Exhibit 7, page 7)

8. Superintendent Lanman replied on December 21, 2001, by return email, stating: “You are hereby ordered to stop any association with Vermont Protection and Advocacy and with Inmate F” (State’s Exhibit 7, page 17).

9. On January 2, 2002, Superintendent Lanman and Assistant Superintendents Sharon Smith and David Martinson met with Grievant. VSEA Field Representative Marty Raymond represented Grievant. During the meeting, in response to a question from Superintendent Lanman why Grievant became involved with inmate LF and Vermont Protection and Advocacy, Grievant relied on a February 2001 email from Commissioner Gorcyzk to assert that the Commissioner granted permission for Grievant to act as an inmate liaison. Superintendent Lanman told Grievant that she disagreed with

him that the Commissioner had granted such permission. Grievant provided details during the meeting of his involvement with LF, including his communications with Vermont Protection and Advocacy, and with the reporter from the *Chronicle* who wrote the December 12, 2001, article (State's Exhibit 7, pages 8-21).

10. Pathways is a substance abuse program for inmates that is supported by federal grant monies. On February 1, 2002, Grievant sent an email to the Vermont Attorney General's Office setting forth his concerns about the Pathways program at NSCF. The Attorney General's Office forwarded Grievant's email to the Department of Corrections for a response. Superintendent Lanman responded to Grievant's email by a memorandum dated March 15, 2002 (State's Exhibits 9-10, pages 25-26).

11. On March 18, 2002, Mike Jones, leader of the NSCF Pathways program, wrote Superintendent Lanman to "inquire about the process for lodging a formal complaint against CO Sanville and his involvement with the Pathways program." Jones stated that "we received many reports from inmates stating that (Grievant) was discouraging them from participating and telling them that the staff was dishonest, malicious, incompetent and ultimately would conspire to keep them in prison longer." Jones further stated: "I have serious concerns about CO Sanville continuing to be utilized in this building and intentionally poisoning the atmosphere for our residents." (State's Exhibit 11, pages 27-28).

12. On March 25, 2002, Grievant filed a grievance with Superintendent Lanman over "the threat of adverse consequences, up to and including dismissal, as set out in a letter sent out to me from Supt. Lanman by certified mail regarding my participation in protected activity – request for union representation." Grievant further

stated: “My first Amendment right to free speech and association has been denied me since approximately 12-21-01 for the purposes of ‘investigation’. At no time have I been provided with written notification of the reasons for the investigation or abeyance of my rights”(State’s Exhibit 28, pages 66-68).

13. On March 26, 2002, James Cronan interviewed Grievant as part of the investigation the Employer had hired Cronan to conduct on Grievant’s involvement with LF and communications he had with Vermont Protection and Advocacy and with the *Chronicle* reporter (State’s Exhibit 14, pages 32-35).

14. Superintendent Lanman informed Grievant by letter of March 29, 2002, that he “was temporarily relieved of . . . duties . . . with pay, for a period of up to 30 workdays”. She stated that “(t)his action is taken to remove you from the workplace while a fitness for duty examination is pending” and that “I have initiated this process because of concerns that I have regarding your fitness for duty”. She further stated: “(t)his fitness for duty process is being conducted in accord with Article 35, Section 2(b)(6) of the Corrections Unit Agreement” (State’s Exhibit 20, pages 52-53).

15. On April 2, 2002, Grievant sent Superintendent Lanman an email that provided in pertinent part:

> On April 1, 2002 I received your certified letter requiring me to submit to a ‘fitness for duty’ examination by an ‘appropriate health professional’ as outlined in Article 35, Section 2(b)(6) of the Corrections Unit Agreement. The Section quoted states that I may be required to submit to such an examination ‘when there is sufficient reason’ for an appointing authority or representative to conclude that the examination and subsequent certification is necessary.
>
> I agree to submit to such an examination, and to release the findings of that examination, with your assertion that you can provide prior ‘sufficient reason’ to support your ‘concerns’ regarding my ‘fitness for duty’ as prescribed by Article 35. In order for me to knowingly give consent to examination and certification, it is essential that I understand the nature of the examination or of any testing that will be conducted, the criteria used to determine ‘pass’ or ‘fail’ of

> the testing and whether this examination or its work product will have a disparate impact on my tenure in State employment.
> . . .
> I am emailing this to you so that you may schedule an appointment with a health professional; I am mailing the 'release of medical' information today, April 2, 2002, referring to an enclosed copy of this email in order to preserve any rights I have, under Contract or law, which may have been overlooked.
> . . .
> (State's Exhibits 13, page 31; 23, page 57)

16. The Employer retained psychologist Ken Kelley to conduct the examination of Grievant. By letter dated April 24, 2002, Superintendent Lanman informed Grievant that he was scheduled to meet with Kelley on May 1 (State's Exhibit 21, page 54).

17. It took Kelley several months to complete his examination of Grievant and issue a report. By letters dated April 24, May 29, July 10 and August 14, 2002, Superintendent Lanman informed Grievant that his relief from duty with pay was being extended "for a period of up to 30 more workdays" while a "fitness for duty examination is pending". Kelley issued his report on August 21, 2002 (State's Exhibits 19, sealed exhibit; 22; 24, 25, 26).

18. On August 29, 2002, Lanman informed Sanville that he had been "released to come back to work". Sanville returned to work a few days later. Sanville v. Department of Corrections, 26 VLRB 249, 251 (2003).

19. Grievant did not file any complaints or grievances from March 26 through September 8, 2002.

20. On or about September 9, 2002, Grievant submitted to Superintendent Lanman a "Step I Complaint" on a form. Therein, Grievant did not include any factual allegations. Grievant listed "unfair labor practices; retaliation and harassment" as the

"complaint issue". Under a section posing the question "What Sections of the Contract did you cite?", Grievant wrote: "Articles 5, 11, 35 and Americans with Disabilities Act, Dept. of Personnel 'prohibited conduct', overtime and stipend" (State's Exhibits 29, pages 69-70; 31, page 72).

21. On or about September 17, 2002, Grievant submitted a "Step II" grievance to Commissioner Gorczyk. Therein, Grievant did not include any factual allegations. He stated that he was requesting a Step II meeting "to discuss violation of unfair labor practices; violation of grievant's civil rights; equal protection and due process; violation of VSEA contract Articles 5, 11, 12, 35". Grievant further stated: "Submitted to Supt. Lanman on 9-11-02; no response" (State's Exhibit 31, page 72).

22. By letter dated October 7, 2002, Peter Garon, Corrections Human Resources Coordinator, responded to Grievant's Step II grievance submitted on or about September 17, 2002. Garon denied as untimely filed allegations of Grievant concerning placement on administrative leave (State's Exhibit 33, pages 75-77).

23. On November 15, 2002, Grievant filed a Step III grievance with the Department of Personnel concerning Superintendent Lanman: 1) ordering him to have no association with inmate LF, Vermont Protection and Advocacy and the newspapers; 2) threatening him with adverse consequences without providing him with reasons for investigating him; and 3) placing him on administrative leave (State's Exhibit 36, page 81).

OPINION

The Employer contends that both of these grievances should be dismissed because they were untimely filed at earlier steps of the grievance procedure. Thus, as a threshold issue, the Board must decide whether to dismiss the grievances as untimely filed.

The Board will resolve an issue on the merits if at all possible unless the collective bargaining agreement requires it to be dismissed on procedural grounds. Grievance of Brewster, 23 VLRB 96, 98 (2000). Grievance of Kimble, 7 VLRB 96, 108 (1984). Grievance of Amidon, 6 VLRB 83, 85 (1983). One of the principal reasons for which the Board has dismissed grievances on procedural grounds has been if grievances were not timely filed at earlier steps of the grievance procedure.

Under contracts between the State and the Vermont State Employees' Association providing that grievances must be filed within specified times at earlier steps of the grievance procedure, the Board, with the approval of the Vermont Supreme Court, has refused to consider grievances which were untimely filed at earlier steps of the grievance procedure. Grievance of Adams, 23 VLRB 92 (2000). Grievance of Boyde, 18 VLRB 518 (1995); *Affirmed,* 165 Vt. 624 (1996). Grievance of Ulrich, 12 VLRB 230, 239 (1989); *Affirmed,* 157 Vt. 290 (1991). Generally, there must be specific and timely raising of issues at earlier steps of the grievance procedure or the right to raise the issue is waived. Ulrich, 12 VLRB at 239, 157 Vt. at 293-95.

Here, the Grievance Procedure article of the Contract requires that Step I complaints and, in the event Step I is bypassed, Step II grievances be filed "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". Article 15, Section 3(a)(1)

and (2). If a grievance is not filed within contractual time frames, the "matter shall be considered closed". Article 15, Section 3(b)(1).

We first conclude that Grievant filed the grievance in Docket No. 02-60 in an untimely manner. He contends that the Employer violated State policies and several articles of the Contract by improperly ordering him to refrain from engaging in the protected activities of assisting a mentally ill inmate to request assistance from Vermont Protection and Advocacy, Inc., the Attorney General's Office and the media. The occurrence of the matter which gave rise to this grievance was the order issued by Superintendent Lanman on December 21, 2001, in email correspondence that Grievant stop any association with the involved inmate and Vermont Protection and Advocacy.

Thus, Grievant was required by the Contract to file a complaint or grievance within 15 workdays of December 21, 2001. He failed to do so. The first time Grievant filed a complaint or grievance where he apparently raised an issue with the December 21, 2001, order was on March 25, 2002. This was more than two months beyond the timeframe set forth in the Contract for filing a grievance. Since the grievance was not filed within contractual timeframes, the Contract provides that the matter shall be considered closed.

We also conclude that Grievant filed the grievance in Docket No. 02-61 in an untimely manner. Grievant contends that the Employer violated State policies and articles by retaliating against him, and harassing him, for engaging in the protected activities of assisting a mentally ill inmate. Specifically, Grievant contends that the Employer retaliated against him and harassed him by placing him on administrative leave and requiring him to undergo a psychological assessment. The occurrence of the matter which

gave rise to this grievance was Superintendent Lanman informing Grievant by letter of March 29, 2002, that she was placing him on relief from duty with pay and requiring him to submit to a fitness for duty examination.

Grievant was required to file a grievance within fifteen workdays of the April 1, 2002, date that he received Lanman's March 29, 2002, letter. Again, he failed to do so. The evidence indicates that Grievant did not file any complaints or grievances from receipt of this letter through early September. Thus, the grievance he ultimately filed that is before us as Docket No. 02-61 was untimely filed, and Grievant has waived his right to have the Board review the merits of the grievance.

We recognize that the Employer extended Grievant's relief from duty with pay status on several occasions subsequent to the March 29 initial placement of him on relief from duty. Nonetheless, this does not result in Grievant having a valid continuing grievance.

The Board has accepted the validity of a continuing grievance in cases where pay practices were involved and employees initially did not grieve the alleged violations within contractual time limitations, but grieved the alleged violations during the period they were still occurring. The Board held that grievants were permitted to institute grievances over the matter at any time during the period in which the alleged violations were occurring, since there was a new occurrence of the alleged violation every time a paycheck was issued, with the restriction that the grievants waived their right to back pay for all periods prior to the pay period immediately preceding the filing of the grievances. Grievance of Shine, 21 VLRB 103 (1998). Grievance of Reed, 12 VLRB 135, 143-44

(1989). Grievance of Cole, 6 VLRB 204, 209-210 (1983). Nonetheless, for the reasons set forth below, Grievant has not set forth a case for a valid continuing grievance.

Grievant is not contesting ongoing pay practices in this case. Instead, the basis of his grievance is that the initial placement of him on relief from duty with pay, along with the requirement to submit to a fitness for duty examination, violated State policies and the Contract. He is quarrelling with being placed on relief from duty at all, not with circumstances involved in the extensions of the relief from duty.

The fact that the consequences of the relief from duty continued through the various extensions does not change this conclusion. The dismissal of an employee also has ongoing consequences such as continuing loss of wages, leave accrual and retirement credits. Yet a continuing grievance is not recognized when a dismissal is at issue. Grievance of Sanville, 26 VLRB 134, 138 (2003). *Affirmed,* Unpublished Decision (Supreme Court Docket No. 2003-343, February 13, 2004). Here too, a continuing grievance is not recognized due to continuing consequences resulting from the grieved action of initial placement of Grievant in relief from duty status.

We note that our conclusion eliminates the need for any further proceedings with respect to the unfair labor practice aspect of this case. On October 6, 2003, the Board issued a Memorandum and Order declining to issue an unfair labor practice complaint in Docket No. 02-61. Sanville v. Vermont Department of Corrections, 26 VLRB 249. We indicated though that Grievant may move to reopen the unfair labor practice case if the Board decision in this grievance did not clearly decide the unfair labor practice issue.

We so provided because we concluded that the circumstances surrounding the last two extensions of relief from duty status needed to have the full development of facts

afforded by an evidentiary hearing before the Board could address the significance of these extensions to the timeliness of allegations made by Grievant in his unfair labor practice charge. Id. at 261. We stated that the necessary factual exploration could occur in the evidentiary hearing on the grievance, allowing the Board to examine the significance of these extensions to the timeliness of allegations made by Grievant in his unfair labor practice charge. 26 VLRB at 253.

We have examined the significance of the extensions, and conclude that they do not result in Grievant having made any timely allegations in his unfair labor practice charge. Therein, just as in his grievance, Grievant contested his placement on administrative leave and the requirement that he undergo a psychological assessment. He is quarrelling with the basis for being placed on relief from duty at all, not with circumstances involved in the extensions of the relief from duty. Since his placement on relief from duty occurred on March 29, 2002, and he did not file an action with the Board until December 24, 2002, he is well outside the six month statute of limitations for filing an unfair labor practice charge. Id. at 250.

We make one final point before concluding our discussion of Docket No. 02-61. Even if we assume for the sake of argument that Grievant timely filed his grievance at the initial step of the grievance procedure, he subsequently waived the right to have the grievance considered on the merits due to untimely filing the grievance at Step III of the grievance procedure. He filed his Step III grievance more than a month after receiving his Step II answer, well after the 10 workday deadline in the Contract for submitting Step III grievances after receipt of a Step II response. Since the grievance was not filed within contractual timeframes, the Contract provides that the matter shall be considered closed.

In sum, we conclude that the grievances in Docket Nos. 02-60 and 02-61 should be dismissed as untimely filed at the initial step of the grievance procedure, and that Grievant has no basis to further pursue his unfair labor practice charge in Docket No. 02-61.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the Grievances of Terrence Sanville in Docket Nos. 02-60 and 02-61 are dismissed.

Dated this 5th day of April, 2004, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

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Richard W. Park, Chairperson

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Carroll P. Comstock

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Edward R. Zuccaro