VERMONT LABOR RELATIONS BOARD

APPEAL OF:	)	
	)	DOCKET NO. 99-62
GLORIA DANFORTH	)	

MEMORANDUM AND ORDER

The issues before the Labor Relations Board are whether to grant motions filed by the Vermont Department of Public Safety ("Employer") in connection with this appeal by Gloria Danforth ("Appellant") of her dismissal from employment as a State Police Detective Sergeant, Specifically, on January 29, 2004, the Employer filed a Motion for Protective Order, a Motion in Limine and a second Motion for Protective Order. Appellant filed responses to the first motion on February 13 and 17, 2004. She filed a response to the other motions on March 10, 2004. The Employer filed a reply to Appellant's second response on March 12, 2004. We will discuss each motion in turn.

Motion for Protective Order

The Employer requests that the Board issue a protective order with respect to a document ("Exhibit A") that contains the information that the Board ordered the Employer to make available to Appellant through a Memorandum and Order issued in this case on February 25, 2000. 23 VLRB 51; *Affirmed*, 174 Vt. 231 (2002). The Board stated in pertinent part:

> In sum, the Employer is required to provide Grievant with summaries of all allegations of misconduct by state police officers, and the findings as to such allegations, since January 1, 1995, covered by Sections 1.0, 2.0, 3.0, 8.0, 9.0 and 14.0 of Part A; and Sections 7.0 and 11.0; of the Employer's disciplinary guidelines. Summaries of alleged offenses in these sections should be sufficient to allow Grievant to seek to establish her claim that discipline was not applied to her in a uniform and consistent manner. . . The summaries of allegations and findings should be prepared so that the identity of the involved state police officer is not revealed, and the summaries set forth the alleged misconduct and the disposition in such a form to permit a determination whether discipline is imposed on

> members uniformly and consistently. The Board will be prepared to issue protective orders as necessary to ensure that the identity of (the) involved state police officer is not revealed. 23 VLRB at 56.

The Employer does not object to admission of Exhibit A by the Board, with the understanding that it will be sealed by the Board and that it will not be released to Appellant pending the Board's ruling on the motion for protective order. The Employer further moves that the Board seal any deposition, document, exhibit, testimony or recording that contains or references Exhibit A. The Employer moves that the Board issue a protective order that contains the following provisions:

Permitted Disclosure

1. Upon request by Appellant at a deposition or a hearing on the matter, the Employer will provide a copy of Exhibit A to Appellant to assist her in formulating questions during depositions or at a hearing. In the event Appellant wishes to refer to Exhibit A to prepare a filing or to prepare her case, the Board shall provide her with Exhibit A for her use while at the Board office.

2. Appellant may provide documents to the attorneys for the Employer that contain or reference the information set forth in Exhibit A.

3. Appellant and other witnesses may testify about Exhibit A, provided that it is given in accordance with this order and that it is otherwise admissible.

General Prohibitions and Procedure

1. Appellant shall not disseminate the information set forth in Exhibit A to anyone, or any entity, unless pursuant to order of a court or the Board.

2. Appellant shall not copy, by any means, the information set forth in Exhibit A unless pursuant to order of a court or the Board.

3. In the event Appellant needs to file or admit any document that contains or references the information set forth in Exhibit A (i.e. motions, proposed findings or exhibits) in a Board or court proceeding, she shall seal the document prior to filing. The sealed information shall not be disseminated to anyone, unless pursuant to order of a court or the Board.

4. In the event that a party intends to present or elicit testimony that references the information set forth in Exhibit A, the party shall first notify the Board of its intent to present the testimony in order to permit the Board the opportunity to seal the testimony. Sealing in this instance shall be accomplished by recording the testimony on a cassette tape that then shall be sealed. During testimony regarding the information set forth in Exhibit A, only the parties, attorneys for the parties, court reporter hired by a party, witness giving the testimony, and the Board and its staff shall be present in the hearing room. Sealed testimony shall not be disseminated to or for anyone, unless pursuant to order of a court or the Board.

5. At the conclusion of any deposition or hearing on the matter, Appellant shall immediately return Exhibit A to the Employer.

6. Appellant shall immediately return Exhibit A to the Board after her review of it, prior to leaving the Board offices.

7. The Employer is authorized to treat the internal affairs information as records of the Office of Internal Affairs subject to the protections of 20 V.S.A. Section 1923.

Enforcement

A violation of this order by Appellant may result in a Board order denying Appellant the use of the information set forth in Exhibit A, including as an exhibit, evidence, testimony or as information offered in a motion, proposed finding or other filing. A violation of this order by Appellant may result in dismissal of the case. The Board shall not permit any person from using or presenting the information set forth in Exhibit A, in any manner or form to the Board, if the information set forth in Exhibit A was obtained as a result of violation of this order. Nothing shall prevent the Employer or the state from pursuing other remedial action in the event of a violation of this order.

The Employer also moves that the Board prohibit Appellant from access to Exhibit A until there is in place either a confidentiality agreement entered into by Appellant and the Employer or a court order that incorporates by reference the terms of the proposed protective order. The Employer cites as reasons for this additional provision that a protective order cannot completely deter Appellant from disseminating the information in Exhibit A at the conclusion of this matter, or adequately compensate the Employer in the event a violation is discovered. The Employer contends that only a

confidentiality agreement or court order (enforceable by contempt proceedings and the issuance of fines and injunctive relief) may provide sufficient deterrent to dissemination or compensation for the violation.

On February 13, 2004,Appellant filed a response to the Employer's Motion for Protective Order and Request to Stay. Appellant contended that there was no need to rule on the motion because the Employer had sent Appellant a copy of Exhibit A along with its motion. On February 13, 2004, the Employer moved for issuance of an order requiring Appellant to return to the Board all copies of Exhibit A and prohibiting her from further disseminating it. The Employer subsequently indicated that it had sent Appellant a copy of Exhibit A by mistake. By orders dated February 13 and 24, 2004, the Board issued temporary orders requiring Appellant to forthwith return to the Board all copies of Exhibit A in her possession, including a copy of Exhibit A in her constructive possession. Appellant has returned two copies of Exhibit A to the Board. She has not returned the copy of Exhibit A in her constructive possession.

In a February 17, 2004, response, Appellant alleged that the confidentiality provisions proposed by the Employer were not for the protection of state police officers' identities; but rather to restrict Appellant's ability to prepare for her defense at Board hearings, delay an already prolonged hearing process, and to humiliate and punish Appellant for the exercise of her rights to a Board hearing. Appellant further contends that the manner in which Exhibit A was created already accomplishes the purpose of a protective order to camouflage the identities of state troopers. Finally, Appellant contends that the importance the Employer seeks to place on the confidentiality of Exhibit A is

belied by the fact that the Employer did not follow its own confidentiality rules by sending Appellant a copy of Exhibit A.

We concur with the Employer that it is appropriate to have a protective order in place so that Exhibit A and information derived from it is sealed. In our earlier discovery order in which we required the Employer to provide Grievant with summaries of allegations of misconduct by state police officers, and the findings as to such allegations, we stated that "the Board will be prepared to issue protective orders as necessary to ensure that the identity of (the) involved state police officer is not revealed." 23 VLRB at 56. Upon review of Exhibit A, we conclude that there is a risk that the identity of involved state police officers could be revealed if Exhibit A and information derived from it is not sealed.

Further, we do not believe that Appellant's ability to prepare and present her case will be hampered by the protected order proposed by the Employer. She will be subject to some degree of inconvenience to access Exhibit A under the provisions set forth in the proposed order. Nonetheless, these are reasonable provisions to both preserve confidentiality and allow her to fully present her case.

We also are not persuaded by Appellant's contention that we should deny the Employer's motion because the Employer already sent her a copy of Exhibit A. The confidentiality of Exhibit A has not been irreparably compromised by the Employer providing Exhibit A to Appellant by mistake. Appellant has returned the two copies of Exhibit A to the Board that we understand from her were in her actual possession.

In response to a further inquiry from the Board whether she had disseminated any copies of Exhibit A, Appellant indicated that she had given a sealed copy of Exhibit A,

marked “confidential”, to an unidentified person for safekeeping with directions not to reveal it to anyone. The Board concluded that this copy of Exhibit A is in Appellant’s constructive possession, and ordered Appellant to retrieve it and forthwith return it to the Labor Relations Board *(See Supplemental Temporary Order issued by Board on February 24, 2004).* Appellant has not yet returned this copy to the Board. Nonetheless, the confidentiality of this copy of Exhibit A has not been irreparably compromised given Appellant’s representation that the copy has been sealed with directions for it not to be revealed to anyone.

Thus, we grant the Employer’s motion for a protective order to the extent that Exhibit A and information derived from it is sealed and that Appellant has access to Exhibit A according to the provisions of the proposed protective order. However, we do not grant all terms of the proposed protective order. We revise the paragraph requested by the Employer concerning treatment of the internal affairs information as records of the Office of Internal Affairs, subject to the protections of 20 V.S.A. Section 1923, to ensure that this provision shall not be deemed to prevent the Board from using such information in this case.

We also conclude that the Enforcement section requested by the Employer, prescribing actions by the Board in the event that Appellant violates the protective order, is overly prescriptive and premature. It suffices to provide that violation of the protective order is subject to enforcement according to the Board Rules of Practice.

Further, we deny the Employer’s request that the Board prohibit Appellant from access to Exhibit A until there is in place either a confidentiality agreement entered into by Appellant and the Employer or a court order that incorporates by reference the terms

of the proposed protective order. We recognize the Employer's concerns that a protective order cannot completely deter Appellant from disseminating the information in Exhibit A at the conclusion of this matter, or adequately compensate the Employer in the event a violation is discovered. Nonetheless, the Employer is requesting that we grant something that is beyond our authority.

The Board only has such adjudicatory jurisdiction as is conferred on it by statute. Grievance of Brooks, 135 Vt. 563, 570 (1977). The Board's jurisdiction is limited to deciding disputes through our proceedings and issuing remedies for violations of rules and regulations, contracts or statutes. We are not authorized to order persons to sign agreements or issue orders contingent on court orders providing for fines and injunctive relief. In the event that the Employer finds our remedial powers inadequate, the Employer may pursue any additional remedies it may have in court.

Motion in Limine

The Employer moves in limine for the issuance of an order, limiting the scope of discovery and the presentation of evidence to those events that have occurred since May of 1999 and clarifying the scope of the issues to be heard in this phase of the proceedings. At a March 20, 2003, hearing in this matter, Appellant's attorney Kimberly Cheney stated on the record that he agreed to "confine pertinent inquiry to facts that occurred after May 26, 1998". May 26, 1998, was the day before Appellant and other employees filed a grievance that ultimately was heard by the Board from April – June 1999 and decided by the Board on September 30, 1999. 22 VLRB 220. Issues in that grievance, like this appeal, were whether the Employer discriminated against Appellant based on whistleblowing and grievance activity.

The Employer contends that it is appropriate to go beyond the May 26, 1998, date agreed to by Appellant's attorney, and use May 1999 as the cutoff date for scope of discovery and evidence purposes in this proceedings. The Employer bases this request on the fact that the Board hearings in the earlier grievance went until June of 1999 and evidence was presented on Appellant's grievance and whistleblowing activities prior to May of 1999.

It is unnecessary to issue an order ruling on the Employer's motion. Appellant's attorney already has agreed on the record to a restricted timeframe for pertinent inquiry in this case to a date after the previous grievance was filed. An order is not needed to reiterate what has already been agreed. As far as the date from when the previous grievance was filed to the date that grievance was heard by the Board, the Board can take official notice of the record in that grievance to ensure that repetitious evidence is not presented in this case. Again, an order is not needed to confirm that the Board will adhere to a practice it has consistently followed of taking official notice of its own proceedings.

The Employer also requests that the Board issue an order precluding any inquiry by Appellant concerning the merits of grievances filed by Appellant to support her contention that she was discriminated against for grievance activities. Again, an order is not needed in this area. It has been the longstanding practice of the Board to not allow evidence on the merits of a grievance when the contention in the matter before the Board is limited to whether the grievant was discriminated against for grievance activities. An order is not needed to confirm that the Board will adhere to a practice it has consistently followed.

The Employer further requests that the Board issue an order prohibiting any inquiry by Appellant concerning the merits of Appellant's grievances concerning the Employer placing Appellant on administrative leave and involuntarily transferring her. Once again, such an order is unnecessary. In the appeal filed with the Board, Appellant's attorney stated: "In the event Sgt. Danforth is reinstated as a result of the first grievance, she appeals from the denial of her Step II grievance concerning improper placement on Administrative Leave on June 16, 1999." The appeal further stated: "In the event Sgt. Danforth is reinstated as a result of the first grievance, she hereby processes her grievance for improper transfer from Bureau of Criminal Investigation at the Bethel Barracks, to the Washington Investigative Network (WIN), on August 24, 1999." The appeal also stated: "The Dismissal rendered temporarily moot Sgt. Danforth's grievances over being placed on Administrative Leave without just cause, and her involuntary transfer to WIN." Through her appeal, Appellant has indicated that the merits of her grievances concerning her placement on administrative leave and her involuntary transfer only will be examined if she prevails in the appeal of her dismissal and is reinstated. Given the position of Appellant, it is unnecessary at this stage of the proceeding to order her not to inquire into something that she has already accepted.

In sum, we deny the motion in limine. The issues that are relevant at this point in the proceedings have been sufficiently made clear through the contents of the appeal filed by Appellant; the statements made on the record at the March 20, 2003, hearing in this matter by Appellant's attorney Kimberly Cheney concerning withdrawal of certain claims that had been raised in the appeal; and the Findings of Fact, Opinion and Order issued by the Board on July 22, 2003. 26 VLRB 140. An order clarifying issues is unnecessary.

Second Motion for Protective Order

The Employer moves for issuance of a protective order to prevent Appellant from conducting a deposition of the Employer's attorney, Elizabeth Novotny, and calling her as a witness. Appellant contends that she needs to depose Novotny and have her testify, in her position as Counsel for the Employer, on her efforts to develop and enact policies and procedures for the Employer to be in compliance with: a) federal law relative to EEOC, civil rights, disability and grants received by the Employer from federal funding sources; b) state law relative to equal employment, disability, budget requirements; and c) the collective bargaining contract between the State and the Vermont State Employees' Association. Appellant also infers that the Employer will not be prejudiced because Novotny is neither the sole counsel nor the lead counsel in this case for the Employer.

The effect of a successful effort by Appellant to depose Novotny and call her as a witness in this case would be to remove Novotny as counsel for the Employer pursuant to Rule 3.7 of the *Vermont Rules of Professional Conduct* governing attorneys. Given the serious ramifications of such a result, including impacting the right of the Employer to decide who will represent it and the circumstances of a lengthy and involved case, Appellant has to establish that she is unable to obtain relevant information sought from Novotny from another source. It is not of significance under the circumstances of a lengthy and involved case that Novotny is not the sole or lead counsel.

Given these considerations, we grant the Employer's motion for a protective order to prevent Appellant from deposing Novotny and calling her as a witness. Appellant has not established that the information she seeks to obtain from Novotny is relevant or appears reasonably calculated to lead to the discovery of admissible evidence concerning

the remaining issues in the case. Even if we assume *arguendo* that this threshold test has been met with respect to some information sought from Novotny, Appellant has not established that she is unable to obtain the information from another source.

Deposition of Ray Keefe

The Employer requests that the Board include within the protective order a provision precluding Appellant from taking Ray Keefe's deposition. Appellant indicates that she wishes to speak with Keefe "either by telephone, person to person and/or deposition relative to his knowledge of being a co-worker" of Appellant.

We deny the Employer's request. Appellant "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action". V.R.C.P. 26 (b) (1). "It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence". Id. Keefe, as a co-worker of Appellant, may be able to provide information that leads to discovery of admissible evidence relating to remaining issues in this case such as whether Appellant was discriminated against based on grievance or whistleblowing activities, or whether just cause existed for her dismissal. It would be inappropriate at this juncture to foreclose Appellant from questioning Keefe with respect to such information. In the event that Appellant deposes Keefe pursuant to V.R.C.P. 30, the Employer has mechanisms available under the rule in appropriate circumstances to seek to terminate or limit the examination.

Based on the foregoing reasons, it is ordered:

1. The Vermont Department of Public Safety's motion for a protective order concerning the summaries of allegations of misconduct by state police officers, and the findings as to such allegations, provided by the Department to Appellant

Gloria Danforth is granted to the extent reflected in the following provisions and denied in all other respects:

a. Upon request by Appellant at a deposition or a hearing on the matter, the Employer will provide a copy of Exhibit A to Appellant to assist her in formulating questions during depositions or at a hearing. In the event Appellant wishes to refer to Exhibit A to prepare a filing or to prepare her case, the Board shall provide her with Exhibit A for her use while at the Board office.

b. Appellant may provide documents to the attorneys for the Employer that contain or reference the information set forth in Exhibit A.

c. Appellant and other witnesses may testify about Exhibit A, provided that it is given in accordance with this order and that it is otherwise admissible.

d. Appellant shall not disseminate the information set forth in Exhibit A to anyone, or any entity, unless pursuant to order of a court or the Labor Relations Board.

e. Appellant shall not copy, by any means, the information set forth in Exhibit A unless pursuant to order of a court or the Labor Relations Board.

f. In the event Appellant needs to file or admit any document that contains or references the information set forth in Exhibit A (i.e. motions, proposed findings or exhibits) in a Board or court proceeding, she shall seal the document prior to filing. The sealed information shall not be disseminated to anyone, unless pursuant to order of a court or the Labor Relations Board.

g. In the event that a party intends to present or elicit testimony that references the information set forth in Exhibit A, the party shall first notify the Board of its intent to present the testimony in order to permit the Board the opportunity to seal the testimony. Sealing in this instance shall be accomplished by recording the testimony on a cassette tape that then shall be sealed. During testimony regarding the information set forth in Exhibit A, only the parties, attorneys for the parties, court reporter hired by a party, witness giving the testimony, and the Board and its staff shall be present in the hearing room. Sealed testimony shall not be disseminated to or for anyone, unless pursuant to order of a court or the Labor Relations Board.

h. At the conclusion of any deposition or hearing on the matter, Appellant shall immediately return Exhibit A to the Employer.

i. Appellant shall immediately return Exhibit A to the Board after her review of it, prior to leaving the Board offices.

j. The Employer shall treat the internal affairs information contained in Exhibit A as records of the Office of Internal Affairs subject to the protections of 20 V.S.A. Section 1923. This provision shall not be deemed to prevent the Labor Relations Board from using such information in reaching a decision in this case.

k. A violation of this order shall be subject to enforcement according to the Rules of Practice of the Vermont Labor Relations Board.

2. The Motion in Limine filed by the Vermont Department of Public Safety is denied; and

3. The second motion for a protective order filed by the Vermont Department of Public Safety to prevent Appellant from deposing Department General Counsel Elizabeth Novotny, and calling her as a witness, is granted.

Dated this 20th day of March, 2004, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

_____
Edward R. Zuccaro, Acting Chairperson

_____
Richard W. Park

_____
Joan B. Wilson