VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 05-34
LAWRENCE ROSENBERGER	)	

MEMORANDUM AND ORDER

The issue before the Labor Relations Board is whether to grant a motion to exclude evidence filed on February 8, 2006, by Grievant Lawrence Rosenberger ("Grievant") in connection with his grievance contesting his dismissal as a Game Warden with the State of Vermont Agency of Natural Resources, Department of Fish & Wildlife ("Employer"). Specifically, Grievant seeks an order prohibiting the Employer from introducing evidence obtained in an April 4, 2005, meeting between Grievant and his supervisor, Lieutenant Robert Lutz, and evidence gathered in its subsequent investigation stemming from that meeting.

The Employer filed a memorandum, and supporting materials, in opposition to the motion on February 21, 2006. Grievant filed a reply to the Employer's memorandum on March 6, 2006. The Labor Relations Board conducted oral argument on the motion on March 9, 2006, in the Board hearing room in Montpelier before Board Members Edward Zuccaro, Chairperson; Carroll Comstock and Richard Park. Michael Casey, VSEA Deputy General Counsel, represented Grievant. Assistant Attorney General Julio Thompson represented the Employer.

Underlying Information Pertinent to Motion

The underlying information pertinent to deciding this motion follows: Grievant has been employed by the Employer since 1987. On April 4, 2005, he was a Game

Warden, and his immediate supervisor was Lieutenant Robert Lutz. At that time, Lutz had been a supervisor for a month. Grievant and Lutz met on April 4, 2005.

On April 5, 2005, Lutz completed a misconduct complaint form on Grievant. Lutz described the "nature of alleged complaint" as follows: "Warden Lawrence Rosenberger claimed compensation for call-in pay for incident #05FW01566, an injured deer on the circumferential highway in Essex. Warden Rosenberger reported the incident to VSP dispatch as an actual response, when in fact he did not respond to the incident." Included in the complaint made by Lutz was a statement that on April 4, 2005, Grievant "admitted he did not respond to the call as he had reported" (Grievant's Exhibit 5 in Support of Motion to Exclude Evidence).

On or about April 8, 2005, the Employer assigned Lieutenant Kenneth Denton to conduct an investigation based on the misconduct complaint submitted by Lutz. On April 14, 2005, Denton interviewed Grievant. Grievant was represented by VSEA Representative Marty Raymond. Denton questioned Grievant about his actions in the incident identified in the misconduct complaint submitted by Lutz (Exhibit 6 to Employer's Evidence in Support of Opposition to Grievant's Motion to Exclude Evidence).

On April 19, 2005, Lutz sent a memorandum to Denton. The memorandum provided in pertinent part as follows with respect to the April 4 meeting between Lutz and Grievant:

> On April 4, 2005 I was reviewing time sheets and corresponding CAD law incident reports relating to overtime reported for the pay period from 3-20-05 to 4-2-05. This is standard procedure to ensure that calls; 1) have met the criteria for self-activation as defined in SOP, and 2) that the law incident has been correctly coded prior to closure.

> Warden Rosenberger had claimed two calls for call in pay. One of these calls, #05FW01566 was reported to have occurred on 3-27-05 and was reported to dispatch by Warden Rosenberger at 20:31 hours. The call was for an injured deer on the circumferential highway. The town code was for Burlington. The circ. Highway is in Essex. The call was reported as completed at 21:01. This did not allow time for travel to the scene, dispatching and loading a deer and returning to home station in Milton. There was no complainant listed on the call, however a Gille Gaudette was listed as a contact.
>
> Warden Rosenberger came into my office as I reviewed this call. I asked him if he had responded to a call for an injured deer in Burlington. He was unsure, and as I reviewed the call further I discovered that Warden Rosenberger had reported the call as having occurred in Essex to the dispatcher. He reportedly cleared from the call at 21:01 and went off-duty at the same time. Warden Rosenberger became very nervous and emotional as I reviewed the written radio log from the call.
>
> I asked Warden Rosenberger where the call occurred. He was not sure. I then asked if he had responded at all to an injured deer on this date and time. He stated that he may have written the wrong law incident number on his time sheet. He said he did take care of an injured deer, but forgot when it happened.
>
> As I pointed out the fact that the dispatcher had recorded a call and that someone initiated the call, Warden Rosenberger stated that he did not respond to the injured deer in question. When asked who Gille Gaudette was, Warden Rosenberger stated that he had given a deer to a Bob Gaudette and that must be where the confusion on the call stemmed from.
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> . . .
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> (Grievant's Exhibit 2 in Support of Motion to Exclude Evidence, Employer's Exhibit 5 in Support of Opposition to Grievant's Motion to Exclude Evidence)

On May 24, 2005, Denton interviewed Grievant a second time. Again, Grievant was represented by VSEA Representative Raymond. Among the topics of the interview was the March 27 incident (Exhibit 7 to Employer's Evidence in Support of Opposition to Grievant's Motion to Exclude Evidence).

Denton prepared an investigation report dated June 8, 2005. By letter dated August 22, 2005, Fish & Wildlife Commissioner Wayne Laroche notified Grievant that he was dismissed. He stated that the "reasons for this action are those listed in my letter of July 20, 2005 . . . which are incorporated herein by reference." The July 20, 2005, letter provided in pertinent part as follows:

> As a result of your behavior described below, the Department of Fish & Wildlife is contemplating your dismissal from the position of Game Warden III. . . The following charges of misconduct are based upon an Investigation report prepared by Lt. Kenneth Denton, District Chief, dated June 8, 2005 (copy attached) which my(sic) be consulted for further information regarding the basis for the charges summarized below.
>
> The reasons for contemplating disciplinary action are as follows:
>
> 1) You fabricated a case (#05FW01566) in order to receive call-out compensation. This misconduct included your willfully making false entries in official records (including your time report, radio log, and Computer Aided Dispatch records), making false statements to a dispatcher, and providing your supervisor with misleading information. These actions are in violation of Fish and Wildlife SOP 3.24, 9.03, Article 24 of the Non-Management Unit Bargaining Unit Agreements, and Personnel Policy 5.6.
>
> 2) You failed to maintain daily logs in violation of Fish and Wildlife SOP 9.01.
>
> 3) You violated department policy by going off-duty, self-activating and charging for a callout in violation of Vermont Fish and Wildlife callout policy SOP9.03, 2.b., SOP 3.19, and Article 24 of the Non-Management Bargaining Unit Agreements.
>
> 4) You failed to submit required reports within 14 days, or as directed, in violation of Vermont Fish & Wildlife policy SOP 3.31.
>
> 5) You failed to submit a list of witnesses/complainants in an investigation in violation of Vermont Fish & Wildlife policy SOP 9.06.
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> . . .
>
> (Grievant's Exhibit 7 in Support of Motion to Exclude Evidence)

In the June 8, 2005, Investigation Report attached to the July 20, 2005, letter, Lieutenant Denton concluded that Grievant had violated Employer Standard Operating Procedure ("SOP") 9.03(2) by self-activating for call-outs on eight occasions that did not meet established criteria. One of the eight callouts concerned the March 27, 2005, incident. He also concluded that Grievant violated SOP 9.01 by not keeping daily logs for the past few years. Lieutenant Denton further found that Grievant violated SOP 9.06 by failing to record witnesses/complainants in his investigation reports associated with three

cases. He also concluded that Grievant violated SOP 3.24 by not submitting a required report in a May 29, 2004, incident involving a moose (Exhibit 8 to Employer's Evidence in Support of Opposition to Grievant's Motion to Exclude Evidence).

On January 27, 2006, VSEA Deputy General Counsel Michael Casey took a deposition of Lutz. During the deposition, the following exchange occurred between Casey and Lutz concerning the April 4, 2005, meeting between Lutz and Grievant:

> Casey: And I'd like you just to tell me, what was your involvement – your earliest involvement and what role you played in looking into the conduct for which Mr. Rosenberger was investigated and ultimately dismissed?
>
> Lutz: I was responsible to approve time sheets for the pay period ending I believe it was the 2nd of April. On Monday morning, the 4th, I went into the office and began to review the time sheets. And what I do in that capacity is I look at the hours -- the – the codes for a Vision statement that's kept by Finance and make sure the codes are correct and that the hours actually reflect time worked on those time sheets. I review those. When everything's met satisfactory – . . . I sign the time sheet and submit it to Finance. . . if I see a block of time that is overtime, I look at the law incident in the Spillman computer database to go back and look at the call to ensure that that – first, that it met callout criteria, that it was coded correctly, that everything is – is completed satisfactorily before I move on. . . . This one call in particular I opened up the case, I looked at it, it was for an injured deer, which is a legitimate response by a warden off duty. I looked at the time, which is on the face sheet of the law incident number. The response times and – and radio log entries, and it was a very short period of time, some 20 minutes. That didn't seem to jive with a response to an injured deer. In looking further into it, I saw some discrepancies that didn't make sense. To respond from Milton to Burlington where the call was logged, there was not enough time to do that. The dispatchers often make – make errors in entry so my first inkling is that there's – there's been a mistake made in entry. The next thing I would do is ask the warden about the call, you know, what happened here, so I can code this correctly. At that time I called Larry and asked him to – if he was coming into the office. He said, yup, I'm on my way in, I'll see you there in a little bit. So I waited. I reviewed some other time sheets, stuck his to the side until he got there.
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> . . .

Casey: Okay. So then what happened?

Lutz: Larry came in. I showed him the call on the law incident. I said, what was this call, what happened here? Because the time don't match up. And I – he instantly – when he saw the call and I explained the call to him he became very, very nervous. You know, trembling, like that. Then I suspected –

Casey: Trembling in what respect? His body was trembling or –

Lutz: Yeah. You know, just nervous reaction. Muscles in his neck were jumping. He was trembling physically in his hands.

Casey: And was that unusual for Larry?

Lutz: Yes. Yes.

Casey: Did he exhibit any other signs that to you seemed unusual?

Lutz: His – his speech was wavering. He had difficulty speaking.

Casey: Okay. His voice was – was not strong or –

Lutz: It was not normal.

Casey: Okay.

Lutz: Normally relaxed and he's – he just appeared very nervous.

Casey: Okay. And was that unusual?

Lutz: Yes. Yes.

Casey: Okay. So what happened?

Lutz: I questioned him about it and he became very defensive, kept going off track about – you know, getting away from this call, speaking about other calls and – you know, and he said maybe I didn't put the right call number down, which very well may have happened. So I looked into that quickly. No, that can't be right because it says you went. So, you know, what's happened here? And he just – almost to the point where he couldn't speak anymore. He settled down, started talking about another call. I said, let's get back to this one. What took place here? What happened? Did you go on this call? And eventually he – you know,

he kept going away talking about other calls. I said, Larry, we want to talk about this call. What happened here? Did you go?

. . .

Casey: Okay. So – so you observed him doing this and then – and then what happened after that?

Lutz: I just asked him outright. I said, Larry, did you go on this call –

Casey: Okay.

Lutz: -- and he said no. No, I didn't go on that call. I said, okay. He instantly became more relaxed. Somber, but relaxed.

Casey: Okay.

Lutz: And I explained to him at that point, look, you know, if you did something here that you shouldn't have done, we need to talk about it, and we did. You know, we talked at length. Larry talked about his previous work record and his supervisors. Basically, you know, friend to friend. We've been – we've worked together for quite a while, and it was – it was a relaxed conversation. Much more relaxed than it had been previously.

Casey: Okay. And for how long – how long did you guys – from start to finish, how long did your discussions last?

Lutz: Probably half an hour.

. . .

Casey: Lieutenant, I'm just going to ask you to take a look at Article 14 of the collective bargaining agreement that was in effect at the time that you met with Mr. Rosenberger, specifically Article 14, Section 7, and I'll just ask that you take a look at Section 7, which is right here. Just starts there. And just review that. Were you familiar with that contract provision, Article 14, 7, at the time that you met with Mr. Rosenberger?

Lutz: No.

. . .

Casey: Let me ask you a very simple question. Were you in your role as a supervisor aware of the obligations that you would have had to advise somebody of a union representative under any of the circumstances listed in Section 7?

Lutz: Yes, sir. Yes, sir.

Casey: Okay. What was your understanding?

Lutz: If I had contemplated any disciplinary action, first of all, before I contacted anybody I would have contacted my supervisor who has a lot more experience and ask for his input. I did not anticipate disciplinary action at that point so I saw no need to notify anybody.

Casey: You stated that during your – meeting with Mr. Rosenberger that at some point he indicated that he didn't go on the callout, is that correct?

Lutz: That's correct.

Casey: At the time that this meeting took place, would you think that it was possible for a warden to be disciplined for claiming callout pay when they didn't go on the callout?

Lutz: Yes, it's entirely possible?

Casey: Well, have you ever done that? Have you ever claimed callout pay on a time sheet on a callout that you never responded to?

Lutz: No.

Casey: And if you ever did do that, would you expect discipline could be a possibility from that?

Lutz: Absolutely.

. . .

Casey: As a supervisor do you expect that if somebody did fabricate a case so they could claim callout pay, that discipline could result from that?

Lutz: I do now.

Casey: You didn't at that time though?

Lutz: Depending – I never in my wildest dreams thought that this would have occurred from this call. I was looking at this call from a closing it out in the computer standpoint. I never expected this to happen, to go where it went, so I – I can't say that day – I – I have since learned more and – and now I know but, yeah, I would expect disciplinary action for that.

. . .

Casey: Okay. And I'd like to zero in on paragraph number 3 of (the April 19 memorandum from Lutz to Denton). It starts with Warden Rosenberger came into my office as I reviewed this call. Okay.

And then towards the end of that same paragraph you've written here that Warden Rosenberger became very nervous and emotional as I reviewed the written radio log from the call. . . (W)hy do you feel it was relevant to tell Lieutenant Denton that?

Lutz: Because that was aside from normal.

Casey: But what relevance would that have to this memorandum that you're writing to Lieutenant Denton?

Lutz: It was an observation I made. . . I've conducted criminal investigations. I've interviewed suspects on hundreds of cases.

Casey: Okay. And what does that indicate, that type of conduct?

Lutz: Untruthfulness.

. . .

Casey: Would that – could that be a symptom of guilt?

Lutz: It could be

. . .

Casey: . . . You next write, and again I'm going to quote your memorandum here, I then asked if (he) had responded at all to an injured deer on this date and time. Again, is that a truthful statement?

Lutz: Yes.

. . .

Casey: Okay. Now true or false, Lieutenant. By the time you asked Larry that question you're wondering whether Larry actually did go out on that call, aren't you?

Lutz: True.

Casey: That's a true statement?

Lutz: True.

Casey: And based on your experience as a game warden, if he claimed that callout pay, he didn't go out on that call, would you expect that he could suffer discipline –

Lutz: Yes.

Casey: -- as a result of that?

Lutz: Yes. That was suspicion on my part and that's all.

Casey: And that's why you asked him the question, is that correct?

Lutz: No. No. There was – several things wrong with the case.

Casey: Okay.

Lutz: If there are typographical errors, there are several things wrong. Somebody is innocent until proven guilty, and I didn't suspect that he had done anything wrong.

Casey: Right.

Lutz: I was looking to clear this case and – get on with the time sheet so I – had no accusation against Larry at that time at all. I had my suspicions but that's all.

. . .

Casey: And you did at least suspect that he didn't go out on the call, that's why you asked the question?

Lutz: It was a possibility.

Casey: Is that why you asked the question?

Lutz: Yes. It's a possibility.

. . .

(Exhibit 4 in Support of Employer's Evidence in Opposition to Grievant's Motion to Exclude Evidence, p. 10 – 16, 38 – 39, 41, 51-55; Grievant's Exhibit 2 to Motion to Exclude Evidence, p. 36)

The Employer filed an affidavit of Lutz dated February 20, 2006. The affidavit stated in pertinent part:

. . .

13. When I met with Warden Rosenberger on the morning of April 4, 2005, I did not know or have reason to believe that he had done anything wrong; I simply believed that police dispatcher Still had made some data entry errors in Law Incident Report No. 1566. (In my experience, dispatcher data entry errors are not uncommon.) I wanted Warden Rosenberger to help clear them up so I could complete my timesheet review and deliver the timesheets to Waterbury that day.

14. If I had believed that Warden Rosenberger had engaged in misconduct, I would have immediately notified my supervisor and asked for guidance before

ever speaking to Rosenberger about the matter. On the morning of April 4, 2005, I did not notify my supervisor of the apparent discrepancies in Law Incident Report No. 1566 because I did not view them as evidence of misconduct.

15. I did not take any steps to document what Warden Rosenberger said to me during our April 4 meeting: I did not tape our meeting, did not invite another employee to attend the meeting as a witness, and did not take notes of what Warden Rosenberger said to me.

16. During my April 4 meeting with Warden Rosenberger, I noticed that he seemed to become quite nervous when I asked him about the March 27 injured deer call. However, at the time, I did not this interpret (sic) behavior as evidence that Rosenberger had engaged in misconduct. From my law enforcement experience I know that while nervousness can be an indicator of untruthfulness or guilt, it can also be caused by many other things unrelated to misconduct.

17. Less than a month earlier, I had changed from being Warden Rosenberger's friend and peer to his "boss", and thus had anticipated that there might be some initial awkwardness in dealing with Warden Rosenberger in this new role. April 4, 2005 was the first time I had ever questioned Warden Rosenberger (or any other officer) about his timesheets.

18. I was greatly surprised when Rosenberger told me during our April 4 meeting that he had not gone on the injured deer call reflected in Law Incident Report No. 1566 and his timesheet. At the time, Warden Rosenberger was a respected law enforcement officer with more than 18 years' experience, and I did not think he would have done such a thing.

19. By the end of that meeting, I had still not fully processed what Warden Rosenberger had told me about the March 27 injured deer call-out. Warden Rosenberger was a friend as well as a colleague, and I told him that I would keep his disclosure between the two of us. However, after the meeting ended, and the news began to sink in further, I realized that I had a professional obligation to notify my supervisor, Major David Lecours, and seek guidance on how to proceed.

20. After the April 4 meeting, I reported Warden Rosenberger's apparent nervousness to others because, in retrospect, it seemed that his anxiety was caused by what he knew about the March 27 call-out, and not any discomfort in having a longtime friend and peer questioning him about his work.
(Exhibit 1 in Support of Employer's Evidence in Opposition to Grievant's Motion to Exclude Evidence)

Article 14, Section 7, of the Contract provides in pertinent part:

> 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 . . . 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. . .

Discussion

Grievant contends that the Employer violated its affirmative duty to notify Grievant of his right to VSEA representation on April 4, 2005, pursuant to Article 14, Section 7, of the Contract. Grievant contends that, even though Lieutenant Lutz suspected during the April 4 meeting with Grievant that Grievant had improperly claimed overtime on his timesheet and understood that such conduct could result in discipline, Lutz inappropriately failed to advise Grievant of his right to have a VSEA representative present during questioning. Instead, Grievant maintains that Lutz continued to probe Grievant about the details of the call for which he had claimed overtime. Grievant asserts that it was Grievant's responses to Lutz's questions that prompted the Employer to open a more in-depth investigation, resulting in additional charges against him, and ultimately leading to Grievant's dismissal.

Grievant contends that Lutz's questioning of him on April 4 went beyond the "initial inquiry" permitted by Article 14, Section 7, of the Contract. Instead, Grievant asserts that it was a full-blown unlawful interrogation. Grievant contends that facts discovered by the Employer after the meeting constitute "fruit of the poisonous tree", and must be excluded as evidence in support of the discipline imposed on him. Grievant reasons that because the information obtained by the Employer which resulted in discipline stems directly from its unlawful interrogation of him on April 4, and the

Employer's subsequent investigation was prompted by Grievant's responses to questions on that date, then the Employer cannot rely on the evidence to support the dismissal.

The Employer contends that the Board should not exclude any statements Grievant made to Lieutenant Lutz during their April 4 meeting. The Employer asserts that Lutz did not have a duty to notify Grievant on April 4 that he had a right to VSEA representation because Lutz did not know, or have reason to believe, that discipline was a "likely possibility" pursuant to Article 14, Section 7, of the Contract. The Employer contends that the use of the term "likely possibility" during an "informal initial inquiry" in Section 7 means that a supervisor conducting an informal initial inquiry must know, or have reason to believe, that discipline is probable, and not just a mere possibility.

The Employer further contends that, contrary to Grievant's position, the Board should not exclude from evidence the entire personnel investigation conducted by Lieutenant Denton. This should be the conclusion, the Employer first asserts, because Lieutenant Lutz did not violate the Contract during the April 4 meeting, and thus the personnel investigation is admissible evidence. Even if Lutz did violate the Contract, the Employer contends that evidence gathered during the Denton investigation should be admissible because it was inevitable that the Employer would learn of Grievant's misconduct. The Employer relies on two exceptions to the "fruit of the poisonous tree" doctrine, the independent source rule and the inevitable discovery doctrine, to support this contention.

We first consider whether we should prohibit the Employer from introducing evidence obtained in the April 4 meeting between Grievant and Lutz. When an employer has violated Article 14, Section 7, by improperly failing to inform an employee of a right

to VSEA representation, the Board has ruled that the employer may not rely on any harmful statements made by the employee at a meeting as evidence to support disciplinary action. Grievance of Dustin, 9 VLRB 296, 302 (1986). The Board has reasoned that the employer should not benefit, and the employee and VSEA conversely should not be harmed, by the fruit of a contractually-prohibited interview. Id.

In determining whether Lutz violated Article 14, Section 7, of the Contract during the April 4 meeting by not informing Grievant that he had a right to VSEA representation, we need to decide between the narrow interpretation of that right advanced by the Employer or the broader interpretation argued by Grievant. The Employer takes the position that our inquiry in this case essentially should be limited to the sentence in Article 7 that states: "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". Grievant contends that for the Board to accept the Employer's argument would result in the sentence cited by the Employer improperly swallowing the overriding standard set forth elsewhere in Section 7, which provides: "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 . . . 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."

We concur with Grievant that we must examine Section 7 in its entirety to decide this matter. A contract must be construed, if possible, so as to give effect to every part,

and from the parts to form a harmonious whole. In re Grievance of VSEA on Behalf of "Phase Down" Employees, 139 Vt. 63, 65 (1980). The contract provisions must be viewed in their entirety and read together. In re Stacey, 138 Vt. 68, 72 (1980). In construing a contract, the Board can "consider the practical construction placed upon an instrument by the parties." In re Cronan, 151 Vt. 576, 579 (1989). In addition, based on its evaluation of the contract language, the Board can look at the "situation and motive of the parties," and the result "contemplated by the parties when they executed the . . . agreement." In re Gorruso, 150 Vt. 139, at 143, 145 (1988).

In applying these contract construction standards to this case, it is instructive to examine earlier decisions interpreting Article 14, Section 7, to seek to ascertain the intent of the parties in agreeing to the provisions of Section 7. In Grievance of VSEA, 27 VLRB 1, 18-19 (2005), the Board stated:

> Article 14, Section 7, of the Contract provides that "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, . . . 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." This language is essentially identical to the U.S. Supreme Court's holding in the *Weingarten* decision except that it requires management to notify the employee of the right to presence of a union representative, whereas *Weingarten* requires the employee to request such presence. The parties agree that *Weingarten* and its progeny provide guidance in interpreting the meaning of Article 14, Section 7, of the Contract. We concur, and thus examine the holdings of *Weingarten*, and subsequent National Labor Relations Board and federal appeals court decisions elaborating on *Weingarten* rights, to provide guidance which is generally applicable in this case.
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> The *Weingarten* Court stated as follows with respect to the presence of a union representative at an investigative interview and the representative's role at the investigative interview:
>
> > (T)he Act is designed to eliminate the "inequality of bargaining power between employees . . . and employers." *(citation omitted)* Requiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the Act was designed to eliminate, and bars recourse to the safeguards the Act provided "to redress the

> perceived imbalance of economic power between labor and management." *(citation omitted)* Viewed in this light, the Board's recognition that Section 7 guarantees an employee's right to the presence of a union representative at an investigatory interview in which the risk of discipline reasonably inheres is within the protective ambit of the section " 'read in the light of the mischief to be corrected and the end to be attained.'" *(citation omitted)*
>
> The Board's construction also gives recognition to the right when it is most useful to both employee and employer. A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview. Certainly his presence need not transform the interview into an adversary contest. Respondent suggests nonetheless that union representation at this stage is unnecessary because a decision as to employee culpability or disciplinary action can be corrected after the decision to impose discipline has become final. In other words, respondent would defer representation until the filing of a formal grievance challenging the employer's determination of guilt after the employee has been discharged or otherwise disciplined. At that point, however, it becomes increasingly difficult for the employee to vindicate himself, and the value of representation is correspondingly diminished. The employer may then be more concerned with justifying his actions than re-examining them. 420 U.S. at 262-264.

In another case, the Board has indicated that if an investigator has information that would reasonably lead the investigator to suspect that the employee being interviewed had engaged in misconduct, then the employee has the right to VSEA representation during the investigative interview pursuant to Article 14, Section 7, of the Contract. Grievance of VSEA, 27 VLRB 65, 72 (2005). The Board further stated that "if it becomes reasonable for an investigator to believe that an employee was beginning to provide information that may result in such employee being disciplined . . . the investigator would have an affirmative duty pursuant to Article 14, Section 7, of the Contract to notify the employee of the right to presence of a VSEA representative." Id. at 73.

These cases indicate that the opportunity for VSEA representation is required when the "risk of discipline reasonably inheres" or, put another way, when it is reasonable to suspect that the employee being interviewed has engaged in misconduct. Nonetheless, the Employer argues that the standards set forth in these cases do not govern because they did not involve an "initial informal inquiry" by a supervisor like this case. Instead, the Employer contends that for VSEA representation rights to apply in this case Lutz must have known, or have reason to believe, that discipline was probable, and not just a mere possibility.

We conclude that the construction of Section 7 urged by the Employer restricts employee rights to VSEA representation to an extent not intended by the parties. The argument advanced by the Employer would result in employees having less rights than resulting from the Weingarten decision of the United States Supreme Court. This is because VSEA representation rights would not apply in some cases until discipline was probable, rather than the less strict standard under Weingarten of when the "risk of discipline reasonably inheres". If the parties intended such a result, such intent would have to be manifested by different language than they did negotiate in Section 7.

Instead, a more reasonable interpretation of Section 7 is that employees are to be notified of the right to request the presence of a VSEA representative whenever a supervisor, manager or investigator of the employer is requiring an employee to give oral or written statements on an issue involving the employee, and it is reasonable for the supervisor, manager or investigator to suspect that the statements may lead to discipline against the employee. The "informal initial inquiry" sentence of Section 7 is best read as not providing an exception to this standard. Rather, its application is limited to situations

when a supervisor begins an inquiry of an employee without knowledge or reason to believe that discipline of the employee is a likely possibility. This applies to numerous interactions that occur between supervisors and subordinates on a regular basis in the workplace. It is apparent that the parties sought to ensure that this type of necessary communication was not unduly hindered by a concern that VSEA representation rights may apply. However, if during this inquiry it becomes reasonable for the supervisor to suspect that statements by the employee may lead to discipline against the employee, the supervisor needs to suspend the inquiry until the employee is provided with the opportunity for VSEA representation.

Our conclusion that Article 14, Section 7, should not be interpreted to provide more limited rights to an employee being questioned by a supervisor rather than an investigator is consistent with the Vermont Supreme Court decision in Grievance of VSEA and Dargie, ___ Vt. ___ (2005 VT 129, Sup. Ct. Docket No. 2004-141, Dec. 23, 2005). There, the Court stated that "Article 14, Section 7 gives covered employees more, not less, protection than Weingarten alone affords." Id., slip op. at 7. If we were to accept the Employer's argument that the "informal initial inquiry" language of Article 14, Section 7, trumps the general standard articulated in Section 7, we would be holding in essence that employees have less protection than Weingarten. Such a result is not consistent with a fair interpretation of Section 7 in its entirety.

Our interpretation of Section 7 results in a conclusion that Grievant's right to an opportunity for VSEA representation was violated during the April 4 meeting with Lieutenant Lutz. Such rights did not adhere at the outset of the meeting. At that point, it was reasonable for Lutz not to suspect that Grievant may have committed misconduct

with respect to seeking call-out compensation for the March 27 incident. Instead, it was reasonable for him to believe that problems with the call-out claim were attributable to dispatcher error.

However, as the meeting developed, it reached a point where it was reasonable for Lutz to suspect that Grievant may have engaged in misconduct in seeking call-out compensation. That point was reached at the very latest when Lutz asked Grievant; as he stated in his April 19, 2005, memorandum and in his deposition; if he had responded at all to an injured deer on the date and time, and gone on the call-out, as he claimed in his time report.

Prior to asking Grievant this question, Lutz had observed that Grievant was nervous and emotional when Lutz was discussing the call-out with him. Lutz suspected such nervousness and showing of emotion possibly could result from guilt or untruthfulness, although he also thought that it could be caused by other things unrelated to misconduct. Also, prior to asking Grievant this question, Lutz had observed that Grievant had changed the subject when Lutz questioned him about the March 27 call-out. Prior to asking the question, Lutz also knew that Grievant had not been able to offer a satisfactory explanation for claiming call-out compensation. Given these developments preceding Lutz asking Grievant if he gone on the call-out at all, it was reasonable for Lutz to suspect that Grievant had committed misconduct in claiming call-out compensation for March 27.

It was not only reasonable for Lutz to have such suspicions, he indicated in his deposition that he did wonder whether Grievant actually had gone out on the call at the time he asked the question. He also indicated in his deposition that he suspected that it

was possible that Grievant had not gone out on the call. He further stated in the deposition that he expected that Grievant could be disciplined if he claimed call-out pay and had not gone out on the call.

Since it was reasonable for Lutz to suspect that Grievant's response to Lutz's question may lead to discipline against Grievant, Lutz should have provided Grievant with the opportunity for VSEA representation prior to asking him the question. His failure to do so means that the Employer may not rely on evidence of any harmful statements made by Grievant at the April 4 meeting after this question was asked to support disciplinary action taken against Grievant. The employer should not benefit, and the employee and VSEA conversely should not be harmed, by the fruit of a contractually-prohibited interview. This would be the result if we allowed the Employer to rely on the wrongfully procured evidence.

This does not end our inquiry. Where illegally procured statements form the sole basis for disciplinary action, the Board has rescinded the disciplinary action imposed. Dustin, supra. However, evidence relied on by the employer gathered outside of, and independent from, admissions made by an employee during a contractually-prohibited interview is properly before the Board in determining the validity of disciplinary action. Grievance of VSEA and Tatro, 10 VLRB 78, 86-87 (1987). Here, the Employer is not basing the dismissal of Grievant solely on admissions made by Grievant during the April 4 meeting. The Employer also is relying on evidence obtained outside the April 4 meeting as part of Lieutenant Denton's investigation.

Grievant contends that the Employer should not be able to rely on any of this other evidence. Grievant reasons that because the information obtained by the Employer

to discipline Grievant stems directly from its contractually-prohibited interrogation of him on April 4, and the Employer's subsequent investigation was prompted by Grievant's responses to questions on that date, then the Employer cannot rely on that evidence to support the dismissal. Thus, we need to consider whether the Employer should be prohibited from relying on any of this evidence.

Part of the evidence gathered by Lieutenant Denton in the investigation resulted from subsequent interviews that he conducted of Grievant. Evidence gathered during these interviews involving admissions made by Grievant concerning the March 27 incident cannot be considered independent of similar admissions made by Grievant during the April 4 meeting. This evidence is fruit of the contractually-prohibited interview.

Nonetheless, the Employer contends that the Board should not exclude such evidence under the "inevitable discovery doctrine" exception to the "fruit of the poisonous tree" rule. The inevitable discovery doctrine was recognized in a criminal context by the U.S. Supreme Court in Nix v. Williams, 467 U.S. 431 (1984). Therein, the Court held that "(i)f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means – here the volunteers' search – then the deterrence rationale has so little basis that the evidence should be received." Id. at 444.

The inevitable discovery doctrine does not aid the Employer with respect to obtaining evidence from Grievant's post-April 4 meeting statements. The "legal means" referenced in the Nix case involved obtaining evidence other than from the criminal suspect – i.e., from volunteers' search for the body of a murder victim. Similarly here, for

the inevitable discovery doctrine to apply, the legal means would have to involve obtaining evidence other than from statements of Grievant.

If we were to allow the Employer to rely on evidence of admissions made by Grievant concerning the March 27 incident subsequent to the April 4 meeting, we would be eviscerating the significance of his rights to obtain VSEA representation prior to being questioned about suspected misconduct. Thus, we would be permitting the Employer to escape the effects of its failings even though the failings significantly harmed Grievant through wrongfully procured admissions. Such a result would too readily discount the taint of the April 4 meeting. It would be inappropriate to allow the employer to act contrary to its notification obligation under Article 14, Section 7, thereby obtain incriminating information from an unrepresented employee, and then with knowledge of that incriminating information procure the same information from the employee at a later time when a VSEA representative is present. Like the harmful statements made by Grievant in the April 4 meeting, the Employer should not benefit, and Grievant and VSEA should not be harmed, by the fruit of a contractually-prohibited interview.

This leaves as the remaining consideration whether the Employer may rely on evidence obtained as part of Lieutenant Denton's investigation separate and apart from the April 4 meeting, other than evidence of admissions made by Grievant concerning the March 27 incident. We reserve judgment on this question. The full development of facts afforded by an evidentiary hearing on the merits is required before we can adequately address this issue. At the hearing, the parties should be prepared to address whether such evidence is independent from admissions made by Grievant during the contractually-

prohibited interview. The parties also should be prepared to address whether the inevitable discovery doctrine applies to any of the evidence.

Based on the foregoing reasons, it is ordered:

1. Grievant's motion to exclude evidence is granted to the extent that the Employer may not rely on evidence of any harmful statements made by Grievant at the April 4 meeting after Lieutenant Lutz asked him if he had responded at all to an injured deer on the date and time and gone on the call-out as Grievant claimed in his time report, or evidence of admissions made by Grievant concerning the March 27 incident subsequent to the April 4 meeting, to support disciplinary action taken against Grievant; and

2. Judgment is reserved on the motion in all other respects.

Dated this 30th day of March, 2006, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

_____
Edward R. Zuccaro, Chairperson

_____
Carroll P. Comstock

_____
Richard W. Park