VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 14-55
CASSANDRA EDSON	)	

MEMORANDUM AND ORDER

The issue before the Labor Relations Board in this matter is whether to grant the motion to dismiss this grievance filed by the State of Vermont Department of Labor ("Employer").

On July 11, 2014, Cassandra Edson ("Grievant"), Workers' Compensation Investigator with the Employer, filed a grievance alleging that the Employer violated Articles 5 and 15 of the collective bargaining agreement between the Vermont State Employees' Association ("VSEA") and the State of Vermont for the Non-Management Unit effective July 1, 2012, to June 30, 2014 ("Contract") by making negative comments on the overall satisfactory performance evaluation she received on November 13, 2013. Grievant contended that the negative comments were in retaliation for complaints Grievant made to her supervisor's supervisor on December 12, 2012, and on other occasions about her supervisor. Grievant requested the following remedial action: "1. All comments dealing with the above listed issues found in the supervisor comments section of the performance evaluation be removed. 2. That the Vermont Department of Labor cease and desist from any acts of retaliation or discrimination against Grievant."

The Employer filed a motion to dismiss this grievance on April 13, 2015, on the grounds that the grievance is moot because the Employer has removed all comments from Grievant's performance evaluation and there no longer exists an actual controversy for the Labor Relations Board to decide. On April 28, 2015, Grievant filed a response opposing the Employer's motion to dismiss on the basis that the grievance is not moot.

The factual background pertinent to deciding this motion is as follows: On November 13, 2013, Grievant received a performance evaluation covering the period September 29, 2012, to September 29, 2013, in which her overall performance was rated as "satisfactory". Included within the evaluation were statements in the section entitled "Supervisor Comments" which Grievant considered to be negative comments. The Employer did not provide Grievant with a performance evaluation for the September 29, 2013 to September 29, 2014, period. On March 4, 2015, the Employer removed the "Supervisor Comments" section from the performance evaluation for the September 29, 2012, to September 29, 2013, period, resulting in Grievant receiving an overall performance rating of "satisfactory" with no supervisor comments. This amended evaluation is a one page document with the original issuance date of November 13, 2013.

The collective bargaining agreement provides in pertinent part as follows with respect to these allegations:

> . . .
> Article 5, No Discrimination or Harassment; and Affirmative Action
> Section 1: "In order to achieve work relationships among employees, supervisors and managers at every level which are free of any form of discrimination, neither party shall discriminate against, intimidate, nor harass any employee because of . . . filing a complaint or grievance, or any other factor for which discrimination is prohibited by law."
> . . .
> Article 12, Performance Evaluation
> . . . Section 2. . . "There shall be four (4) grades on an annual or special evaluation: Unsatisfactory ("U"), Satisfactory ("S"), Excellent ("E") and Outstanding ("O"). An overall performance evaluation grade of "S" or better shall not be grievable. Adverse comments shall be grievable up through but not beyond Step II. An Unsatisfactory overall grade is fully grievable. The VLRB shall not have the authority to change such grade but may remand the rating to the employer for reconsideration consistent with the VLRB ruling on the merits. . .
> . . .
> Section 8. . . "If a performance evaluation contains allegedly adverse comments which have not been incorporated in the next annual evaluation or as a special evaluation, issued

within one year following its issuance, the comments section of the evaluation shall be expunged at the request of the employee.
. . .
Article 15, Grievance Procedure
. . .
Section 6: "The parties agree, subject to applicable law, that every employee may freely institute complaints and/or grievances without threats, reprisal, or harassment by the employer."
. . .

We first discuss as a threshold matter the ability of Grievant to file a grievance in this matter even though she received a satisfactory performance evaluation, and Article 12 of the Contract provides that adverse comments shall be grievable up to but not beyond Step II of the grievance procedure. The Labor Relations Board is Step IV of the grievance procedure. However, the Article 12 language has to be considered along with the non-discrimination provisions of Articles 5 and 15 which Grievant alleges has been violated in this matter.

In construing the Contract as a whole, we conclude that the VSEA and the State did not intend to prohibit employees from filing a grievance alleging that negative comments in a performance evaluation resulted from retaliation for filing complaints against supervisors. Any other conclusion would frustrate the express statements of the parties that "neither party shall discriminate against, intimidate, nor harass any employee because of . . . filing a complaint or grievance" (Article 5, Section 1), and "(t)he parties agree, subject to applicable law, that every employee may freely institute complaints and/or grievances without threats, reprisal, or harassment by the employer" (Article 15, Section 6).

The central issue to be decided in considering the Employer's motion to dismiss this grievance is whether an actual controversy remains between the Employer and Grievant. The jurisdiction of the Board in grievance proceedings is limited by the requirement that there be an actual controversy between the parties. In re Friel, 141 Vt. 505, 506 (1982). To satisfy the actual

controversy requirement, there must be an injury in fact to a protected legal interest or the threat of an injury in fact. Id. Grievance of Boocock, 150 Vt. 422, 425 (1988). Where future harm is at issue, the existence of an actual controversy "turns on whether the plaintiff is suffering the threat of actual injury to a protected legal interest, or is merely speculating about the impact of some generalized grievance." Id. at 424.

When the employer, prior to the Board hearing on the case, has provided as a remedy the most that the Board could award as a remedy, the Board has determined that the "actual controversy" requirement has not been met, and has dismissed the grievance, even though the employer had not admitted to any contract violations. Grievance of Vermont State Colleges Faculty Federation, AFT, UPV Local 3180, AFL-CIO, 28 VLRB 220, 235-236 (2006). Grievances of Cray, 25 VLRB 194, 216-217 (2002). Grievance of Rennie, 16 VLRB 1, 5-6 (1993). Grievance of Ray, 14 VLRB 67, 78-79 ((1991). Grievance of Sherbrook, 13 VLRB 359, 362-63 (1990). The Board reasoned that, to provide an adequate basis to assert jurisdiction, a grievance must be more that an argument over contract interpretation; it also must be a request for action that the Board has the authority to order. Id.

The Employer contends that this case is moot because there no longer is an actual controversy between the parties due to the removal of the allegedly adverse comments contested by Grievant. The Employer asserts that it has removed any threat of actual injury to Grievant's legal interests. The Employer also maintains that because the "supervisor comments" are no longer contained within the September 29, 2012 – September 29, 2013 performance evaluation, and because the Employer did not issue a performance evaluation for the September 29, 2013 – September 29, 2014 period, there is no adverse consequence to Grievant or the potential of a future adverse consequence.

Grievant contends that this grievance is not moot because the Employer's decision to remove the entire comments section from the evaluation does not grant the relief Grievant seeks and leaves Grievant in a worse position. Grievant asserts that her personnel record with the removal of all supervisor comments, and the use of the original date on the evaluation rather than the date the evaluation was amended, is likely to result in negative collateral consequences to her. She asserts that, in future employment applications, other state managers viewing the evaluation will only be able to conclude that the performance evaluation contained adverse comments, and that all comments were expunged at Grievant's request under Article 12, Section 8, and not through a grievance proceeding. Grievant contends that this leaves her with the stigma resulting from the retaliatory, adverse comments. She maintains that, if the Employer prevails on its motion, then it will be clear that the State can retaliate against state employees without repercussion by including adverse comments in performance evaluations so long as it unilaterally removes all comments before any hearing.

It is true, as Grievant asserts, that the Employer has not granted the relief sought by Grievant by removing the "supervisor comments" section of the evaluation. Grievant requested removal of the negative comments on her evaluation, not all supervisor comments. Grievant also requested as a remedy that the Employer cease and desist from retaliation against her. The Employer has provided as a remedy less than the Board could award as a remedy if this grievance proceeded to hearing and decision by the Board.

However, this does not necessarily mean that an actual controversy remains between the parties. There must be an injury in fact to a protected legal interest or the threat of an injury in fact to satisfy the actual controversy requirement. There is no injury in fact to a protected legal interest to Grievant since the allegedly adverse comments have been removed from her

performance evaluation and have played no part in any subsequent performance assessment of her.

We also do not conclude that there is a threat to Grievant of an actual injury to a protected legal interest. Grievance of Boocock, 150 Vt. 422, 425 (1988). Instead, Grievant's assertion as to the negative way her amended evaluation would be viewed by potential hiring managers in state government constitutes "speculating about the impact of some generalized grievance." Boocock, 150 Vt. at 425. Grievance of Moriarty, 156 Vt. 160, 164. It is not at all clear how the amended evaluation providing an overall "satisfactory" rating with no supervisor comments would be viewed in the future by those possibly interested in hiring Grievant. It is speculation to so predict. In sum, we conclude that the removal of the "supervisor comments" from the performance evaluation has resulted in no actual controversy remaining between the parties.

Our conclusion should not be construed as diminishing in any respect the importance of the rights of Grievant or any other employee to engage in protected activities without being discriminated against for the exercise of these rights. We simply have determined under all the circumstances that there is no actual injury in fact to a protected legal interest or the threat of an injury in fact to Grievant to satisfy the actual controversy requirement to conduct a hearing and rule on the merits of this grievance. We will carefully consider any future claims by Grievant or other employees alleging violation of protected rights.

Based on the foregoing reasons, it is ordered that the motion of the State of Vermont Department of Labor to dismiss this grievance is granted and this matter is dismissed.[1]

Dated this 8th day of June, 2015, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park
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Richard W. Park

/s/ James C.Kiehle
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James C. Kiehle

/s/ Alan Willard
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Alan Willard

/s/ Edward W. Clark, Jr.
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Edward W. Clark, Jr.

/s/ Robert Greemore
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Robert Greemore

[1] Labor Relations Board Chairperson Gary Karnedy has not participated in this decision.