VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 16-02
CHRISTOPHER SCHWANER	)	

MEMORANDUM AND ORDER

The issue before the Labor Relations Board in this grievance is whether to grant the motion to quash subpoenas filed by the Vermont State Colleges ("Employer"). In his grievance, Christopher Schwaner ("Grievant") is seeking to overturn the November 12, 2015, decision of Castleton University President David Wolk concluding that Grievant had engaged in sexual harassment of a former student and ordering that Grievant be banned from Castleton University property and students. Grievant alleges in the grievance that the Colleges violated specific provisions of Colleges Policy 311, Policy 311A and the collective bargaining agreement by its actions. Grievant requests as a remedy reimbursement for lost pay including regularly performed overloads, internships, independent studies and open houses.

On July 29, 2016, the Employer filed a motion to quash *Subpoenas Duces Tecum* served on Castleton University and the former student which sought production of:

> Any and all mental health records including but not limited to diagnostic and treatment records, pharmaceutical records, diaries or notes, files, discs, e-mails, letters, reports, tapes or memorializations of any type, whatsoever generated by any provider or by you, in your possession, custody or control with a period beginning August 2013 to date concerning (the former student).

Grievant filed an Objection to the Motion to Quash on August 19, 2016. The Employer filed a Reply in Support of Employer's Motion to Quash Subpoenas on August 29, 2016. Oral argument on the motions was held on October 21, 2016, in the Board hearing room in Montpelier before Board Members Gary Karnedy, Chairperson, and Edward Clark, Jr., present in person,

and Robert Greemore, participating by telephone. Attorney Sophie Zdatny appeared in person on behalf of the Employer. Attorney Lisa Chalidze appeared by telephone on behalf of Grievant.

The Employer moves to quash the subpoenas pursuant to V.R.C.P. 45(c)(3)(A) which provides that "(o)n timely motion, the court for which a subpoena was issued shall quash or modify the subpoena if it . . . requires disclosure of privileged or other protected matter and no exception or waiver applies." The Employer contends that the mental health records at issue are protected from disclosure by the patient's privilege established by 12 V.S.A. §1612(a) and Vermont Rules of Evidence ("VRE").

12 V.S.A. §1612(a) provides:

> (a) **Confidential information privileged.** Unless the patient waives the privilege or unless the privilege is waived by an express provision of law, a person authorized to practice medicine, chiropractic, or dentistry, a registered professional or licensed practical nurse, or a mental health professional as defined in 18 V.S.A.§7101(13) shall not be allowed to disclose any information acquired in attending a patient in a professional capacity, including joint or group counseling sessions, and which was necessary to enable the provider to act in that capacity.

VRE Rule 503, Patient's Privilege, provides in pertinent part:

> . . .
> (b) **General rule of privilege.** A patient has a privilege to refuse to disclose and to prevent any other person, including a person present to further the interest of the patient in the consultation, examination or interview, from disclosing confidential communications made for the purpose of diagnosis or treatment of his physical, mental, dental, or emotional condition, including alcohol or drug addiction, among himself, his physician, dentist, nurse, or mental health professional, and persons who are participating in diagnosis or treatment under the direction of a physician, dentist, nurse, or mental health professional, including members of the patient's family.
> (c) **Who may claim the privilege.** The privilege may be claimed by the patient, his guardian or conservator, or the personal representative of a deceased patient. The person who was the physician, dentist, nurse, or mental health professional at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the patient.
> (d) **Exceptions.**
> . . .
> (3) *Condition an element of claim or defense.* There is no privilege under this rule as to a communication relevant to an issue of the physical, mental, or emotional

> condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense . . .

The Labor Relations Board has recognized the patient's privilege in a prior grievance. In Grievance of Towle, 16 VLRB 196, 199 (1993), the Board relied on VRE Rule 503 for guidance, and held that a patient has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications made for the purpose of diagnosis or treatment of the patient's physical, mental, dental, or emotional condition. The confidential communications protected are among the patient, physician, dentist, nurse or mental health professional, and persons who are participating in diagnosis or treatment under the direction of the physician, etc., including members of the patient's family. The privilege is claimed by the patient or on behalf of the patient. Id. The patient waives the privilege by voluntarily disclosing or consenting to disclosure of any significant part of the privileged matter. Id.

The Employer asserts that the former student has a patient's privilege, that she has not waived it, and that an exception to the patient's privilege does not apply. The Employer contends that Grievant is impermissibly seeking to compel the disclosure of a third-party's mental health records. Such disclosure should occur, the Employer maintains, only if there exists a compelling justification, and such justification is absent here. The Employer asserts that forcing student victims of sexual harassment to publicly release their mental health records to their harasser will have a chilling effect on the willingness of victims of sexual harassment to step forward and report such behavior. Further, the Employer contends that allowing inquiry into the former student's medical condition will create an undue burden for the Employer and its member institutions in the enforcement of their legally required policies on sexual harassment and sexual misconduct.

Grievant contends that the Employer does not have standing on the question of the patient's privilege; that only the former student can assert such privilege. Grievant maintains there is evidence of the former student's waiver of the privilege because she has never claimed the privilege after being served with the subpoena, and has been silent. Grievant asserts that there is a compelling justification to obtain the former student's mental health records because the entire action taken against Grievant rests on the former student's credibility, and that statements of the former students in the medical records and her pattern of behavior reflected there may support Grievant' s position that allegations of sexual harassment made by the former student are false.

It is true, as Grievant contends, that the Employer may not assert the patient's privilege on behalf of the former student. The privilege may only be claimed by the former student, her guardian or conservator. However, this does not result in the conclusion that the Employer lacks standing to move to quash the subpoena seeking disclosure of the former student's medical records. The Employer, as a party to the case, may appropriately move to quash subpoenas pursuant to V.R.C.P. 45(c)(3)(A) if they require disclosure of privileged or other protected matter and no exception or waiver applies. Appeal of Danforth, 23 VLRB 51 (2000). Appeal of Danforth, 23 VLRB 288 (2000). A party to a case has a legitimate interest in ensuring that privileged matters are not inappropriately disclosed during the discovery process or the merits hearing.

The mental health records of the former student are expressly privileged matters pursuant to 12 V.S.A. §1612(a), VRE 503 and Board precedent. In determining whether the former student has waived the patient's privilege, Grievant must demonstrate that she intentionally relinquished her entitlement to the privilege. Grievance of Palmer, 25 VLRB 81, 90-91 (2002).

Grievant maintains there is evidence of the former student's waiver of the privilege because she has never claimed the privilege after being served with the subpoena, and has been silent. We disagree. The waiver must be an affirmative relinquishment of entitlement to the privilege, and the former student's silence is insufficient to find such a waiver.

There is an exception to the patient's privilege if a patient is relying on his or her physical, mental or emotional condition as an element of his or her claim or defense. VRE 503(d)(3). This exception does not apply here. The former student is not a party to this case, and thus is not relying on her physical, mental or emotional condition as a claim or defense in this action.

Absent a waiver or other exception, we would grant the motion to quash the subpoenas seeking disclosure of the former student's medical records mental health records unless Grievant can provide the "most compelling justification" for access to the privileged information. In State v. Percy, involving an appeal of a criminal conviction for sexual assault, the Vermont Supreme Court addressed claims by the defendant that he was entitled to a court order that his psychological experts be allowed to interview the victim, and that mental health information be disclosed and produced from mental health professionals who had interviewed and treated the victim. The Court stated in response to these claims of the defendant seeking an exception to the patient's privilege:

> While we do not preclude the possibility that a case will arise where due process will require some access to privileged information about the victim not held by the State, this is clearly not such a case. The purpose of the privilege is to encourage patients to be candid about information needed for medical or mental health diagnosis or treatment. Often, that candor means disclosure of sensitive and embarrassing information. We are particularly solicitous of the need of a victim of a sexual assault to seek and receive mental health counseling without fear that her statements will end up in the public record in order to afford defendant as effective cross-examination as possible. We are unwilling to require the victim to forego counseling or risk disclosure absent the most compelling justification – none has been asserted here. 149 Vt. at 635.

We conclude that the "most compelling justification" standard applied in a criminal case involving sexual assault also is applicable in this grievance involving alleged sexual harassment. It is inappropriate to require the alleged victim of sexual harassment to forego mental health treatment or risk disclosure absent the most compelling justification.

Grievant asserts that there is a compelling justification to obtain the former student's mental health records because the entire action taken against Grievant rests on the former student's credibility, and that statements of the former students in the medical records and her pattern of behavior reflected there may support Grievant' s position that allegations of sexual harassment made by the former student are false. We are not persuaded that this constitutes the most compelling justification for disclosure of the mental health records. Grievant's stated reasons for the information concerning the credibility of the former student could be given for every alleged victim who seeks mental health treatment about the alleged offense and its mental health effects. State v. Percy, 149 Vt. at 632, 636. Grievant has various other avenues available to him that are sufficient to seek to impugn the former student's credibility without the serious invasion of the former student's privacy that would result from disclosure of mental health records concerning her.

Thus, we grant the Employer's motion to quash the *Subpoenas Duces Tecum* served on Castleton University and the former student. The subpoenas require disclosure of privileged matters and no exception or waiver applies.[1]

[1] We note that the Employer has represented that Castleton University does not have any records responsive to Grievant's subpoena. If Castleton University were to have any mental health records relating to the former student in its possession, custody or control, we conclude that it would not be required to disclose such information absent a waiver from the former student.

In addition to the Motion to Quash filed by the Employer, the Employer alternatively – in the event the motion is not granted in its entirety - moves for a protective order providing that the requested discovery not be had or that it be limited in scope. Given our decision granting the Employer's motion in its entirety, it is unnecessary to address this issue.

Based on the foregoing reasons, it is ordered that the motion of the Vermont State Colleges to quash the *Subpoenas Duces Tecum* served on Castleton University and the former student, seeking production of mental health records concerning the former student, is granted.

Dated this 31st day of October, 2016, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Gary F. Karnedy

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Gary F. Karnedy, Chairperson

/s/ Edward W. Clark, Jr.

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Edward W. Clark, Jr.

/s/ Robert Greemore

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Robert Greemore