VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 17-48
MICHAEL DOHENY	)	

MEMORANDUM AND ORDER

On November 7, 2017, the Vermont State Employees'' Association ("VSEA") filed a grievance on behalf of Michael Doheny, a Department of Corrections employee ("Grievant"), alleging that the State of Vermont ("State") violated a 1994 Stipulated Agreement and Articles 5 and 11 of the collective bargaining agreement between the State and VSEA ("Contract") by retaining the 1994 Stipulated Agreement in Grievant's personnel file. The 1994 Stipulated Agreement provides in part: "That, in consideration of the terms of this agreement, the State agrees to rescind, destroy, and remove from Mr. Doheny's personnel file the two day suspension dated February 17, 1994 on or about July 17, 1994, if no further similar disciplinary action is taken against Mr. Doheny." Grievant asserts that he discovered in 2017 that the State had retained the 1994 Stipulated Agreement in his personnel file, and that the State failed to remove it from his file when asked to do so.

VSEA requested the following remedial action in the grievance: 1) Grievant be made whole; 2) the Stipulated Agreement and all related documents be immediately removed from his official personnel file and destroyed; 3) the Department of Human Resources conduct a comprehensive review of all stipulated agreements and related personnel files where the agreements limit or define what materials may be placed or excluded from specific personnel files; and remove materials from files if they violate the clear intent of stipulated agreements; and 4) the Department of Corrections and the State cease and desist continued violations of stipulated agreements and the Contract.

The State filed a motion to dismiss the grievance on February 2, 2018. Grievant filed an objection to the motion to dismiss on February 12, 2018. The State filed a response to Grievant's objection to the motion to dismiss on February 20, 2018. Grievant filed a reply to the State's response on February 27, 2018.

The State contends that this matter should be dismissed as moot because the 1994 Stipulated Agreement has been removed from Grievant's personnel file. The State filed in support of its motion an affidavit from a human resources administrator stating that on February 1, 2018, she removed and destroyed the 1994 Stipulated Agreement from Grievant's official personnel file, and that no other material related to the Stipulated Agreement is in Grievant's official personnel file. The State maintains that the State has already afforded the most that the Board could award as a remedy based on Grievant's pleading. Accordingly, the State asserts that Grievant has been made whole and there is no remaining actual controversy between the parties for the Board to decide. Also, with respect to Grievant's requested remedial action concerning stipulated agreements involving other employees, the State contends that the Board will be able to review in future appeals any allegations that the State has improperly retained stipulated agreements in as-yet-unspecified grievants' official personnel files.

VSEA responds that the matter is not moot. VSEA asserts that merely removing the document solves nothing if it can be re-inserted as soon as the case is dismissed, or if another record has been inserted in its place. Further, VSEA maintains that the remedial order must go beyond removing the physical document from his file and must ensure that anyone who was improperly informed of the prior discipline does not hold that discipline against Grievant. Moreover, VSEA contends that there may be many other employees who have signed similar agreements that are affected similarly to Grievant, and that the important questions raised in this

grievance will not be answered for a significant number of employees if this grievance is dismissed as moot.

VSEA takes the position in its February 27 reply that it would be a better use of resources for the Board to decide this grievance since it has already reached the Board, but it included in its reply a copy of a grievance now at Step III of the grievance procedure, the step below the Board, which provides in part: “VSEA, on behalf of all employees covered by the Supervisory, Corrections, and Non-Management Unit Collective Bargaining Agreements who have signed stipulation agreements that are retained in their personnel files, does hereby grieve the Department of Human Resources actions in retaining grievance stipulations in employees’ personnel files as records of discipline, in cases where the stipulation provides that records of the settled discipline should be removed. This is a continuing violation.”

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 employee is suffering the threat of actual injury to a protected legal interest or is merely speculating about the impact of some generalized grievance.” Boocock, 150 Vt. at 424. Grievance of Moriarty, 150 Vt. 160, 164 (1991).

When the employer, through the grievance procedure, 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 VSEA (Re: Request for Information), 33

VLRB 435, 447 (2016). 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 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.

In applying these standards here, we conclude that the State has provided as a remedy to Grievant the most that the Board could award as a remedy. VSEA requested the following remedial action with respect to Grievant: that Grievant be made whole, and that the Stipulated Agreement and all related documents be immediately removed from his official personnel file and destroyed. The State has remedied any injury to Grievant by removing and destroying the 1994 Stipulated Agreement from Grievant's official personnel file and verifying that no other material related to the Stipulated Agreement is in Grievant's official personnel file.

We do not find persuasive the assertion by VSEA that merely removing the document solves nothing if it can be re-inserted as soon as the case is dismissed, or if another record is inserted in its place. The result of removing and destroying a document is that it will be given no force and effect. A document that has been destroyed cannot be reinserted into a file. The possible insertion of another record in its place is pure speculation. There is no threat of future harm to Grievant in this regard warranting concluding that an actual controversy exists.

We conclude similarly with VSEA's position that the remedial order needs to go beyond removing the physical document from his file and must ensure that anyone who was improperly informed of the prior discipline does not hold that discipline against Grievant. Once again, the actual controversy requirement has not been met because VSEA is "merely speculating about the

impact of some generalized grievance." It is speculative that anyone who was improperly informed of the prior discipline will hold that discipline against Grievant.

We have considered whether to deny the motion to dismiss this grievance based on VSEA's contention that there may be many other employees who have signed similar agreements that are affected similarly to Grievant, and that the important questions raised in this grievance will not be answered for a significant number of employees if this grievance is dismissed as moot. We concur that this is a significant issue that needs to be resolved. However, we conclude that this grievance is not the appropriate vehicle to decide these questions. VSEA has made no factual allegations in this grievance concerning the existence of similar agreements involving other employees. Instead, the better vehicle to address this issue is the grievance now working its way through the grievance procedure, referenced by VSEA in its February 27 reply, that makes factual allegations concerning the existence of similar agreements involving employees represented by VSEA in the Non-Management, Supervisory and Corrections Units.

Based on the foregoing reasons, it is ordered that the State of Vermont's motion to dismiss this grievance is granted, and the Grievance of Michael Doheny is dismissed.

Dated this 27th day of April 2018, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

Richard W. Park, Chairperson

/s/ Edward W. Clark, Jr.

Edward W. Clark, Jr.

/s/ Karen K. O'Neill

Karen K. O'Neill