

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 80-75
RICHARD FRIEL)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of the Case

This grievance was filed with the Vermont Labor Relations Board on September 22, 1980, by the Vermont State Employees' Association, (hereinafter "VSEA") on behalf of Richard Friel, (hereinafter "Grievant") member of the Supervisory Unit and employee of the State of Vermont Department of Corrections. The grievance has been denied at Steps I, II, and III of the grievance procedure. Grievant alleges that management violated Article 12 and Article 16, Section 7, of the collective bargaining agreement between the parties (hereinafter "Agreement") by inclusion of materials related to grievances brought by him in his official personnel file.

On September 24, 1980, the State filed an answer to the grievance denying the allegations.

A hearing was held at the Board hearing room in Montpelier on December 18, 1980. Board members Kimberly B. Cheney and Robert H. Brown were present. Grievant was represented by Michael R. Zimmerman, counsel for VSEA; Assistant Attorney General Bennett E. Greene represented the State.

Requests for findings of fact and memorandum were filed by Mr. Zimmerman on January 7, 1981. Mr. Greene filed requests for findings of fact, conclusion of law, and order on January 15, 1981.

FINDINGS OF FACT

1. Grievant is, and has been at all times relevant, a permanent status employee of the State of Vermont, Department of Corrections.

2. Grievant began his employment with the State of Vermont, Department of Corrections, on February 28, 1976. He has been continuously employed since then as Coordinator of Treatment Services, a pay scale 15 position. His work location has continuously been the St. Albans Correctional Facility at St. Albans, Vermont. In his position, Grievant directly supervises five employees.

3. On, or shortly before, June 4, 1980, Grievant requested that he be allowed to look through his official personnel file which was maintained at the workplace. The reason for his request was that he had recently applied for another position in the Department of Corrections, but his application and resume had become lost. Grievant thought that perhaps the application and resume had been filed away in his personnel file.

4. During his review of his official personnel file, Grievant discovered a number of papers (see below) relating to past grievances which Grievant had filed.

5. As a result of his discovery of the grievance material in his personnel file, Grievant, on June 4, 1980, delivered a memorandum to then-Superintendent (of the St. Albans Correctional Facility) Richard Hashaw, which provided, in pertinent part, as follows:

"In my personnel file there are numerous documents referring to grievances (sic) that I have filed in the past...I feel that under Article XII and Article XVI, Section 7, of the Contract, that such materials should not be retained in one's personnel file..."

(Grievant's Exhibit #4)

6. On June 12, 1980, Grievant met with Assistant Superintendent Raymond Pilette. At that meeting, Grievant was given a memorandum dated June 12, 1980, from Assistant Superintendent Pilette, wherein Grievant's request (see Finding 5 above) for removal of the grievance materials from his personnel file was denied (Grievant's Exhibit #5).

7. On June 20, 1980, VSEA, on Grievant's behalf, filed a Step II grievance with the Commissioner of the Department of Corrections, wherein it was requested that the grievance materials (among other things) be removed from Grievant's personnel file (Grievant's Exhibit #6).

8. On July 10, 1980, the Commissioner of the Department of Corrections answered Grievant's Step II grievance as follows:

"It is my understanding you wish grievance documents removed from your personnel file. I have learned:
1) All employees at the St. Albans facility have all material related to their employment and employer-employee relationship filed in their personnel files...
I find no violation of Article XII, Section I; (sic) or Article XVI, Section 7, of the Agreement between the State of Vermont and Vermont State Employees (sic) Association, Inc. Therefore, I hereby deny your grievance..."

(Grievant's Exhibit #7)

9. On July 16, 1980, VSEA, on behalf of Grievant, filed a Step III grievance with the Commissioner of the Department of Personnel, wherein it was requested that the grievance materials be removed from Grievant's file (Grievant's Exhibit #8).

10. By letter dated August 21, 1980, the designee of the Commissioner of the Department of Personnel denied the Step III grievance. The letter provided, in pertinent part, as follows:

"I can find no reference in ... Section 1 (of Article XII of the contract) ... that would indicate what type of material should, or should not, be included in an employee's official personnel file. Article XII, Section 3, does reference those items that may be in a personnel file (and thus subject to disclosure or non-disclosure) as 'documents and materials'. This language certainly does not restrict or limit the kinds of documents or materials that may be included in a personnel file.

You have alleged that inclusion of grievance material in a personnel file constitutes a threat, reprisal or harassment by the employer. I find nothing to support your claim that the employer has harassed, threatened or in any way discriminated against you because of the inclusion of grievance material in your personnel file."

(Grievant's Exhibit #9)

11. The pertinent portions of the relevant contractual provisions are as follows:

ARTICLE - VIII

No Discrimination and Affirmative Action

1. There shall be no discrimination against any employee because of race, color, religion, creed, ancestry, sex, age, national origin, handicap, membership or non-membership in the Association or any other factor for which discrimination is prohibited by law.
2. The parties acknowledge the need for positive and aggressive affirmative action to redress the effects of past discrimination, if any, to prevent future discrimination and to ensure equal opportunity in the application of this agreement.

ARTICLE - XII

Employee Personnel Records

1. Except for preemployment documents as may be maintained at the Personnel Department, an employee's official personnel file is that file maintained by an employee's agency, department, or office and shall accompany the employee to his new agency in case of permanent transfer. The employer will publish a list designating the official personnel file within any agency.

2. A copy of any form issued or recognized as a personnel form by the Department of Personnel is to be given, on a one-time basis, to an employee at no cost to the employee, when the form or forms are written out on that employee.

3. Subject to the exceptions below, an employee will be allowed access to his official personnel file during normal working hours. Copies of all documents or materials placed in any official personnel file after July 1, 1979, with the exception of (a) material that is confidential or privileged under law, and (b) supervisors' notes concerning performance which have not yet been merged in a warning, evaluation, or other recognized personnel form, will be provided on a one-time basis to an employee at no cost. Copies of any such old documents or materials not excepted above will be provided upon request to an employee at the going rate for photocopy cost per page.

4. Any material, document, note, or other tangible item which is to be entered or used in any grievance hearing held in accordance with Article XVI of this Agreement or hearing before the Vermont State Labor Relations Board, is to be provided to the employee on a one-time basis, at no cost to him.

5. The employee has the right to authorize his bargaining representative or his attorney in writing to act for him in requesting access to his personnel file and receiving the material he is entitled to have in accordance with the preceding part of this article. The State or its agents are to honor this authorization upon its receipt.

6. Letters of reprimand or warning, supervisors' notes, or written records of relief from duty with pay (including investigative notes) which are more than two years old and have not resulted in official action or further discipline against the employee will be removed from the employee's official personnel file and destroyed.

ARTICLE - XVI

Section 7

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.

12. The material of which Grievant is complaining consists of the following:

(A) A photocopy of a letter, dated August 22, 1979, from the Executive Director of VSEA to the Secretary of Administration concerning the Department of Corrections' change in Grievant's work schedule (Grievant's Exhibit #10, page 1);

(B) A photocopy of a Step IV grievance filed October 26, 1979 by VSEA on behalf of Grievant, wherein the issue was Grievant's entitlement to overtime compensation for attending a grievance meeting (Grievant's Exhibit #10, pages 2 - 11);

(C) A photocopy of a memorandum, dated November 19, 1979, from Barbara Berly, Personnel Administration for the Department of Corrections, to Bennett Evans Greene, Assistant Attorney General, wherein is discussed Grievant's Step IV grievance of October 26, 1979 (Grievant's Exhibit #10, page 12):

(D) A photocopy of the State's answer to Grievant's Step IV grievance of October 26, 1979 (Grievant's Exhibit #10, pages 13 - 15);

(E) Two photocopies of a letter, dated September 27, 1979, from Joseph G. Kecskemethy to Rita Ricketson, wherein Grievant's Step III grievance concerning overtime compensation was denied (Grievant's Exhibit #10, pages 16 - 17 and 18 - 19);

(F) A photocopy of Grievant's Step III grievance concerning overtime compensation (Grievant's Exhibit #10, pages 18 - 19);

(G) A photocopy of a memorandum, dated August 1, 1979, from Kathie Gayer to Superintendent Bashaw, wherein was discussed Grievant's claim for overtime compensation for attendance at a grievance meeting (Grievant's Exhibit #10, page 20).

(H) Two photocopies of a letter, dated September 4, 1979, wherein Grievant's Step II grievance concerning overtime compensation was denied (Grievant's Exhibit #10, pages 21 - 22 and 8 - 9);

(I) A photocopy of an order, dated March 7, 1980, of the Vermont Labor Relations Board, wherein the Board refused to issue a complaint of unfair labor practice concerning a schedule change for Grievant [see 12 (A), above] (Grievant's Exhibit #10, page 23);

(J) A photocopy of Findings, Opinion and Order, dated February 14, 1980, of the Vermont Labor Relations Board, wherein the Board dismissed Grievant's Step IV grievance concerning overtime compensation for attending a grievance meeting (Grievant's Exhibit #10, pages 24 - 29);

(K) A photocopy of a letter, dated July 9, 1979, from Joseph G. Keckskemethy to Grievant, wherein the date of a Step III grievance meeting was discussed (Grievant's Exhibit #10, page 30);

(L) A photocopy of a letter, dated July 10, 1979, from Joseph G. Keckskemethy to Grievant, wherein the date of a Step III grievance meeting was discussed (Grievant's Exhibit #10, page 31);

(M) A photocopy of a letter, dated June 27, 1979, from the Commissioner, Department of Corrections, wherein Grievant's Step II grievance concerning a schedule change was denied (Grievant's Exhibit #10, page 32);

(N) A photocopy of a letter, dated July 27, 1979, from Joseph G. Keckskemethy to Grievant, wherein Grievant's Step III grievance concerning a schedule change was denied (Grievant's Exhibit #10, Page 33);

(O) A photocopy of a memorandum, dated June 12, 1980, from Assistant Superintendent Pilette to Grievant, wherein Grievant's request

that the material herein complained of be removed from his personnel file was denied (Grievant's Exhibit #10, page 34):

(P) A photocopy of a memorandum, dated June 4, 1980 from Grievant to Superintendent Bashaw, wherein Grievant requested that the material herein complained of be removed from his personnel file (Grievant's Exhibit #10, page 35).

13. As a supervisor, Grievant has had occasion to review the official personnel files of the employees he supervises. It is his experience that an employee's official personnel file typically contains an employee's application for employment, personnel action forms (eg., completion of probation), Performance Evaluations, records of discipline imposed, and letters of commendation. He has never, in his experience, seen an employee's official personnel file containing material relating to the employee's past grievances.

14. Grievant has, within the past year, applied for other positions in state government, but was not appointed to any of those other positions. There is no evidence from which we can find that Grievant's failure to be selected for another position was the existence of the complained-of material in his personnel file.

OPINION

There is a single issue before us in this grievance: May materials relating to past grievances brought by an employee be properly maintained in that employee's official personnel file, or does inclusion of these materials in Grievant's personnel file constitute a violation of the contractual right to "institute complaints and/or grievances without

threats, reprisal or harassment by the employer"? (Article XVI, Section 7)

There is no express language in the Agreement stating whether grievance materials should be contained in an employee's personnel file.

Article XII, entitled "Employee Personnel Records" does not define the contents of the file. The Article does mention, by negative implication, items that may be included. Items mentioned are personnel forms, supervisors' notes, personnel evaluations, letters of reprimand or warning, records of relief from duty with pay. There is nothing in the contract to indicate this list is exhaustive. In short, the express contractual language is unclear, and of little assistance in resolving this issue.

In construing contractual language that is ambiguous, we look to the principles stated by the Vermont Supreme Court relative to contract construction. In re: Grievance of Vermont State Employees' Association, Inc. on behalf of certain "Phase Down" Employees, 139 Vt ___, 421 A2d 1311 (1980) the Court stated:

"It is the duty of the Court to interpret the provisions of a disputed contract, not remake it or ignore it. South Burlington School District v. Calcagni-Frazer-Zajchowski Architects, Inc., 138 Vt. 33, 43, 410 A2d 1359, 1363 (1980). In carrying out this task, we are guided by the rule of construction that 'a contract must be construed, if possible, to give effect to every part; and from the parts to form a harmonious whole'. Jackson v. Rogers, 120 Vt. 138, 141, 134 A2d 620, 622 (1957).

Thus, in this case, we must determine the true intent of the parties based upon the Agreement as a whole, and strive to give the ambiguous contract language a construction which is reasonable and equitable to both parties.

In viewing the Agreement as a whole, we find that it is the intent of the parties that employees will not be discriminated against in any form whatsoever. Article XIII, Agreement, states, in whole:

1. There shall be no discrimination against any employee because of race, color, religion, creed, ancestry, sex, age, national origin, handicap, membership or non-membership in the Association or any other factor for which discrimination is prohibited by law.

2. The parties acknowledge the need for positive and aggressive affirmative action to redress the effects of past discrimination, if any, to prevent future discrimination and to ensure equal opportunity in the application of this agreement.

The portions of this article that are particularly applicable here are: "there shall be no discrimination against any employees because of...membership...in the Association or any other factor for which discrimination is prohibited by law," and "the parties acknowledge the need for positive and aggressive affirmative action to...prevent future discrimination and to ensure equal opportunity in the application of this agreement".

Filing grievances is certainly one factor for which discrimination is prohibited by law; specifically by 3 V.S.A., §901-1007, the State Employees Labor Relations Act. Under Sections 903 and 926, employees are given, among other rights, the rights to assist employee organizations, institute grievance proceedings, and appeal grievances. Employers are prohibited (by Section 961) from interfering with, restraining, or coercing employees in the exercise of their rights, and discharging or otherwise discriminating against an employee because he has filed charges or complaints or given testimony under this chapter.

The parties have reaffirmed these employee rights in the Agreement. Article XVI, Section 7 states:

"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."

Thus, the intent of the parties is clear; employees have a clear right to file grievances without being discriminated against. This discrimination does not have to be in the past. The parties, in Article VIII, stress the need for affirmative action to prevent "future discrimination". The claim in the grievance before us is not that Grievant alleges past discrimination, but that the potential for discrimination exists because material relating to grievances brought by him is maintained in his personnel file.

The task before us then is to determine whether the inclusion of such material in Grievant's personnel file constitutes a potential for future discrimination. We find that the potential for future discrimination certainly exists. A management official viewing Grievant's personnel file may indeed view him as a 'troublemaker' continually questioning management's actions, and may hold this against him when opportunities for promotion, transfer, or reappointment arise. While there is no specific evidence of this attitude in this case, there is such potential for it to exist that both the Vermont Legislature and the US Congress felt compelled to legislate against it by designating that action an unfair labor practice (3 V.S.A., §961; 29 USC, §158). To allow that material relating to grievances brought by the employee be contained in his personnel file would be to ignore the intent of the parties to prevent future discrimination against employees for pursuing their statutory and contractual right to present grievances.

One additional factor that should be addressed here is whether the removal of such material from Grievant's personnel file is reasonable and equitable, or whether one party gains an unfair and unreasonable advantage. The rights of the employees (and their representative) and management must be balanced. In How Arbitration Works, Elkouri and Elkouri, the authors state:

"In management's direction of the enterprise, situations sometimes occur in which employees allege an invasion of their right to privacy or an infringement upon their peace of mind. Arbitrators have attempted to strike a balance between the personal rights of the employee and the rights of the company in the conduct of business, considering such factors as whether there was a legitimate business need for management's action or rule, whether there was reasonable safeguard for employee rights, and whether management's action resulted in a substantial change in working conditions." (page 727)

In the case before us, management offers no claim of "legitimate business need" for inclusion of materials relating to grievances brought by the employee in the employee's personnel file. Previously, [Grievance of Paul Maraschiello, 1 VLRB 406, 416 (1978)], this Board has found that inclusion of materials of "dubious relevance" in an employee's personnel file was "inappropriate and unfair". As has been demonstrated, the removal of such materials from the file would safeguard the employee's right to present grievances without fear of being discriminated against for filing grievances.

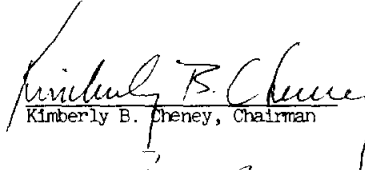
We find that the statutes and the Contract require that employees presenting grievances not be discriminated against in any way. We conclude that the inclusion of materials relating to grievances brought by the employee in his personnel file constitutes a potential for such discrimination. We also find that management has presented no rationale for inclusion of such materials in a personnel file.

ORDER

NOW, THEREFORE, based on these findings of fact, and for the foregoing reasons, it is hereby ORDERED that:

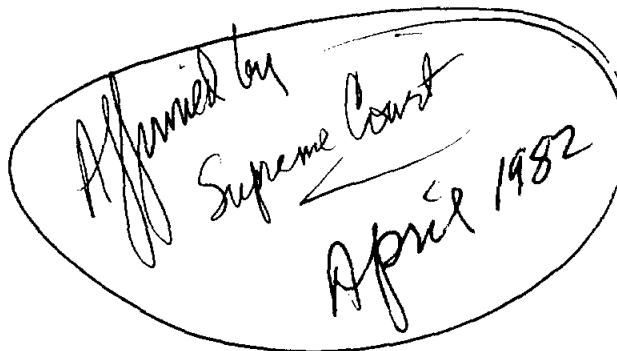
All materials relating to grievances brought by Richard Friel be removed from his official personnel file.

VERMONT LABOR RELATIONS BOARD


Kimberly B. Cheney, Chairman


Robert H. Brown

Dated this 10 day of February, 1981, at Montpelier, Vermont.


Affirmed by
Supreme Court
April 1982