

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 92-3
DAVID TOWLE)	

MEMORANDUM AND ORDER

At issue are various discovery motions with respect to this grievance over the dismissal of David Towle ("Grievant") from employment as a Field Supervision Officer with the State of Vermont, Department of Corrections, Probation and Parole ("Employer"). In support of his contention that his dismissal was without just cause, Grievant asserts, among other things, that the Employer: 1) inappropriately bypassed progressive discipline in dismissing Grievant for engaging in sexual activities with co-worker J.P., and 2) failed to apply discipline in a uniform and consistent manner by dismissing Grievant and taking no disciplinary action against J.P.

Subsequent to the filing of the grievance, various motions were filed by the Employer, Grievant, and Attorney David Mullet, who intervened on behalf of J.P. Some of these motions cannot be decided without additional information. Herein, we address those motions which are ready for decision without the need of additional information.

Deposition of Probation and Parole Employees

The Employer filed a Motion For a Protective Order requesting that the Board direct Grievant not to depose St. Johnsbury Probation and Parole Office employees Timothy Workman, Michael Cusumano, Mark Whitcomb and Joan Delisle. The State

contended that the effort to depose the employees appeared to be an effort to annoy, embarrass, oppress, or unduly burden them, and requested that Grievant be allowed to depose the employees only when he made a showing that doing so was reasonably calculated to lead to the discovery of admissible evidence. In response to the State's motion, Grievant contended that deposing the four employees was appropriate since they had significant daily contact with J.P. and may have discussed issues relevant to the grievance with her. Specifically, Grievant contends the employees may have discussed with J.P. her medical/mental health condition, her relationship with Grievant and her sexual contacts with him. Further, Grievant contends that the employees may have had an opportunity to observe J.P. and Grievant together during the course of their relationship and thus be able to relate any relevant information with respect to that relationship.

The discovery provisions of the Vermont Rules of Civil Procedure, which apply to grievances before the Board pursuant to Section 12.1 of the Board Rules of Practice, permit a party to "take the testimony of any person by deposition" to "obtain discovery regarding any matter . . . which is relevant to the subject matter involved in the pending action". V.R.C.P. 26(b)(1); V.R.C.P. 30 . It is not ground for objection that the information sought will be inadmissible at a hearing if it "appears reasonably calculated to lead to the discovery of admissible evidence." V.R.C.P. 26(b)(1). Here, the deposition of the four employees who had regular contact with J.P. appears reasonably calculated to lead to the discovery of admissible

evidence relating to the relationship between J.P. and Grievant. This is relevant to Grievant's claim that he was subject to disparate treatment when he was dismissed but no disciplinary action was imposed on J.P. Thus, the Employer's Motion For a Protective Order is denied, and Grievant is permitted to depose the four employees.

Identity of J.P.

The Employer and J.P. have filed motions requesting that the Board issue an order protecting from disclosure the identity of J.P. At a July 23, 1992, meeting among Board Chairman Charles McHugh, Board Executive Director Timothy Noonan and the attorneys for the Employer, Grievant and J.P.; Grievant's attorney stated that he did not object to the Board record containing no reference to the identity of J.P. Accordingly, we have expunged from the Board record any reference to the identity of J.P. It necessarily follows that any materials filed by the parties in the future, and any verbal statements which will become part of the Board record, also should not disclose the identity of J.P.

Information on Medical Condition of J.P.

The Employer has filed a motion requesting that the Board issue an order protecting from disclosure "any information filed with the Board which in any manner discusses or discloses the medical condition of J.P." We are not prepared to grant such an extraordinarily broad request at this time. Many of the materials now on file with the Board "discuss" J.P.'s medical condition in some "manner". It would be inappropriate to remove such materials

from public scrutiny absent some compelling justification. The Employer has presented no such compelling justification. Under the circumstances, we deny the Employer's motion subject to the right of the Employer to renew the motion at any time with respect to particular materials and other information related to J.P.'s medical condition.

Deposition of J.P.

J.P. has filed a motion to quash the subpoena for deposition from Grievant's counsel, and has requested that the Board agree to receive in camera medical information in support of J.P.'s assertions that she should not be subject to deposition in this matter to protect her emotional health and well being. J.P. contends that she has suffered severe emotional distress as a result of the incidents relevant to this grievance, and that a deposition would severely exacerbate her difficulties. The Employer supports this motion, and Grievant has opposed it.

The Board, "upon motion by a party or by the person from whom discovery is sought, and for good cause shown . . . may make an order which justice requires to protect a person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . that discovery not be had." V.R.C.P. 26 (c); Board Rules of Practice 12.1. Pursuant to this provision, we conclude that it is appropriate that J.P. be provided an opportunity to demonstrate to the Board that undergoing a deposition would be greatly injurious to her health. This would ensure that she is not subject to "oppression" pursuant to V.R.C.P. 26 (c).

However, we do not believe it is appropriate for the Board alone to review the medical information. Justice requires that Grievant's attorney be allowed to review this information. Grievant is entitled to have access to the medical information so that he can reasonably challenge any contention by J.P., or ultimate determination by the Board, that J.P. should not be subject to a deposition. The testimony of J.P. obviously has relevance to Grievant's claim that he was not dismissed for just cause, and Grievant normally would have every right to depose her in preparation for his case. Grievant is entitled to access to any information which could prevent the exercise of this normal right.

We conclude that the most appropriate way to protect the interests of all concerned is for the Board, Grievant's attorney, the Employer's attorney and J.P.'s attorney to review the medical information in private session.

Mental Examination of J.P.

Grievant has filed a motion requesting that the Board order a mental examination of J.P. We believe that ruling on such a motion, prior to the review of the medical information on J.P., would be premature. Thus, we reserve judgment on the motion.

NOW THEREFORE, based on the foregoing reasons, it is hereby ORDERED:

1. The Employer's Motion For a Protective Order, requesting that the Board direct Grievant not to depose St. Johnsbury Probation and Parole Office employees Timothy Workman, Michael Cusumano, Mark Whitcomb and Joan Delisle; is DENIED;
2. The Motions For Protective Order filed by the Employer and J.P., requesting that the Board issue an order protecting from disclosure the identity of J.P. is GRANTED;

any references to the identity of J.P. shall be expunged from the Board record, and any materials filed by the parties in the future, and any verbal statements which will become part of the Board record, also shall not disclose the identity of J.P.;

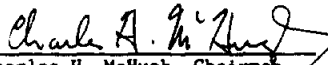
3. The Employer's motion, requesting that the Board issue an order protecting from disclosure any information filed with the Board which in any manner discusses or discloses the medical condition of J.P., is DENIED; subject to the right of the Employer to renew the motion at any time with respect to particular materials and other information related to J.P.'s medical condition;

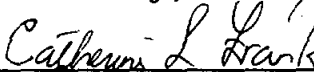
4. In connection with J.P.'s motion to quash the subpoena for deposition from Grievant's counsel, the Board, Grievant's attorney, the Employer's attorney and J.P.'s attorney shall convene in private session at the Labor Relations Board offices, 13 Baldwin Street, Montpelier, Vermont, on January 7, 1993, at 9:30 a.m., to review the medical information in support of J.P.'s assertions that she should not be subject to deposition in this matter; and

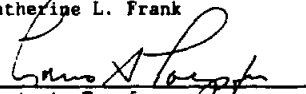
5. Judgment is reserved on Grievant's motion requesting that the Board order a mental examination of J.P.

Dated this 10th day of December, 1992, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Charles H. McHugh, Chairman


Catherine L. Frank


Louis A. Toepfer