VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 92-25
JUDITH RENNIE	)	

MEMORANDUM AND ORDER

On May 27, 1992, Judith Rennie ("Grievant") filed a grievance against the State of Vermont, Agency of Human Services, Department of Social and Rehabilitative Services ("Employer"). Therein, Grievant alleged that the Employer had violated Articles 12 and 14 of the collective bargaining agreement between the State and the Vermont State Employees' Association for the Supervisory Unit, effective for the period July 1, 1992 to June 30, 1994 ("Contract"), by: giving her an unsatisfactory performance evaluation without just cause, bypassing progressive corrective action, giving her inadequate notice of performance deficiencies and no opportunity to remediate, changing standards of performance, and misusing the process of corrective action. Grievant further contended that the Employer violated Article 5 of the Contract by subjecting her to a campaign of harassment in retaliation for her grievance activity and her refusal to voluntarily resign her position. As a remedy, Grievant requested that the Board order that the annual performance evaluation be removed from Grievant's personnel file, rescinded and destroyed; and that the Board order the State to cease and desist its campaign of harassment, intimidation and retaliation.

This case came before Board members Charles H. McHugh, Chairman; Louis A. Toepfer and Carroll P. Comstock on December

29, 1992, for a hearing on the merits. Mary Lang, Special Assistant Attorney General, represented the Employer. Attorney David Gibson represented Grievant. Prior to the introduction of any evidence, the Employer made a Motion to Dismiss And/Or For Summary Judgment. In support of its motion, the Employer indicated that the adverse performance evaluation at issue was removed from Grievant's personnel file and was rescinded. The Employer then destroyed the evaluation. Grievant then made a motion to amend her grievance to make a claim that her resignation from employment constituted a constructive discharge. The Board reserved judgment on the motions and concluded the hearing without taking any evidence.

Motion To Amend

We first address Grievant's motion to amend her grievance. Grievant moved to amend the grievance to claim that her resignation from employment on June 1, 1992, constituted a constructive discharge. The Employer objects to the motion to amend. The Employer also contends that making the motion on the day of the hearing on the merits is prejudicial to the Employer because the Employer was not prepared to present evidence on such a claim. The Employer claims that the amendment is untimely given that it was made nearly seven months after Grievant's resignation. At the December 29 hearing, Grievant's attorney admitted that the motion could have been, and should have been, made much earlier. Nonetheless, he contends that any prejudice to the Employer can be eliminated by the Board granting a continuance.

Section 12.7 of the Board Rules of Practice permits amendment of grievances as the Board "deems proper." Under the circumstances, we conclude that it would be improper to permit amendment of the grievance.

The Board has permitted amendment of grievances given the lack of prejudice to the employer, where the amendment was made shortly after the filing of the grievance. Grievance of VSEA (Re: Refusal to Provide Information, 15 VLRB 13 (1992). Here, prejudice does exist. The Employer had no notice until the day of the hearing on the merits that Grievant was claiming that she was constructively discharged, and thus had no opportunity to prepare to defend against such a claim.

Grievant's claim that the prejudice to the Employer can be eliminated by granting a continuance of the hearing in this case does not make granting an amendment proper. No justifiable excuse exists for Grievant waiting until the day of the hearing to amend her grievance, when the hearing occurred nearly seven months after her resignation. Grievant was aware of facts underlying her claim of constructive discharge at the time she resigned, and there was no excuse to wait nearly seven months to make such a claim. In fact, Grievant's attorney admitted that the amendment could have been, and should have been, made much earlier.

This was prejudicial not only to the Employer, given the unreasonable delay with respect to notice as to contested issues, but disruptive to the orderly and efficient processing of cases by the Board. The Board convened for hearing on December 29 solely to hear the grievance filed by Grievant. If we were to grant Grievant's motion to amend the grievance, and continue this

matter to provide the Employer an adequate opportunity to prepare with respect to the amendment, this would require the expending of additional resources by the Board to convene for another day of hearing, and would delay the resolution of other cases pending before the Board. Also, granting the amendment could set off another round of discovery which would further delay this matter. Given the inexcusable delay by Grievant in seeking to amend the grievance, it would be unjust and improper for us to permit such results. Thus, we deny Grievant's motion to amend her grievance.

Employer's Motion To Dismiss And/Or For Summary Judgment

We next address the Employer's Motion to Dismiss And/Or For Summary Judgment. The Employer makes various arguments in support of the motion, but we believe it is necessary to address only the contention that the grievance should be dismissed because the adverse performance evaluation at issue was removed from Grievant's personnel file, rescinded and destroyed.

We conclude that this action taken by the Employer warrants the dismissal of this grievance. As a public administrative body, the Board has only that adjudicatory authority conferred on it by statute. Boynton v. Snelling, 147 Vt. 564, 565 (1987). In grievance proceedings, the Board's jurisdiction is limited by both the definition of the term "grievance" in 3 VSA §902(14), and 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. Where future harm is at issue, the existence of an actual controversy turns on whether the individual is

suffering the threat of actual injury to a protected legal interest, or is merely speculating about the impact of some generalized grievance. Grievance of Boocock, 150 Vt. 422, 424 (1988).

In this case, the remedy requested by Grievant as a result of any injury caused by the adverse performance evaluation has either been granted by the Employer or is no longer applicable. In her grievance, Grievant made two specific requests for remedy: 1) that the Board order the State to remove the evaluation from Grievant's personnel file and rescind and destroy it; and 2) that the Board order the Employer to cease and desist its campaign of harassment, intimidation and retaliation.

The Employer has granted the former request by removing the adverse performance evaluation from Grievant's personnel file, and rescinding and destroying it. The latter request that the Board order the Employer to cease and desist its campaign of harassment, intimidation and retaliation is no longer applicable since Grievant has resigned from employment.

Thus, the most we would have granted as a remedy had we concluded that the adverse performance evaluation violated the Contract has been done. In sum, there is no remaining injury in fact to Grievant with which we can provide a remedy. Also, there is no threat of an injury in fact. The contested adverse performance evaluation has been removed from Grievant's personnel file, rescinded and destroyed. Accordingly, it cannot adversely impact her in obtaining future employment and suffering consequential damages.

In such circumstances, the "actual controversy" requirement for the Board to take jurisdiction has not been met. Grievance of Sherbrook, 13 VLRB 359, 362 (1990). To provide an adequate basis for us to have jurisdiction, there must be more than an argument over whether the Contract was violated; there must also be a request for action which we are able to order. Id. at 362-63. Since that is lacking in this case, we grant the Employer's motion to dismiss this grievance.

Now therefore, based on the foregoing reasons, it is hereby ORDERED that Grievant's Motion To Amend is DENIED, the Employer's Motion To Dismiss is GRANTED, and the Grievance of Judith Rennie is DISMISSED.

Dated this 7th day of January, 1993, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh, Chairman

Louis A. Toepfer

Carroll P. Comstock