VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 99-62
GLORIA DANFORTH	)	

MEMORANDUM AND ORDER

The issue before the Labor Relations Board is whether to grant motions filed by the State of Vermont Department of Public Safety ("Employer") and the Vermont State Police Advisory Commission ("SPAC") to quash subpoenas served by Grievant Gloria Danforth ("Grievant") in connection with this grievance over the dismissal of Grievant from employment as a State Police Detective Sergeant. In appealing her dismissal, Grievant contends, among other things, that: 1) the Employer violated Article 5 of the collective bargaining agreement between the State and the Vermont State Employees' Association ("Contract") by discriminating against Grievant on the basis of gender, and complaint and grievance activity, 2) the Employer violated Article 53 of the Contract by discriminating against Grievant on the basis of her free speech and whistleblowing activities; 3) the Employer violated Article 14 of the Contract by dismissing Grievant without just cause; 4) the Employer violated Article 14 of the Contract by failing to apply discipline with a view toward uniformity and consistency; 5) the Employer violated Article 14 of the Contract by inappropriately bypassing progressive discipline; and 6) the Employer failed to follow the Disciplinary Guidelines set forth in its rules and regulations.

On December 21, 1999, the Employer filed a motion, and supporting memorandum, to quash a subpoena duces tecum served by Grievant on Department of Public Safety Commissioner A. James Walton, Jr. On the same day, SPAC filed a motion, and supporting memorandum, to quash a subpoena duces tecum served by

Grievant on SPAC Chair Karen Bradley. Grievant filed memoranda in opposition to the motions on January 3 and 13, 2000. Oral argument on the motions was held on February 3, 2000, in the Board hearing room in Montpelier before Board Members Edward Zuccaro, Acting Chairperson; Carroll Comstock and Richard Park. Attorney Kimberly Cheney represented Grievant. Attorney Daniel Burchard represented the Employer. Assistant Attorney General Michael McShane represented SPAC.

We first address the motion to quash filed by the Employer. In the subpoena duces tecum served on Commissioner Walton, Grievant seeks production of records maintained by the Employer's Office of Internal Affairs with respect to all allegations of misconduct by state police officers, and the findings as to such allegations, since January 1, 1995. The subpoena provides that the records "may be redacted so that the name of the individual police officer is not revealed so long as the log shows the alleged misconduct and the disposition, and is in such a form as to permit a determination whether discipline is imposed on members uniformly". In the subpoena, Grievant further seeks copies of the records of the Office of Internal Affairs relating to Grievant; copies of the command and review sheets (or records) relating to the preferral of charges against and dismissal from employment of Grievant; and copies of any e-mails, notes, or written material of any sort, not otherwise requested, from or to Commissioner Walton relating to the preferral of charges against and dismissal from employment of Grievant.

The Employer relies on V.R.C.P. 45(c)(3)(A) in support of the motion to quash the subpoena. It provides in pertinent part 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 documents of the Office of Internal Affairs which Grievant seeks to

obtain are protected from discovery by statutory and evidentiary privilege pursuant to 20 V.S.A. Section 1923(d) and the decision of the Vermont Supreme Court in State v. Roy, 151 Vt. 17, 32 (1989).

20 V.S.A. Section 1923(d) provides:

> Records of the office of internal investigation shall be confidential, except:
> 1) The state police advisory commission shall, at any time, have full and free access to such records; and
> 2) The commissioner shall deliver such materials from the records of the office of internal investigation as may be necessary to appropriate prosecutorial authorities having jurisdiction; and
> 3) The state police advisory commission shall, in its discretion, be entitled to report to such authorities as it may deem appropriate, or to the public, or to both, to ensure that proper action is taken in each case.

In State v. Roy, a criminal defendant, in appealing his conviction of simple assault on a police officer, sought to overturn a trial court ruling denying him access to the files of the Office of Internal Affairs relating to the state trooper whom the defendant had assaulted. In affirming the denial of access, the Supreme Court stated:

> The specific records that the defendant requested are made confidential by 20 V.S.A. Section 1923(d). There is no exception in the statute for use of the records in court proceedings. It is clear that the intent of the statute is that the records not be subject to disclosure except for the statutory purposes. Thus, the statute creates a form of evidentiary privilege in a court proceeding . . . We do not exclude the possibility that a defendant could have access to internal investigation files in a proper case and in a proper manner. 151 Vt. at 32, 35.

The Employer maintains that, since the records in question are privileged and are not "subject to disclosure except for the statutory purposes", Grievant's subpoena duces tecum should be quashed. Grievant contends that the confidentiality provision of 20 V.S.A. Section 1923(d) and the decision in Roy do not prevent disclosure of the information in this case. Grievant notes that Roy left open the possibility that, "in a proper case", a defendant could have access to confidential internal investigation files, and asserts that the Board should determine that this is a "proper case" to order

disclosure. Grievant contends that her constitutional right against deprivation of the property interest of employment without due process of law is at stake, and an interpretation of Section 1923(d) which vitiates a constitutional right should be avoided. She asserts that there is no evident purpose in Section 1923(d) to interfere with enforcement of laws and contracts relating to labor relations by withholding information so that Public Safety managers enjoy an immunity from scrutiny found nowhere else in public employment.

Grievant contends that she needs the information requested in the subpoena to be able to establish the allegations she has made in her grievance. Grievant was dismissed based on her refusal to answer certain questions in an internal affairs investigation on June 8 and 15, 1999, without counsel present. She argues that she cannot determine if discipline was imposed uniformly without knowledge of what discipline was imposed on other officers. She also contends that she cannot determine if she was given a reasonable time to respond to questions without counsel present unless she is provided with data relating to the time usually given to officers to obtain counsel and respond to an internal affairs investigation. She further asserts that, without access and knowledge concerning internal affairs investigations relating to her, she cannot know whether some conduct other than the stated reasons for her dismissal motivated the actions of the Commissioner. Finally, she contends that, without the command and review sheets relating to her dismissal, she cannot tell whether the reasons given for her dismissal in the dismissal letter were the only reasons, or whether some improper motive existed.

In ruling on the motion to quash, we are mindful that the Roy case, unlike this case, dealt specifically with a criminal matter. However, we see no reason why the

reasoning of Roy should not apply to this case involving an employee subject to a collective bargaining agreement entered into by the State.

In ruling on the motion, we seek to respect the confidentiality provisions of Section 1923(d) without negating Grievant's right to seek to establish her allegations of violations of the Contract. We conclude that this can be done with respect to Grievant's request for the production of Office of Internal Affairs records concerning all allegations of misconduct by state police officers, and the findings as to such allegations since January 1, 1995, by requiring that Grievant be provided with summaries of certain allegations and findings.

Although Grievant requests production of all allegations of misconduct, and findings as to such allegations, we find that it is necessary to only provide her with information in a more limited category of cases to allow her to seek to establish her claim that discipline was not applied uniformly and consistently on her. Grievant was charged with violating Section 14.0, Truthfulness, of Part A of the Employer's disciplinary guidelines. The basis for the charge was her refusal to answer certain questions in an internal affairs investigation on June 8 and 15, 1999, without counsel present. Dismissal is listed as the sanction for the first offense of this section. Some, but not all, Part A offenses are relevant to Grievant's allegation that she was not disciplined in a consistent and uniform manner. Those are violations in which dismissal is the sanction for a first offense. Violations that fit in this category are: a) Section 1.0, Bribes; b) Section 2.0, Cheating on Examination, c) Section 3.0, Criminal Conduct – Felony; and d) Section 9.0, Falsification and Misuse of Property and Evidence. Other applicable Part A offenses are those similar in nature to a violation of the truthfulness provisions of Section 14.0. Alleged violations of Section 8.0, False Statements, fit in this category.

Further, Grievant contends that her offense, if any, is more akin to a lesser Part B offense, such as Section 11.0, relating to obedience to orders. In order to seek to establish this allegation, Grievant should be provided with summaries of allegations and findings in this section of offenses. Other applicable Part B offenses are those similar in nature to Grievant's alleged offense. Alleged violations of Section 7.0, False Statements, fit in this category.

In sum, the Employer is required to provide Grievant with summaries of all allegations of misconduct by state police officers, and the findings as to such allegations, since January 1, 1995, covered by Sections 1.0, 2.0, 3.0, 8.0, 9.0 and 14.0 of Part A; and Sections 7.0 and 11.0; of the Employer's disciplinary guidelines. Summaries of alleged offenses in these sections should be sufficient to allow Grievant to seek to establish her claim that discipline was not applied to her in a uniform and consistent manner. We note that, although Grievant's request for access to the records themselves, unlike the Roy case, ostensibly allows for anonymity via redaction, we are concerned that in a state of Vermont's size even redacted records could lead to the unnecessary loss of protection for a number of other state employees. The summaries of allegations and findings should be prepared so that the identity of the involved state police officer is not revealed, and the summaries set forth the alleged misconduct and the disposition in such a form to permit a determination whether discipline is imposed on members uniformly and consistently. The Board will be prepared to issue protective orders as necessary to ensure that the identity of involved state police officer is not revealed.

Grievant further seeks, through subpoena, records of the Office of Internal Affairs since January 1, 1995, relating to the time usually given to officers to o btain counsel and respond to an internal affairs investigation. Once again, we conclude that this can be

complied with, and the confidentiality provisions of Section 1923 (d) can be respected, by providing Grievant with summaries of Internal Affairs records.

Grievant will be provided with an adequate opportunity to seek to establish her claim that she was not given a reasonable time to respond to questions without counsel present if the Employer provides her with the following limited information for all internal affairs investigations since January 1, 1995: a) the case number, b) the date the member being investigated was notified of the charges, c) the date the member was interviewed, d) whether the member requested that an attorney be present for the interview, e) all cases in which the interview took place after the member requested legal counsel, without legal counsel for the member present; and f) all cases in which discipline was taken for refusal to answer questions without legal counsel present. The Employer is required to provide this summary to Grievant, with the understanding that the summary is prepared so that the identity of the involved state police officer is not revealed.

Grievant also seeks, through subpoena, copies of the records of the Office of Internal Affairs relating to Grievant. Grievant indicates that this information is in three categories: a) records of discipline or complaints against her, b) records relating to an August 23 interview in which Grievant answered all questions, and c) copies of the chain of command review sheets or records concerning her dismissal. Grievant asserts that, without access and knowledge concerning internal affairs investigations relating to her, she cannot know whether some conduct other than the stated reasons for her dismissal motivated the actions of the Commissioner.

In order to obtain records protected by the confidentiality provisions of Section 1923(d), Grievant must at a minimum make a sufficient case of need under the

circumstances. State v. Roy, 151 Vt. at 34. We conclude that Grievant has not made a sufficient showing with respect to the internal affairs materials relating to herself.

Pursuant to Section III, Article III, 5.2, of the Employer's Rules and Regulations, members must be notified of any allegations of misconduct and improper conduct promptly, prior to an investigation, and such notification must include a complete explanation of the substance of the allegation made. If the Commissioner ultimately determines that no misconduct or improper conduct occurred, no record of the allegation is placed in the member's personnel file. Section III, Article III, 9.3. If the Commissioner determines that any misconduct or improper conduct is not such as to warrant disciplinary action, but that administrative action may be required, a record of any administrative action may be placed in the member's personnel file but no other record of the allegation shall be placed in the member's personnel file. If charges are preferred against a member and disciplinary proceedings occur, a charged member "shall be given a copy of all of the statements and other evidence compiled during the course of the investigation into the allegations against him/her" at the same time as charges are served. Section III, Article IV, 2.3.

These provisions of the Employer's Rules and Regulations provide members with sufficient notification and information relating to allegations of misconduct and improper conduct against them, and sufficient protection that unsubstantiated allegations cannot be used against them, such that unimpeded access to internal affairs records is not required. Any past complaints made against Grievant can only be used against her to the extent they resulted in administrative or disciplinary action reflected in her personnel file and of which she is fully aware. With respect to the disciplinary action before us, and any past case in which charges were preferred and disciplinary proceedings occurred, the

Employer was required to provide Grievant with copies of all of the statements and other evidence compiled during the course of the investigation into the allegations against her. These protections afforded by the Employer's rules and regulations, together with other discovery mechanisms available to Grievant in this grievance, are sufficient to allow her to attempt to establish the allegations she has made in this grievance.

The final materials sought by Grievant in the subpoena served on the Employer are copies of any e-mails, notes, or written material of any sort, not otherwise requested, from or to Commissioner Walton relating to the preferral of charges against and dismissal from employment of Grievant. In responding to the subpoena, the Employer indicated that no such documents exist. Given such a representation, it is apparent a ruling on this issue is not necessary. In any event, Grievant's request is so broad as to include privileged communications.

We next address the motion to squash filed by SPAC. In the subpoena duces tecum served on SPAC Chair Karen Bradley, Grievant seeks production of records submitted by the Commissioner of Public Safety to SPAC with respect to all allegations of misconduct by state police officers, and the findings as to such allegations, since January 1, 1995. Given that this subpoena seeks materials already sought by subpoena from the Employer, and we already have ruled on the disclosure of these materials in this decision, there is no need to involve SPAC in this matter. Grievant can obtain the applicable information from the Employer, and there is no need to also receive it from SPAC. Thus, we grant SPAC's motion to quash the subpoena. In so ruling, we note that it is unnecessary for us to decide our authority to require SPAC to release information.

NOW THEREFORE, based on the foregoing reasons, it is hereby ORDERED that the subpoena duces tecum served on Commissioner Walton by Grievant is modified consistent with this decision, and the Vermont State Police Advisory Commission's motion to quash subpoena is granted.

Dated this ____ day of February, 2000, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

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Edward R. Zuccaro, Acting Chairperson

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Carroll P. Comstock

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Richard W. Park