VERMONT LABOR RELATIONS BOARD

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| APPEAL OF: | ) | |
| | ) | DOCKET NO. 99-62 |
| GLORIA DANFORTH | ) | |

MEMORANDUM AND ORDER

The issue before the Labor Relations Board is whether to grant a motion filed by the State of Vermont Department of Public Safety ("Employer") to quash a second subpoena duces tecum served by Appellant Gloria Danforth ("Appellant") on Department Commissioner A. James Walton, Jr., in connection with this appeal over the dismissal of Appellant from employment as a State Police Detective Sergeant. This is the second motion to quash decided by the Labor Relations Board in this case. On February 25, 2000, the Board issued a decision modifying a subpoena served on Commissioner Walton by Appellant, and granting the Vermont State Police Advisory Commission's motion to quash a subpoena served by Appellant. 23 VLRB 51. The Employer filed an interlocutory appeal of that decision, and Appellant filed a cross-appeal, with the Vermont Supreme Court. Those appeals are pending before the Court.

This case originated on September 30, 1999, when Appellant filed an appeal with the Labor Relations Board over her dismissal. In appealing her dismissal, Appellant contends, among other things: 1) the Employer violated Article 5 of the collective bargaining agreement between the State and the Vermont State Employees' Association for the State Police Bargaining Unit ("Contract") by discriminating against Appellant on the basis of gender, and complaint and grievance activity; 2) the Employer violated Article 53 of the Contract by discriminating against Appellant on the basis of her free speech and whistleblowing activities; 3) the Employer violated Article 14 of the Contract by dismissing Appellant 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.

The Employer filed the motion to quash the second subpoena now before us for decision, and supporting memorandum and attachments, on August 14, 2000. The Employer, as it did in moving to quash the subpoena at issue in our earlier decision, relies on V.R.C.P. 45(c)(3)(a) in moving 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". Grievant filed a memorandum, with attachments, in opposition to the motion on September 6, 2000. Oral argument on the motions was held on November 30, 2000, in the Board hearing room in Montpelier before Board Members Edward Zuccaro, Acting Chairperson; Richard Park and John Zampieri. Attorneys Daniel Burchard and Elizabeth Novotny represented the Employer. Attorney Kimberly Cheney represented Appellant.

In the subpoena served on Commissioner Walton, Appellant seeks the following materials: 1) documents relating to any request that State Police Lieutenant Bruce Lang appear for an interview with an Internal Affairs Investigator, or any other form of investigation, relating to allegations that Lieutenant Lang lied in his deposition given in this case on November 22, 1999; 2) documents relating to any charges or disciplinary action brought against Lieutenant Lang based on his deposition testimony; 3) documents relating to any request that State Police Lieutenant Dennis Madore appear for an interview with an Internal Affairs Investigator, or any other form of investigation,

relating to allegations made by Appellant concerning Lieutenant Madore's conduct in her answer to the Employer's Interrogatories given on June 1, 2000; 4) documents relating to any Departmental charges, or criminal charges, preferred against Lieutenant Madore arising out of this conduct; 5) reports of all allegations of misconduct by Lieutenants Lang or Madore, and the findings as to such allegations, submitted by Commissioner Walton to the State Police Advisory Commission since April 24, 2000, relating to any of this conduct; 6) all reports from the Barre City Police Department received by the Department of Public Safety relating to possible criminal conduct of Lieutenant Madore regarding domestic assault on his wife; and 7) all documents relating to any information given to the Director of State Police or Commissioner Walton relating to possible criminal conduct of Lieutenant Madore regarding domestic assault on his wife.

Before discussing the particulars of the subpoena, we first address issues raised by the Employer concerning our jurisdiction and scope of review in this matter. The Employer contends that our powers in reviewing dismissals of state police officers under 20 V.S.A. Section 1880 are the same as the powers delegated to hearing panels by that section, and that the Board lacks the authority to consider whether the discipline imposed on Appellant in this case is consistent with the discipline imposed in other cases. The Employer asserts that the provisions of the Board's Rules of Practice support this limited scope of review. The Employer argues that the Board's task is a narrow one and is limited to the Board conducting an impartial inquiry leading up to the imposition of discipline to determine whether there is merit to the charges of misconduct that led to the appealing officer's dismissal.

We disagree that 20 V.S.A. Section 1880 and the Board Rules of Practice prescribe such a limited scope of review. Section 1880 provides a state police officer with

two alternative routes of redress once the Department of Public Safety Commissioner prefers written charges on an officer. The officer can request a hearing before a hearing panel on the charges. The hearing panel will determine if the charges are proved. If they are not proved, no discipline is taken against the member. If they are proved, the Department of Public Safety Commissioner determines appropriate disciplinary action, and any action taken by the Commissioner is final.

Alternatively, if the officer does not request a hearing before a hearing panel, the Commissioner then determines appropriate disciplinary action. The officer then, pursuant to Section 1880(c), "may appeal the charges and the disciplinary action taken by filing an appeal with the state labor relations board within 30 days of the imposition of disciplinary action by the commissioner". Hearings before the Board on the appeal "shall be de novo". Id.

This statutory scheme makes it clear that the powers of the Board are not the same as that of a hearing panel. The hearing panel has no authority to rule on disciplinary action imposed by the Commissioner since their role precedes the taking of any disciplinary action, and any resulting disciplinary action by the Commissioner is final. To the contrary, Section 1880 expressly gives the Board authority to rule on the disciplinary action taken by the Commissioner. Thus, the Employer's contention that the Board's role is the same as the hearing panel in being limited to determining whether charges are proved is incorrect.

In exercising its authority to rule on the disciplinary action taken by the Commissioner, the Board must determine whether the Commissioner's action was consistent with the Contract's provisions relating to discrimination and disciplinary action, which are binding on the Commissioner. Article 5 of the Contract, among other

things, prohibits discrimination based on gender and filing of complaints or grievances. Article 14 of the Contract provides in pertinent part that "no disciplinary action shall be taken without just cause", and "disciplinary action will be applied with a view toward uniformity and consistency". In applying these contractual provisions, we are required to consider whether the discipline imposed in the case on appeal to the Board is consistent with the discipline imposed in other cases.

The provisions of the Board's Rules of Practice relating to disciplinary action against state police members are not inconsistent with these statutory and contractual requirements. The Employer contends that the Board's authority in state police dismissal cases is expressly limited by Section 44.4 of the Rules, which provides: "The Board shall conduct a *de novo* review of the facts leading up to the imposition of discipline against members to the extent such *de novo* review is specifically authorized by 20 V.S.A. Section 1880." The Employer contends that, since this rule makes no provision for the Board to review or modify the discipline itself, a re-examination of the discipline imposed on Appellant would be contrary to the Board's Rules, and it is equally contrary for the Board to allow Appellant to investigate whether the discipline she received is consistent with the discipline imposed in other cases.

The Employer misconstrues our Rules of Practice. The fact that a substantive power granted to the Board by statute is not again set forth in our Rules of Practice does not result in a conclusion that the Board somehow has decided to not exercise its statutory power. The Rules of Practice focus on practices and procedures of the Board rather than the substantive powers of the Board.

Also, a review of the development of the rule cited by the Employer, Section 44.4, should make it evident that the interpretation argued by the Employer is not correct. The

existing Section 44.4 became effective May 15, 1996, as part of a comprehensive revision of Board Rules of Practice. This was shortly after the Act amending 20 V.S.A. Section 1880 to its present form was approved on April 17, 1996. Public Act, 1996 Session, No. 98.

Section 44.4 replaced Section 43.4 of the previous Board Rules, which provided: "The Board shall not conduct a de novo review of the facts leading up to the imposition of discipline against members but shall rely on the charges proved before the panel or district court pursuant to 20 V.S.A. Section 1880(d)". This section reflected the Board practice under the statutory scheme set forth in 20 V.S.A. Section 1880 prior to the 1996 revision, under which the Board had no statutory authority to conduct a *de novo* hearing. The revised Section 44.4 was designed simply to reflect the statutory change authorizing *de novo* hearings, and was not intended to limit in any way the substantive authority of the Board to review the disciplinary action taken by the Commissioner.

We turn to addressing the particulars of the subpoena and whether to grant the Employer's motion to quash the subpoena. Appellant contends that she is entitled to internal affairs unit information concerning any investigation into alleged improper conduct by Lieutenants Lang and Madore in an effort to establish that discipline was discriminatorily applied to her due to her gender and in violation of the contractual requirement of uniform and consistent discipline.

There is a threshold issue of whether the information sought by Appellant is relevant to our review of her dismissal. This is because any information sought concerning Lieutenant Lang necessarily would have been developed after Appellant's dismissal since it involves alleged improper conduct by Lang during a deposition taken in this case. Also, at least some of the internal affairs information sought concerning

Lieutenant Madore potentially may post-date Appellant's dismissal even though it involves alleged improper conduct by Madore occurring prior to Appellant's dismissal.

Appellant contends that the Employer's actions in other cases after Appellant's dismissal can be relevant on whether the Employer discriminated against her. Appellant cites the U.S. Supreme Court decision in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973), which held that an employee who asserts the employer's reasons for dismissal are a pretext can introduce evidence that the employer has a general policy and practice of discrimination against minorities. Appellant asserts that, if she were to establish that she was fired for conduct that a male officer was not punished for, whether before or after her dismissal, the evidence could be relevant regarding the employer's general policy and practice. We concur that an employee may introduce evidence of an employer's general policy and practice to seek to establish a discrimination claim, but that does not resolve the more specific question of whether such evidence involving post-dismissal cases is relevant to our role under 20 V.S.A. Section 1880.

In determining whether post-dismissal evidence of alleged inconsistent discipline is relevant to our review of Appellant's dismissal, we first examine our role in the dismissal process. In fulfilling its duty of deciding whether just cause exists for an employee's dismissal, the Board has power to police the exercise of discretion by the employer and to keep such action within legal limits. In re Goddard, 142 Vt. 437, 444-445 (1983). But the Board is not given, by the statute or by the agreement, any authority to substitute its own judgment for that of the employer, exercised within the limits of law or contract. Id. at 445. The ultimate criterion of just cause is whether the employer acted reasonably in discharging the employee because of misconduct. Id. at 443.

In carrying out our function as the independent administrative agency determining whether just cause exists for dismissal, our job is to determine *de novo* and finally the facts of a particular dispute, and whether the penalty imposed on the basis of those facts is within the law and the contract. Grievance of Colleran and Britt, 6 VLRB 235, 265 (1983). Once the underlying facts have been proved, the Board must determine whether *the discipline imposed by the employer is within the range of its discretion given the* proven misconduct. Id. at 265-66. If the employer establishes that management responsibly balanced the relevant factors in a particular case, and struck a balance within tolerable limits of reasonableness, its penalty decision will be upheld. Id. at 266.

The Board's decision in Colleran and Britt sets forth twelve relevant factors to be considered to determine whether management has exercised its discretion within tolerable limits of reasonableness. Id. at 266-269. One of the twelve factors is the consistency of the penalty with those imposed on other employees for the same or similar offenses. Id. at 268. These factors are not used to substitute the Board's judgment for that of management, but to ensure the employer considered the relevant factors in each particular case and took an action within legal limits. Id. at 268.

This review of our role in the dismissal process lends support to a conclusion that evidence of alleged inconsistent discipline is not relevant to our review of Appellant's dismissal to the extent that it involves alleged improper conduct by other employees of which management was unaware at the time of Appellant's dismissal. Since our duty is to police the exercise of discretion by the employer to ensure the employer considered the relevant factors in each particular case and took action within tolerable limits of reasonableness, the relevant focus is on management's actions and knowledge at the time the dismissal decision was made. This implies that evidence of inconsistent treatment is

not relevant to the extent that it involves alleged improper conduct by other employees of which management was unaware at the time of the aggrieved employee's dismissal. Grievance of Newton, 23 VLRB 172, 197 (2000) (dismissed employee did not demonstrate inconsistent treatment of him concerning being dismissed in part for having a handgun on facility property where, at the time he was dismissed, there is no evidence of the employer being aware of other employees having handguns on facility property). For us to rule otherwise would inappropriately shift the focus away from the employer's judgment at the time of dismissal and create uncertain standards and timeframes in dismissal cases.

Statutory provisions reinforce our conclusion that evidence of alleged inconsistent discipline is not relevant to our review of Appellant's dismissal to the extent that it involves alleged improper conduct by other employees of which management was unaware at the time of Appellant's dismissal. 20 V.S.A. Section 1880 provides that an appeal of a disciplinary action has to occur "within 30 days of the imposition of disciplinary action by the commissioner". It further provides that, "(w)hen the disciplinary action taken by the commissioner is dismissal, the state labor relations board shall schedule a hearing within 60 days after filing of the appeal". These stringent timeframes reflect a legislative policy that expeditious resolution is an important consideration in appeals of state police dismissals.

We recognize that expeditious resolution has not occurred in this case. We scheduled a hearing within 60 days after the appeal was filed as required by statute. However, the parties have been unable to agree to resolve any outstanding discovery issues, which resulted in contested proceedings before us culminating in the February Board decision which is on interlocutory appeal to the Supreme Court. These matters

have resulted in the Board proceedings being delayed well beyond anything contemplated by the legislature. However, this does not mean the legislative policy of expeditious resolution is without effect. Expeditious resolution would be frustrated even more than it already has in this case if evidence of alleged inconsistent discipline, involving alleged improper conduct by other employees of which management was unaware at the time of Appellant's dismissal, is considered relevant to our review of Appellant's dismissal.

A review of the file in this case is instructive in demonstrating the practical difficulty of promoting expeditious resolution of this case if such post-dismissal evidence of alleged inconsistent discipline is allowed. On November 30, 2000, the day of oral argument in this matter, Appellant filed a copy of a third subpoena served on Commissioner Walton to obtain internal affairs investigative reports concerning alleged false testimony given by two state police officers in a district court hearing on May 10, 2000. Thus, more than a year after Appellant filed her appeal with the Board, she is seeking information on alleged improper conduct occurring eight months after her dismissal. The failure to limit the timeframe for allowing evidence of alleged inconsistent discipline sets into motion the potential for ongoing discovery continuously pushing back the date the case can be heard, a result inconsistent with the legislative policy of expeditious resolution of cases.

In sum, our role in the dismissal process, the legislative policy promoting expeditious resolution of state police dismissals, and practical considerations lead us to conclude that evidence of alleged inconsistent discipline is not relevant to our review of Appellant's dismissal to the extent that it involves alleged improper conduct by other employees of which management was unaware at the time of Appellant's dismissal. Given this conclusion, any information sought by Appellant concerning Lieutenant Lang

clearly is not relevant. Such information necessarily would have been developed after Appellant's dismissal since it involves alleged improper conduct of Lang during a deposition taken in this case.

More extended discussion is necessary with respect to the information sought concerning Lieutenant Madore since it involves alleged improper conduct by Madore occurring prior to Appellant's dismissal. If the Employer was aware of the alleged improper conduct by Madore prior to Appellant's dismissal, and did not take disciplinary action in a reasonable time[1] against Madore prior to Appellant's dismissal, this may be relevant to Appellant's contention that she received discriminatory and inconsistent treatment in being dismissed.

Appellant seeks to compel the production of any internal affairs information concerning Lieutenant Madore that may have been developed concerning alleged improper conduct by Madore. This presents the same question we struggled with in our earlier decision in this case – How do we respect the provisions of 20 V.S.A. Section 1923(d), providing for the confidentiality of internal affairs records, without negating Appellant's right to establish her allegations that she received discriminatory and inconsistent treatment in being dismissed in violation of the Contract?

In our earlier decision, we concluded this could be done by requiring that the Employer provide Appellant with certain summaries of internal affairs records concerning allegations of misconduct against state police officers, as well as summaries relating to the time usually given to officers to obtain counsel and respond to an internal

[1] Article 14, Section 2(b) of the Contract provides:

> Disciplinary proceedings shall be instituted within a reasonable time after the violation of the Code of Conduct occurred or was discovered and disciplinary action shall be taken within a reasonable time after disciplinary charges have been proved or admitted. Non-criminal internal investigations should normally be completed within 30 work days, and notice of disposition should normally be given within 30 work days after completion of the investigation.

affairs investigation. 23 VLRB at 55-57. We required that summaries be prepared so that the identity of the involved state police officer is not revealed, and indicated a willingness to issue protective orders as necessary to ensure that the identity of the involved officer is not revealed. Id.

We cannot achieve a similar result with respect to the present subpoena. We took great pains in our earlier decision to respect the confidentiality provisions of Section 1923(d). We see no practical way to provide Appellant with internal affairs information concerning Lieutenant Madore and respect these confidentiality provisions. This is because the attachments to Appellant's memorandum contesting this motion concerning Lieutenant Madore provide details of his alleged improper conduct. Given these details in our public files, any information from the internal affairs files provided at this point, in whatever form, cannot practically be made available to Grievant to be useful in determining consistency of discipline and, at the same time, protect Madore's right to confidentiality concerning internal affairs records.

Appellant is not without other options if we decline to require the release of the internal affairs information concerning Lieutenant Madore. She is not foreclosed from employing alternative discovery avenues to seek to establish her contention that she received discriminatory and inconsistent treatment compared to Madore. Appellant can depose management officials who played a role in Appellant's dismissal, and inquire of them what knowledge they had of Madore's alleged improper conduct at the time disciplinary action was being considered against Appellant. Also, in this regard, the reports from the Barre City Police Department received by the Employer relating to Madore's conduct, which Appellant seeks from the Employer by subpoena, alternatively can be sought by Appellant contacting the Barre City Police Department. Further,

Appellant can depose Lieutenant Madore, and inquire as to whether any disciplinary investigation had commenced against him, or any disciplinary action had been taken against him, by the time Appellant was dismissed.

Given the circumstances, we decline to require the release of the internal affairs information concerning Lieutenant Madore. We conclude the information is privileged matter protected from disclosure, and there is no proper manner to provide Appellant with access to information from the internal affairs files. V.R.C.P. 45(c)(3)(a). State v. Roy, 151 Vt. 17, 32, 35 (1989). Appellant must use alternative discovery methods to seek to establish her contention that she received discriminatory and inconsistent treatment compared to Lieutenant Madore.

Based on the foregoing reasons, it is ordered that the Department of Public Safety's motion to quash the second subpoena duces tecum served on Commissioner A. James Walton, Jr., is granted.

Dated this 14th day of December, 2000, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Edward R. Zuccaro, Acting Chairperson

Richard W. Park

John J. Zampieri