

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 00-7
SHERRY BREWSTER)	

MEMORANDUM AND ORDER

The issue before the Labor Relations Board is whether to grant a motion filed by the State of Vermont Department of Employment and Training (“Employer”) to dismiss the grievance filed in this matter. On February 11, 2000, the Vermont State Employees’ Association (“VSEA”) filed a grievance on behalf of Sherry Brewster (“Grievant”) alleging that various actions of the Employer, including not promoting Grievant, constituted discrimination and retaliation on the basis of union membership, complaint and grievance activities, free speech and whistleblowing activities in violation of Articles 5, 15 and 65 the collective bargaining agreement between the State and the VSEA for the Non-Management Unit, effective for the period July 1, 1999 – June 30, 2001 (“Contract”).

On February 23, 2000, the Employer filed a motion to dismiss this grievance on the grounds that Grievant failed to file a timely Step III grievance pursuant to Article 15, Section 3(c)(1) of the Contract. Grievant filed a response to the State’s motion on February 29, 2000.

Article 15 of the Contract contains the following provisions pertinent to resolving this motion to dismiss:

...

3. GRIEVANCE PROCEDURE . . .

(b) STEP II (Department Head Level)

If no satisfactory settlement is reached at Step I, or if Step I is bypassed, the complaint shall be reduced to writing . . . and shall be submitted for action by the aggrieved party or representative to the administrative head of the department in which the aggrieved is employed . . .

(2) The grievance shall be discussed informally, either in person or via telephone, within ten (10) workdays of its receipt, between the employee, and/or his/her representative, and the department head or designee.

(3) The employee shall be notified in writing of the department's decision within five (5) workdays after the discussion . . .

(c) STEP III (Department of Personnel Level)

(1) A grievance conforming to Section 2(c) above shall be submitted to the Department of Personnel within ten (10) workdays of receipt of the Step II decision if the employee wishes to pursue a matter not resolved at Step II. Otherwise, the matter shall be considered closed. . .

The pertinent facts necessary to decide this motion are found to be as follows:

VSEA Field Representative Tenaya Lafore represented Grievant at the Step II hearing in this matter on December 9, 1999. Mona Hersey, Human Resources Administrator for the Employer, was the Step II hearing officer. Hersey denied the grievance by a letter dated December 21, 1999, addressed and mailed to Lafore at the VSEA office. Hersey's letter was received at VSEA on December 27, 1999. The letter contained no indication that a copy of the letter was being sent to Grievant. Hersey did send a copy of the letter to Grievant, and Grievant received the copy on a workday prior to December 27, 1999. Lafore submitted a Step III grievance on behalf of Grievant to the Department of Personnel on January 11, 2000, which was the 10th workday following December 27, 1999.

The Employer contends that this grievance must be dismissed pursuant to Article 15, Section 3(c)(1) of the Contract because Grievant did not submit her Step III grievance to the Department of Personnel "within ten (10) workdays of receipt of the Step II decision". The Employer contends that the time within which to file a Step III grievance begins to run when the employee receives a copy of the Step II decision, not when the employee's VSEA representative receives the decision. The Employer bases this contention on Article 15, Section 3(b)(3) of the Contract, which states that "(t)he

employee shall be notified in writing of the department's decision". Since Grievant received a copy of the Step II decision on a workday prior to December 27, and the 10th workday following receipt of the decision by her was prior to January 11, 2000, then the Employer contends that the Step III grievance was untimely submitted on January 11, 2000.

Grievant contends that it was reasonable to consider the date VSEA received the Step II decision, December 27, 1999, as the trigger date for filing a Step III grievance. Grievant relies on the Step II decision being addressed and mailed to VSEA with no indication that a copy was being sent to Grievant.

The Board will resolve an issue on the merits unless the collective bargaining agreement requires it to be dismissed on procedural grounds. Grievance of Kimble, 7 VLRB 96, 108 (1984). Grievance of Amidon, 6 VLRB 83, 85 (1983). Under contracts providing that grievances must be filed within specified times at earlier steps of the grievance procedure, the Board previously has dismissed grievances for failing to follow the contractual filing timeframes at an earlier step of the grievance procedure. Grievance of Boyde, 18 VLRB 518 (1995); *Affirmed*, 165 Vt. 624 (1996). Grievance of Dyer, 4 VLRB 306 (1981).

We conclude that Article 15, Section 3(c)(1) of the Contract does not require that this grievance be dismissed. It provides that Step III grievances "shall be submitted . . . within ten (10) workdays of receipt of the Step II decision" and, that if grievances are not submitted within that timeframe, "the matter shall be considered closed." Under the circumstances, where the Step II decision was addressed and mailed to the VSEA Field Representative representing Grievant with no indication that a copy was being sent to

Grievant, we consider the “receipt” triggering the running of the grievance time clock to be the receipt by VSEA.

We do not find persuasive the Employer’s contention that Article 15, Section 3(b)(3) of the Contract, which states that “(t)he employee shall be notified in writing of the department’s decision”, results in receipt by Grievant being the trigger date for a Step III grievance. Given the Employer’s failure to indicate on the decision or otherwise that Grievant had been sent a copy of the decision, VSEA as Grievant’s representative could not be expected to know that an earlier, direct service of a decision on Grievant would occur. Further, the Employer has not demonstrated that VSEA knew, or should have known, of earlier service of the decision on Grievant prior to the time the Step III grievance was submitted.

We also do not believe that it would be reasonable to place the burden on Grievant to make her VSEA representative aware of her earlier receipt of the grievance decision. She had no reason to assume timing of receipt would be in question, and she was entitled to rely on her representative’s receipt of the grievance as the triggering date for the Step III grievance. The Employer is primarily responsible for any confusion or lack of knowledge with respect to earlier service on Grievant. The Employer should not be allowed to benefit through dismissal of this grievance based on its own conduct which reasonably led VSEA to believe that December 27, 1999, could be relied on as the trigger date for submitting a Step III grievance.

NOW THEREFORE, based on the foregoing reasons, it is hereby ORDERED that the State of Vermont Department of Employment and Training's motion to dismiss this grievance is DENIED.

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

VERMONT LABOR RELATIONS BOARD

Catherine L. Frank, Chairperson

Carroll P. Comstock

Richard W. Park

Edward R. Zuccaro