

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 01-73
FRANCIS RIOPEL)	

MEMORANDUM AND ORDER

The issue before the Labor Relations Board is whether to grant a motion filed by the State of Vermont Department of Corrections (“Employer”) to dismiss the grievance filed in this matter. In December 2001, Francis Riopel (“Grievant”), a correctional officer at the Northwest State Correctional Facility, filed a grievance contesting two written reprimands imposed on him. Grievant requested as a remedy to be exonerated of all charges and have the written reprimands removed from his personnel file.

On August 13, 2002, the Employer filed a motion to dismiss this grievance. The Employer indicated that Grievant requested to be placed on medical retirement effective July 2, 2002; which request was granted by the Employer (Exhibits 2 and 3 to Employer’s motion). The Employer contends that, as a result of his retirement, the two written reprimands in his personnel file pose no harm to Grievant as they will not be released to a prospective employer or subsequent employer without Grievant’s permission. As support for this contention, the Employer cites State Personnel Policy and Procedure 5.5, which provides that “records of disciplinary action against the employee” are confidential information (Exhibit 4 to Employer’s motion). Thus, the Employer contends that Grievant’s medical retirement has resulted in this case being moot because there no longer is any threat of actual injury to Grievant’s legal interests.

Grievant filed a response to the motion on August 28, 2002. Grievant confirmed that his medical retirement was effective July 2, 2002. Nonetheless, Grievant objects to the Employer’s motion to dismiss on the grounds that presence of the reprimands in his

personnel file could have adverse consequences when he applies for jobs because most prospective employers would require a release of his personnel file. Grievant and the Employer have agreed to the Board deciding this matter without a hearing on the motion.

The jurisdiction of the Board in grievance proceedings is limited 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. Grievance of Boocock, 150 Vt. 422, 425 (1988). Where future harm is at issue, the existence of an actual controversy "turns on whether the plaintiff is suffering the threat of actual injury to a protected legal interest, or is merely speculating about the impact of some generalized grievance." Id. at 424.

The Vermont Supreme Court has applied these standards in two cases in which employees have had grievances pending at the time they resigned from employment. In Grievance of Boocock, 7 VLRB 265 (1984); *Affirmed*, 150 Vt. 422 (1988); the Board and the Supreme Court dismissed a resigned state police officer's grievance contesting his last performance evaluation. The Board and the Court reasoned that the potential harm to the employee that may have been caused by an adverse performance evaluation had been eliminated since the employee had obtained satisfactory employment in the Federal service. The Court stated:

By failing . . . to continue his grievance action within the context of a specific job pursuit, (footnote omitted) grievant essentially asked the Board to speculate about what the performance evaluation's general effect might be. The Board correctly declined to do so since there was a lack of an actual controversy under these circumstances. There was no threat of actual injury to grievant's legal interests. 150 Vt. at 425-26.

In Grievance of Moriarty, 156 Vt. 160 (1991), the Court dismissed the appeal by a former state police lieutenant, who had resigned to take other employment, from a Board

decision that the lieutenant had failed to prove that his transfer was disciplinary rather than administrative. Moriarty argued before the Court that his future employment prospects were hindered because any prospective employer given access to his personnel file would conclude that the transfer was disciplinary. Id. at 163. He further contended that Boocock was inapplicable since Boocock did not intend to leave his new job, whereas Moriarty might seek reemployment with the State Police. Id. at 164. The Court was not persuaded and concluded that there remained no actual controversy:

The mere possibility that one might seek reemployment is not . . . sufficient to transform a nonjusticiable controversy into a justiciable one . . . Moriarty concedes that he does not have any legal right to reemployment. Moreover, he has failed to explain why his application for reemployment would be treated more favorably by the State Police if he should succeed with his appeal. In these circumstances, Moriarty is merely “speculating about the impact of some generalized grievance.” (citations omitted). Id. at 164.

In another grievance involving an employee who had resigned, but unlike Boocock and Moriarty had not obtained full-time employment elsewhere pending the resolution of their grievances, the Board concluded that the employee’s circumstances were sufficiently analogous to those facing Boocock and Moriarty to warrant dismissal of her case. Roddy v. CCV, 20 VLRB 186 (1997). The employee grieved alleged harassment and placement of a disciplinary letter in her personnel file. The Board determined that the employee essentially was asking the Board to speculate about what the general effects may be of the alleged harassment and placement of a disciplinary letter in her personnel file on her ability to obtain full-time employment, which the Board concluded was insufficient to present a threat of actual injury to the employee’s legal interests. Id. at 189. Moreover, the Board reasoned that any potential effect of the disciplinary letter appeared diminished since the employee’s personnel file was deemed confidential and a prospective employer would not have access to it. Id. at 189-90.

We conclude that the circumstances of the case before us are similar to the Roddy case, and grant the Employer's motion to dismiss this grievance due to absence of an actual controversy . Like Roddy, Grievant essentially is asking the Board to speculate about what the general effects may be of placement of disciplinary letters in his personnel file on his ability to obtain other employment, which is insufficient to present a threat of actual injury to Grievant's legal interests.

Also, similar to Roddy, any potential effect of the disciplinary letters appears diminished since, as confirmed by the Employer, they will not be released to a prospective employer or subsequent employer without Grievant's permission. We are not persuaded by Grievant's contention that the presence of the reprimands in his personnel file could have adverse consequences because most prospective employers would require a release of his personnel file. Grievant has presented no basis for his claim that most prospective employers would require a release of his personnel file, and his speculation in this regard is insufficient to demonstrate a threat of actual injury to his legal interests.

Based on the foregoing reasons, it is ordered that the Employer's motion to dismiss the grievance of Francis Riopel is granted.

Dated this ____ day of September, 2002, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Richard W. Park

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