VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 01-45
RHODA WESTBROOK	)	

MEMORANDUM AND ORDER

The issue before the Labor Relations Board in this grievance contesting the dismissal of Rhoda Westbrook ("Grievant"), a State Department of Prevention, Assistance, Treatment and Health Access ("PATH" or "Employer") employee, is whether to grant a motion filed by the Employer to compel Grievant to respond to the Employer's discovery requests. Specifically, the Employer's discovery requests call for disclosure of all names and aliases Grievant has used, the names of Grievant's children, any spouses or former spouses of Grievant's children, Grievant's spouse and former spouses, any current or former spouses of any current or former spouse of Grievant, and any grandchild of Grievant and each of the parents of the grandchild. Grievant objects to responding to these discovery requests to the extent they ask her to identify individuals who were not part of the Employer's investigation in this case leading to her dismissal.

At the outset, it is necessary to discuss the charges against Grievant resulting in her dismissal that are pertinent to deciding this motion. Grievant was charged with violating the Employer's conflict of interest policy by accessing a number of child support cases and other cases that were outside the scope of her assigned work. The June 6, 2001, investigation report that formed the basis of her dismissal states as follows:

> . . . (T)he investigation concludes that Ms. Westbrook violated the PATH Conflict of Interest Policy, and DOP Policy 5.6, in that, between January, 2000, and January, 2001, she accessed the following cases:
>
> DH (daughter)(39 times);
> CH (ex-husband of DH)(4 times);
> BB (ex son-in-law)(6 times);

BB (ex-boyfriend of DH)(1 time);
LD (boyfriend of Ms. Westbrook's other daughter, SB)(7 times);
EE (ex-boyfriend of Ms. Westbrook)(14 times);
RL (cousin of Ms. Westbrook)(2 times);
JM (ex-girlfriend of RL)(3 times);
NH (temporary employee at VDO)(3 times);
JC(child support case of NH)(confidential status)(1 time);
PG(former PATH employee)(1 time);
WP (Ms. Westbrook's ex-husband)(2 times);
SM (a child for whom Ms. Westbrook provided respite care)(1 time);
SM & RM (husband and wife Ms. Westbrook telephoned ML to discuss, discussed above)(1 time each);
DC (former clerical employee VDO co-worker of Ms. Westbrook) (1 time);
GS (child support case related to DC)(1 time);
AY (neighbor of Ms. Westbrook)(2 times);
CT (child support case related to AY)(1 time);
MB (cousin of Ms. Westbrook – former PATH employee) (1 time)

The investigation also concludes that Ms. Westbrook was dishonest in her responses during the investigation. She indisputably was dishonest in her initial denial that she accessed DH's case files. She was also dishonest in her denial that she accessed the other above-listed case files and her claims that other workers used worker #325 to an extent that accounted for those actions (Investigation Report, pages 5-6).

On June 7, 2001, the Employer sent Grievant a letter informing her that her dismissal was being contemplated. That letter, which subsequently was incorporated into her dismissal letter as providing the reasons for Grievant's dismissal, provided in pertinent part as follows:

1. <u>Violation of PATH Conflict of Interest Policy – Accessing Records Inappropriately</u>

It appears that, between January, 2000, and January, 2001, you used the ACCESS computer system to look up PATH and/or Office of Child Support ("OCS") client records on a substantial number of persons who bore no relationship to your assigned duties. These actions involved about twenty (20) persons with whom you have family or personal relationships: You most frequently accessed the files of your daughter, DH (about 39 times), your former boyfriend, EE (about fourteen times), LD, the boyfriend of your other daughter, SB (seven times), and your ex-son in law, BB (six times). It appears that there

were about ninety-two (92) occasions that you accessed these PATH files to which you had no legitimate access . . .
Your actions appear to have violated . . . (t)he PATH Conflict of Interest Policy . . . . . .

8. Dishonesty During the Investigation

It appears that you were dishonest in your responses during the investigation, including but not necessarily limited to the following:

(a) Re: Accessing PATH Records outside your duties: It appears that you were dishonest when you generally denied accessing PATH records outside the scope of your duties. It also appears that you were dishonest when you claimed that other workers used your worker number to regularly access PATH files. You were dishonest in your initial denial that you ever accessed the records of your daughter, DH, and later when you claimed to have permission to do so. You were also dishonest when you denied accessing the PATH records of a long list of individuals with whom you have personal relationships.

. . .

In its discovery requests, the Employer seeks information on the identity of individuals beyond the 20 persons identified in the investigation report and letter stating the reasons for Grievant's dismissal. The Employer contends that the information sought is relevant because the Employer is entitled to put on evidence of Grievant's false statement that she had not inappropriately accessed PATH records. The Employer states that Grievant's denial was not limited to the specific instances that had been discovered in the investigation, but was much broader. The Employer contends that it is entitled to put on evidence of that "lie", and maintains that "(e)vidence of the lie is any evidence that shows that she did inappropriately access the computer records". The Employer also contends that the evidence is important to a possible defense of Grievant that her co-workers, not her, had inappropriately accessed the records at issue.

In ruling on a motion to compel discovery, the Board applies Rule 26(b)(1) of the Vermont Rules of Civil Procedure, which provides that "parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in

the pending action". The information sought is discoverable "if it appears reasonably calculated to lead to the discovery of admissible evidence".

In determining whether the Employer's discovery requests appear reasonably calculated to lead to the discovery of admissible evidence with respect 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.

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. Appeal of Danforth, 23 VLRB 288, 295 (2000). This implies that evidence is not relevant to the extent that it involves alleged improper conduct by an employee which management was unaware of at the time of the employee's dismissal. Id. at 295-96.

In Grievance of Boucher, 9 VLRB 50, 56-57 (1986), the Board discussed whether, in making a decision in a dismissal case, it would rely on post-dismissal evidence gathered by an employer. The Board stated:

> In deciding this issue, we draw a distinction between evidence gathered after discharge which supports the reason given for discharge . . . and evidence gathered after a discharge to add an entirely new offense. The latter is clearly inappropriate. The Contract requires the Employer to state the reasons for dismissal in the dismissal letter . . . and our review does not go beyond the

> reasons given by the employer for its action in the dismissal letter. Grievance of Regan, 8 VLRB 340, 365 (1985).
>
> However, with regard to post-dismissal evidence supporting the stated reasons for disciplinary action, we believe the relevant consideration is really one of fairness and surprise. As a general rule, we believe an employer may investigate further to substantiate facts known to exist at the time of dismissal to support action already taken, as long as an entirely new charge is not added and the discharged employee is given an adequate opportunity to contest it.

This examination of our role and scope of review in dismissal cases leads us to conclude that the Employer's motion to compel should be denied in seeking information relating to the identity of individuals beyond the persons identified in the investigation report and the letter stating the reasons for Grievant's dismissal. In seeking information that may lead to additional evidence that Grievant made false statements, the Employer is acting contrary to our precedents that our review does not go beyond the reasons given by the Employer for its action in the dismissal letter, and that evidence is not relevant to the extent that it involves alleged improper conduct by an employee of which management was unaware at the time of the employee's dismissal.

In the letter stating the reasons for Grievant's dismissal, the Employer identified 92 instances, involving 20 persons, in which Grievant allegedly improperly accessed cases. In that letter, the Employer also relied on those 92 instances to support a charge that Grievant was dishonest in denying that she accessed records outside the scope of her duties. This is the alleged misconduct by Grievant that the Employer was aware of at the time of Grievant's dismissal, and at the hearing the Employer is limited to seeking to establish Grievant's misconduct through introducing evidence of these instances.

The Employer's contention that it is entitled to introduce "any evidence that shows that she did inappropriately access the computer records" goes beyond seeking to substantiate facts known to exist at the time of dismissal. Instead, it is seeking to uncover

potential instances of Grievant's misconduct of which the Employer was unaware at the time of Grievant's dismissal, and possibly add entirely new charges of Grievant's dishonesty. This is inappropriate, and thus we deny the Employer's motion to compel in this regard.

We also deny the Employer's motion to compel with respect to requesting Grievant to list all names used by her at present or in the past. The Employer contends that it is entitled to this information to establish whether Grievant has any criminal convictions under an assumed name. The Employer cites the provisions of the Vermont Rules of Evidence that a witness may be impeached by evidence of a conviction of certain crimes. The Vermont Rules of Evidence do not apply in our grievance proceedings, and the Employer has not made a sufficient showing that discovery of this information is reasonably calculated to lead to the discovery of admissible evidence in our review of Grievant's dismissal.

Based on the foregoing reasons, it is ordered that the Employer's motion to compel discovery is denied.

Dated this ____ day of June, 2002, 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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John J. Zampieri