VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 01-62
MERILL CRAY	)	

MEMORANDUM AND ORDER

The issue before the Labor Relations Board is whether to grant two motions for summary judgment, and a motion to strike an oral reprimand from the disciplinary record of Merill Cray ("Grievant") in connection with this grievance over the dismissal of Grievant from employment as a Licensing Board Investigator in the Office of Professional Regulation for the Secretary of State ("Employer").

On December 27, 2001, Grievant filed a motion for partial summary judgment seeking to dismiss Count IV of the grounds given in support of her dismissal. The Employer filed a memorandum in opposition to this motion and a statement of material facts in dispute on February 7, 2002.

On January 10, 2002, Grievant filed a motion for partial summary judgment seeking to dismiss Count I of the grounds given in support of her dismissal. The Employer filed a memorandum in opposition to the motion and a statement of material facts in dispute on February 25, 2002.

On January 30, 2002, Grievant filed a motion to strike from consideration as part of her disciplinary record an oral reprimand which she received. The Employer filed a memorandum in opposition to the motion and a statement of material facts in dispute on February 28, 2002.

We first discuss the two summary judgment motions. Before discussing the specifics of the motions, we set forth the applicable standards in such cases. The

summary judgment motions were filed pursuant to Rule 56 of the Vermont Rules of Civil Procedure, which has been incorporated into Section 12.1 of the Labor Relations Board Rules of Practice.

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and . . . any party is entitled to judgment as a matter of law". V.R.C.P. 56(c)(3). The moving party has the burden of proving that there is no genuine issue as to any material fact, and the non-moving party must be given the benefit of all reasonable doubts and inferences in determining whether a genuine issue of material fact exists. Hodgdon v. Mount Mansfield Co., 160 Vt. 150, 158-59 (1992). Price v. Leland, 149 Vt. 518, 521 (1988). Grievances of Choudhary, 15 VLRB 118, 179-80 (1992). Where the moving party does not bear the burden of persuasion at hearing, it may satisfy its burden of production by showing that there is an absence of evidence in the record to support the nonmoving party's case. Ross v. Time Mirror, Inc., 164 Vt. 13, 17-18 (1995). Before granting summary judgment, the Board provides the party opposing the motion a reasonable opportunity to show the existence of a fact question. Kelly v. Town of Barnard, 155 Vt. 296, 306 (1990). Choudhary, 15 VLRB at 180.

To defeat a motion for summary judgment, an issue of fact in dispute must be both genuine and material; that is, the evidence is such that a reasonable factfinder could return a verdict for the non-moving party. Choudhary, 15 VLRB at 180. We cannot try issues of fact, or weigh the probative effect of conflicting evidence, in considering a motion for summary judgment; we examine the evidence to determine whether a triable

issue exists rather than for the purpose of resolving the issue. Berlin Development Associates v. Department of Social Welfare, 142 Vt. 107 (1982). Baldwin v. Upper Valley Services, 162 Vt. 51, 58 (1994). Summary judgment must be denied if a genuine issue of material fact exists. Baldwin v. Upper Valley Services.

In her first summary judgment motion, Grievant seeks the dismissal of a charge against her that she breached confidentiality by providing a final investigative report to the Vermont State Employees' Association and friends who are attorneys. The Employer stated the following with respect to this charge in the letter providing the reasons for dismissing Grievant:

> As is noted in section 2 above, you, as well as your VSEA Representative and Attorney stated in the June 25, 2001, investigative interview that you provided VSEA with two redacted pages of the final investigative report. Those pages have the identities of witnesses redacted but do provide confidential information regarding the investigation. Further, as noted above, you told me on May 31, 2001, that you showed the report to a couple of friends who are attorneys.
>
> 3 V.S.A. 131(d) states that "[n]either the secretary nor the office shall make public any information regarding disciplinary complaints, proceedings or records except the information required to be released under this section." [emphasis added]. When you have made requests for copies of another investigator's investigative reports in the context of previous grievance proceedings, this office has informed you that investigative reports are strictly confidential and are not generally available to the VSEA.
>
> By providing the VSEA with two redacted pages of the final investigative report and, by your own admission, providing the report to friends of yours who are attorneys, you violated the office policy on confidentiality as well as 3 V.S.A. 131(d).
> (July 16, 2001, letter from Secretary of State Deborah Markowitz to Merill Cray)

In reviewing the materials on file, we conclude that a genuine issue of material fact exists with respect to this charge. In her motion for partial summary judgment on this issue, among the undisputed facts asserted by Grievant is that she did not disclose the investigative report to friends of hers who are attorneys. However, the Employer disputes

this fact, asserting that Grievant told Secretary of State Deborah Markowitz in a May 31, 2001 discussion that she had taken the investigative report from the office and showed it to a couple of attorneys who were friends of hers.

In determining whether Grievant breached confidentiality as charged, it is a material fact whether she showed the report to friends of hers who are attorneys. Since there is a genuine issue as to this material fact, we must deny Grievant's motion for summary judgment on this issue. The full development of facts afforded by an evidentiary hearing on the merits is required before we can adequately address this charge.

In her second summary judgment motion, Grievant seeks the dismissal of a charge against her that she provided dishonest and intentionally misleading responses in a Step II grievance meeting concerning her activities on March 30, 2001. The Employer stated the following with respect to this charge in the letter providing the reasons for dismissing Grievant:

> On May 23, 2001, you made false representations in a Step II meeting when describing your March 30, 2001, schedule and activities. You had been given an oral reprimand for failing to get permission to go directly to a Rutland appointment rather than to first go to the office on March 30, 2001. Your regular workday begins at 7:00 a.m. You claimed you had appointments beginning at 8 AM in Rutland and therefore did not come to the office first. You stated twice in that meeting that you had an 8 AM appointment in Rutland – once at the beginning of the meeting and later in response to a specific question from Jessica Porter. Ms. Porter indicated that she would likely reduce the oral reprimand to supervisor's feedback when she wrote her final decision because you insisted that you did not comply with Mr. West's directive solely because you did not have enough time to come into work before your 8:00 appointment in Rutland.
>
> Our further inquiries established that your first appointment in Rutland on March 30, 2001, was at 10 AM. In the June 25, 2001, investigative interview you agreed that your first appointment was at 10 AM, but indicated you did not recall claiming at the Step II meeting that it was at 8 AM. There were three other

> employees of this office at the Step II meeting and they all agree that you claimed to have an 8 AM appointment in Rutland.
> (July 16, 2001, letter from Secretary of State Deborah Markowitz to Merill Cray)

In reviewing the materials on file, we conclude that a genuine issue of material fact exists with respect to this charge. In order to determine whether Grievant made false representations at the May 23, 2001, Step II grievance meeting, we need a developed evidentiary record as to what occurred at the meeting. The materials on file do not provide such a record, and thus a genuine issue of material fact exists. The full development of facts afforded by an evidentiary hearing on the merits is required before we can adequately address this charge. Thus, we deny the motion for partial summary judgment on this issue.

Finally, we address the motion filed by Grievant to strike from Grievant's disciplinary record an oral reprimand that was issued to her for violating a work rule. In support of the motion, Grievant contends that the work rule was unlawfully instituted, and the oral reprimand was reduced to a "supervisory feedback" by the hearing officer at the conclusion of a Step II grievance meeting over the oral reprimand.

We are not prepared to strike the oral reprimand from Grievant's disciplinary record on the present record before us. The continuing effectiveness of the oral reprimand can only be determined after the full development of facts as to what occurred at the Step II grievance meeting, and subsequent to the meeting, afforded by an evidentiary hearing. Thus, we deny the motion.

Based on the foregoing reasons, it is ordered that the motions for summary judgment, and the motion to strike an oral reprimand from the disciplinary record, filed by Grievant are denied.

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

VERMONT LABOR RELATIONS BOARD

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Catherine L. Frank, Chairperson

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Carroll P. Comstock

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Richard W. Park