VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 02-49
TERRENCE SANVILLE	)	

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. On September 17, 2002, Terrence Sanville ("Grievant") filed a grievance against the Employer. Grievant filed an amended grievance on September 27, 2002. In his grievance as amended, Grievant alleges that the Employer is in violation of Articles 1, 5, 14, 17, 19 and 71 of the collective bargaining agreement between the State and the Vermont State Employees' Association ("VSEA") for the Corrections Bargaining Unit, effective July 1, 1999 – June 30, 2001 ("Contract"); various rules and regulations and a consistent past practice by continuing to deny him shift and post bid benefits.

Grievant contends that the Employer failed to perform the mandatory pre-employment criminal record check on him, and that this error was repeated upon transfer and promotion of Grievant to another facility. As a result, Grievant contends that the Employer acted improperly by not warning him of potential career limitations due to a felony conviction he received thirty years earlier, and that the Employer therefore is prevented from now refusing to offer Grievant certain posts and shifts due to his felony conviction. Grievant asserts that he is being denied his rights to transfer, training and promotional opportunities.

On November 15, 2002, the Employer filed a motion to dismiss the grievance. The Employer contends that the grievance is untimely filed because it was not filed until

more than a year after the Employer notified Grievant that he would not be "post certified" due to a record check which revealed the felony conviction of Grievant, and due to the Employer's standards concerning eligibility for a position that required the possession of firearms. Grievant filed a response to the Employer's motion on December 11, 2002.

A hearing on the Employer's motion was held on May 15, 2003, before Labor Relations Board Members Edward Zuccaro, Acting Chairperson; John Zampieri and Joan Wilson. Grievant represented himself. Assistant Attorney General William Reynolds represented the Employer. At the hearing, the parties presented evidence and oral argument on the motion.

The pertinent facts necessary to decide this motion are as follows: In December 1970, Grievant was convicted of a felony for breaking and entering (State's Exhibit 1). In January 1998, the Employer hired Grievant as a temporary correctional officer at the St. Johnsbury Correctional Facility, and subsequently placed him in a permanent position at the facility (Attachment to Grievant's amended grievance). The Employer did not perform a criminal record check on Grievant prior to hiring him as a temporary correctional officer nor when he was hired on a permanent basis. In February 2000, the Employer promoted Grievant from Correctional Officer I to Correctional Officer II and transferred him to the Northern State Correctional Facility in Newport (Attachment to Grievant's Amended Grievance). The Employer did not perform a criminal record check on Grievant upon his promotion and transfer. At the time Grievant was transferred, there was no expectation that Correctional Officer II's would be required to be certified to possess firearms.

In early 2001, the Employer changed the twelve post positions at the Newport facility from Correctional Officer I positions to Correctional Officer II positions. Two of the post positions are on the facility perimeter and require the officer assigned to such posts to carry firearms. It is illegal for a convicted felon to possess a firearm. The Employer did criminal record checks at that time on all Correctional Officer II's that the Employer was considering certifying for post positions; including a criminal record check on Grievant. The record check revealed the 1970 felony conviction of Grievant for breaking and entering. By letter dated February 16, 2001, Russell Sumner, Security and Operations Supervisor at the Newport facility, informed Grievant that "due to your record check and DOC standards you will not be allowed to be post certified" (State's Exhibit 1).

On March 14, 2002, Grievant for the first time filed a Step I complaint alleging that he was refused an opportunity to bid for a post assignment despite his seniority in violation of the contract, policy and law (State's Exhibit 6). Grievant previously had not filed a Step I complaint or a grievance concerning the Employer's failure to certify him to work a post position due to his felony conviction.

Based on these facts, the Employer contends that, because Grievant allowed more than one year to pass subsequent to being informed that he would not be certified to work posts, Grievant's grievance is untimely and should be dismissed. Grievant responds that the grievance is timely filed because the consequences of the Employer's failure to forewarn him of career limitations are continuing and he is suffering a longstanding injustice.

The Board will resolve an issue on the merits if at all possible unless the collective bargaining agreement requires it to be dismissed on procedural grounds. Grievance of Brewster, 23 VLRB 96, 98 (2000). Grievance of Kimble, 7 VLRB 96, 108 (1984). Grievance of Amidon, 6 VLRB 83, 85 (1983). The most common grounds for the Board to dismiss grievances on procedural grounds have been if grievances were not timely filed, or issues were not raised or were untimely raised, at earlier steps of the grievance procedure.

Under contracts providing that grievances must be filed within specified times at earlier steps of the grievance procedure, the Board, with the approval of the Vermont Supreme Court, has refused to consider grievances which were untimely filed at earlier steps of the grievance procedure. Grievance of Adams, 23 VLRB 92 (2000). Grievance of Boyde, 18 VLRB 518 (1995); *Affirmed*, 165 Vt. 624 (1996). Here, the Grievance Procedure article of the Contract requires that Step I complaints and, in the event Step I is bypassed, Step II grievances be filed "within fifteen workdays of the date upon which the employee could have reasonably been aware of the occurrence of the matter which gave rise to the complaint". Article 15, Section 3(a)(1) and (2). If a grievance is not filed within contractual time frames, the "matter shall be considered closed". Article 15, Section 3(b)(1).

The occurrence of the matter which gave rise to Grievant's complaint is the Employer's notification to Grievant that he would not be certified to work posts due to his criminal record. This occurred in February 2001. Yet Grievant did not file a Step I complaint concerning the Employer not certifying him to work a post position until

March 2002, more than a year after the fifteen day period to file Step I complaints or Step II grievances ended.

Nonetheless, Grievant contends this is a continuing grievance because the consequences of the Employer's failure to warn him of career limitations are ongoing. The Board has accepted the validity of a continuing grievance in cases where pay practices were involved and employees initially did not grieve the alleged violations within contractual time limitations, but grieved the alleged violations during the period they were still occurring. Grievance of Shine, 21 VLRB 103 (1998). Grievance of Reed, 12 VLRB 135, 143-44 (1989). Grievance of Cole, 6 VLRB 204, 209-210 (1983). However, continuing grievances are not recognized when completed acts are involved such as termination through discharge or resignation, a job transfer, or discontinuance of a particular job assignment. Grievance of Boyde, 165 Vt. 624, 626 (1996).

We conclude that a completed act is involved here. The Employer's determination, and notification to Grievant, to not certify Grievant to work posts due to his felony conviction constituted a completed act. It is true that the consequences of this decision are continuing since Grievant does not have the opportunity to bid for certain posts and shifts. However, this does not translate into a continuing grievance. The completed act of dismissal also has ongoing consequences such as continuing loss of wages, leave accrual and retirement credits. Yet a continuing grievance is not recognized when a dismissal is at issue. Here too, a continuing grievance is not recognized when a determination is made to not certify an employee to work posts due to a criminal record.

Thus, we conclude that this grievance should be dismissed as untimely filed at initial steps of the grievance procedure. We note that, even if we assume for the sake of

argument that the grievance is timely filed, Grievant would have no ultimate recourse in challenging the Employer's decision to not certify him to work posts. It is illegal for a convicted felon such as Grievant to possess firearms. Two of the post positions held by Correctional Officer II's at the Newport facility are on the facility perimeter and require the officer to carry firearms. Since Correctional Officer II's work perimeter posts, and Grievant is a Correctional Officer II, the Employer would be acting contrary to law by certifying Grievant to work a post.

Based on the foregoing reasons, it is ordered that the motion of the State of Vermont Department of Corrections to dismiss this grievance is granted and the grievance is dismissed.

Dated this ____ day of June, 2003, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

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Edward R. Zuccaro, Acting Chairperson

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John J. Zampieri

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Joan B. Wilson