VERMONT LABOR RELATIONS BOARD

APPEAL OF:	)	
	)	DOCKET NO. 02-23
CATHY FARMAN	)	

MEMORANDUM AND ORDER

In this appeal contesting the dismissal of Cathy Farman ("Appellant") during her original probationary period, the issue is whether to grant the motion filed by the State of Vermont, Department of Military ("Employer"), to compel Cathy Farman ("Appellant") to appear for a deposition and produce documents requested by the Employer.

The pertinent factual background necessary to decide this motion follows. On October 3, 2002, the Labor Relations Board issued a Notice of Hearing scheduling this matter for a hearing on the merits on December 12, 2002. On October 21, 2002, the Employer's Attorney William Reynolds, Assistant Attorney General, mailed Appellant a Notice of Deposition and Request for Production of Documents pursuant to V.R.C.P. 30 and 34. The Notice provided that the "deposition and inspection of documents will begin at 10:00 a.m. on Monday, November 18, 2002, at the Vermont State Police Barracks in Bethel, Vermont", and requested that Appellant produce at that time "(a)ny and all documents, letters, e-mail messages or other materials that relate in any way to the (appeal)). The certified mail was signed for by Steve Farman on October 26, 2002.

By letter dated November 10, 2002, to Department of Personnel Paralegal Christine Boraker, Appellant stated:

> I am unable to attend the Deposition scheduled for November 18, 2002. I will be providing to you, as required by the Vermont Labor Relations Board, a copy of the documentation to be submitted at the hearing not less than 5 days prior to the hearing scheduled for December 12, 2002 at 9:00 a.m. to be held in the Labor Relations Board hearing room, 13 Baldwin Street, Montpelier, Vermont.

On November 18, 2002, Appellant and Reynolds spoke on the telephone concerning the taking of Appellant's deposition. They reached no agreement to reschedule the deposition. On the morning of November 18, Appellant telephoned the Labor Relations Board and spoke with Board Executive Director Timothy Noonan. During that conversation, Noonan discussed with Appellant the Rules of Civil Procedure adopted by the Board relating to the taking of depositions. On the afternoon of November 18, Reynolds telephoned the Board and asked Noonan if Appellant had called him concerning the taking of depositions. Noonan responded that Appellant had called him that morning, and that he had discussed with her the Rules of Civil Procedure relating to the taking of depositions.

On November 19, 2002, Reynolds filed a motion to compel with the Board, requesting that the Board compel Farman to appear for a deposition and produce documents requested by the Employer. On November 19, 2002, Noonan mailed a letter to Farman requesting that she "file with the Labor Relations Board by Monday, November 25, 2002, a response to the Employer's Motion to Compel".

Appellant filed a response to the motion on November 26, 2002. In her response, among other things, Appellant stated that she had not received the Employer's Motion to Compel until November 22, 2002. She also stated that she was not unwilling to attend a deposition; that she was "willing to attend a deposition held here at the Rutland Police Barracks on Friday, December 6, 2002 after 8:00 p.m."

After Appellant's response was filed, the Board panel scheduled to hear the merits of this appeal on December 12 – Carroll Comstock, John Zampieri and Edward Zuccaro – discussed the motion and Grievant's response to it. The Board panel decided to permit Appellant to be heard on her opposition to the Employer's motion, and converted the December 12 hearing from a hearing on the merits to a hearing on the Employer's motion

to compel discovery. The Board panel also determined that the parties should be prepared to discuss scheduling issues, including dates for completion of discovery, prefiling exhibits and the hearing on the merits. Noonan informed Appellant and Reynolds of the Board panel decision by letter.

On the morning of December 12, 2002, there was a snowstorm and the Board decided to cancel the hearing on the motion due to the storm. When Noonan telephoned Appellant to inform her of the cancellation, Appellant informed Noonan that she had written him a letter informing him that she would not attend the hearing. Noonan informed Appellant that the Board had not received the letter. On December 13, 2002, the Board received a letter from Farman dated December 9, 2002. It stated:

> This is to inform you that I shall not attend the hearing of December 12, 2002 on the Employer's motion to compel discovery. It has become evident that I am not to receive a fair or impartial hearing. The ex-parte communication between Mr. Reynolds and yourself, your tolerance of the harassment of Mr. Reynolds at my workplace, your demand that I respond within two business days to a motion before it is received by me and the changing of the hearing on the merits to a hearing on the Employer's motion to compel discovery for the convenience of Mr. Reynolds has made it quite clear I have not chosen the appropriate avenue to seek justice.

In considering the factual background of the case and deciding what action to take on the Employer's motion, we find it necessary to address the issues raised by Appellant in her letter, and express our disagreement with her view that she would not receive a fair or impartial hearing. Noonan did not have an inappropriate ex parte communication with Reynolds. In conversations he had with both Reynolds and Appellant that day, he was appropriately responding to their respective inquiries relating to issues of procedure before the Board, and was not improperly discussing with one party to the detriment of the other substantive case matters. Noonan did nothing to place Appellant at an unfair disadvantage and did not demonstrate lack of impartiality in responding to Reynolds'

question by informing him that Appellant had called him that morning, and that he had discussed with her the Rules of Civil Procedure relating to the taking of depositions.

Further, there was no "tolerance of harassment" by Reynolds. Appellant did not request action by Noonan or the Board directing Reynolds to discontinue any alleged harassing actions he was taking towards Appellant. Noonan also did not display lack of impartiality or act unfairly towards Appellant through the timeframe he set for Appellant to respond to the Employer's motion. A relatively short timeframe to seek resolution of this discovery issue was appropriate given that a hearing on the merits was scheduled in only three weeks. Also, Noonan could not have reasonably contemplated, assuming typical operation of the mail system, that Appellant would receive a copy of the Employer's motion two days after she received Noonan's request that she respond to the motion. If Appellant needed more time to respond to the motion under the circumstances, she could have contacted the Board and requested an extension of time. As it was, her response was filed the day after it was due, and it was considered by the Board panel.

Appellant's contention that the December 12 hearing was changed from a hearing on the merits to a hearing on the Employer's motion for the convenience of Reynolds lacks merit. The Board panel scheduled to hear the case changed the nature of the hearing because it was the judgment of the Board panel that the issues involved in the motion to compel were not amenable to informal resolution by the parties, and the best way to resolve the motion was to have a hearing before the Board panel. This would have provided the parties with an opportunity to orally present their case, and allow for an interchange among the parties and the Board panel to establish suitable arrangements to resolve the disputed issues. The convenience of Reynolds had nothing to do with the Board panel changing the nature of the hearing.

It is our continued judgment that the issues involved in the motion to compel are not amenable to informal resolution by the parties. However, based on the way this case has proceeded, we no longer believe a hearing before the Board is the best way to resolve the motion. In preparing for the hearing on the merits in this matter, the Employer has the right, pursuant to V.R.C.P 30 and 34, to depose Grievant and to have her produce the documents requested by the Employer. Given our judgment that the likelihood of the parties agreeing to a date, time and place for the deposition and production of documents is slim, we conclude it is most appropriate for the Board to establish these details and order the parties to comply.

Based on the foregoing reasons, the motion filed by the State of Vermont, Department of Military ("Employer"), to compel Cathy Farman ("Appellant") to appear for a deposition and produce documents requested by the Employer is granted. Appellant shall appear at the Vermont State Police Barracks in Rutland, Vermont, on April 29, 2003, at 10:00 a.m., and at that time shall submit to a deposition to be taken by the Employer's attorney and shall produce for inspection by the Employer's attorney any and all documents, letters, e-mail messages or other materials that relate in any way to the appeal in this matter. Failure by Appellant to comply with this order shall subject Appellant to dismissal of her appeal.

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

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Richard W. Park, Chairperson

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Carroll P. Comstock

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Edward R. Zuccaro

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Joan B. Wilson