VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	
VERMONT STATE EMPLOYEES'	)	
ASSOCIATION, LOWELL	)	
NOTTINGHAM, KEITH ALBEE,	)	DOCKET NO. 03-12
DANIEL DILLNER, RAYMOND	)	
MCINTYRE, RANDY MAYHEW,	)	
JAMIE REED, AND LARRY	)	
CHARBONNEAU	)	

MEMORANDUM AND ORDER

The issue before the Labor Relations Board is whether to grant a motion to dismiss this grievance filed by the State of Vermont Agency of Natural Resources, Department of Forests, Parks and Recreation ("Employer"). On March 28, 2003, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of itself and the following employees of the Employer: Lowell Nottingham, Keith Albee, Daniel Dillner, Raymond McIntyre, Randy Mayhew, Jamie Reed and Larry Charbonneau ("Grievants"). Grievants alleged that the Employer violated Articles 1, 15 and 17 of the Non-Management and Supervisory collective bargaining agreements between the State and the VSEA effective July 1, 2001 – June 30, 2003; a longstanding past practice; Agency of Administration Bulletin 2.3; and the principles of promissory and/or equitable estoppel by implementing a policy generally prohibiting employees from commuting to work stations in state vehicles from November 10, 2002 to April 1, 2003.

On June 27, 2003, the Employer filed a motion to dismiss the grievance as untimely filed. The Employer contends that the grievance must be dismissed because Grievants failed to file a timely grievance with the Labor Relations Board the previous year when a grievance was filed at lower steps of the grievance procedure, contesting an essentially identical policy covering the period December 1, 2001 – April 1, 2002, and was not pursued beyond the Step III level of the grievance procedure. The Employer

contends that the November 2002 – April 2003 policy was a continuation of the December 2001 – April 2002 policy, and cannot form the basis for a valid grievance separate from the grievance filed the previous year. The Employer relies on the following provisions in the grievance procedure article of the contracts to support its position: "The appeal from the Department of Personnel's decision shall be to the Vermont Labor Relations Board . . . such appeal shall be filed within thirty (30) days after receipt of the Step III decision or the matter shall be considered closed." Article 15, Section 3(d).

On July 14, 2003, Grievants filed a memorandum in opposition to the motion to dismiss. Grievants contend that the Employer's assertion that the November 2002 – April 2003 policy was a continuation of the December 2001 to April 2002 policy is not borne out by the facts because there is a different period of applicability and substantively different provisions. Grievants contend that the grievance was not pursued to the Board the previous year because, by the time the Step III level of the grievance procedure had been completed, the period of applicability of the policy had expired and the grievance could have been dismissed by the Board as moot.

In considering the Employer's motion to dismiss, we apply the same standards applied in cases where a motion for summary judgment is filed. This is because, in the absence of an evidentiary hearing before the Board, our treatment is the same whether a motion for summary judgment or a motion to dismiss is filed. Grievance of Monti, 10 VLRB 246, 248 (1987). A case shall be dismissed under such standards if there is no genuine issue as to any material fact and the moving party is entitled to dismissal as a matter of law. Id. 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. Grievance of Cray, 25 VLRB 93, 94 (2002).

In reviewing the materials on file, we conclude that the Employer has not demonstrated that there is no genuine issue as to any material fact. Genuine issues of material facts exist with respect to whether the November 2002- April 2003 policy constitutes a continuation of the December 2001 – April 2003 policy, and whether the most recent policy is substantively different than the policy implemented the previous year. The full development of facts on these issues afforded by an evidentiary hearing is required before we would have sufficient evidence to determine if the Employer's timeliness argument has merit. Id.

Thus, we deny the Employer's motion to dismiss. The Employer may present evidence on the timeliness of the grievance during the same Board hearing that evidence on the merits of the grievance is presented.

Based on the foregoing reasons, it is ordered that the motion to dismiss this grievance filed by the State of Vermont Agency of Natural Resources, Department of Forests, Parks and Recreation, is denied.

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

VERMONT LABOR RELATIONS BOARD

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Richard W. Park, Chairperson

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Carroll P. Comstock

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John J. Zampieri

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Edward R. Zuccaro