

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF  
DAVID M. YUSTIN

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DOCKET NO. 80-63

MEMORANDUM AND ORDER GRANTING MOTION TO DISMISS

On August 13, 1980, the Vermont State Employees' Association, Inc. filed a petition with the Vermont Labor Relations Board on behalf of David M. Yustin, a member of the State Police Unit of the VSEA. In that petition, VSEA alleges the State violated Article III(2)(b) of the current Agreement between the State and VSEA for the State Police Unit in giving Mr. Yustin a written reprimand for his involvement in a motor vehicle accident while on duty. VSEA alleges that disciplinary action constitutes a grievance under the contract, charging that Trooper Yustin was subject to discriminatory application of a rule regarding "High Risk Pursuit and/or Responses".

On August 14, 1980, the State filed an answer to the petition, denying the charges therein, and moved to dismiss the grievance as barred from the Board's jurisdiction under 3 V.S.A. §1004 and Article III(2)(c) of the State Police Unit Agreement. The State also moved to dismiss the grievance on the grounds that the grievant failed to raise the issue of unequal treatment in any step prior to submitting his grievance to the Board.

Based on the pleadings, we find as true the facts in paragraphs numbered one through eleven in the petition, and by taking official notice of certain matters make the following additional findings of fact.

1. Article III(4)(a) of the State Police Unit Agreement enables employees to initiate grievances at the Step III level (Department of Personnel) if the subject matter is beyond the control of the Commissioner of Public Safety, as in the instant case.

2. Article III(4)(b) of the State Police Unit Agreement requires that grievances initiated at the Step III level must be filed within ten workdays of the date upon which the employee could reasonably have been aware of the occurrence of the matter which precipitated the grievance.

3. Trooper Yustin's initial grievance submitted at the Step III level and dated June 25, 1980, was filed on the twenty-second workday following Commissioner Philbrook's May 23, 1980, notification of the reprimand grieved.

4. The Board cannot determine when the Department of Personnel answered the grievance. Page one of Mr. Kecskemethy's response is dated July 9, 1980, while page two is dated July 15, 1980.

5. The Step III answer informed Trooper Yustin it was the position of the Department of Personnel that his complaint was not grievable by statute and by contractual agreement, citing 3 V.S.A. §1004 and Article III(2)(c) of the State Police Unit Agreement. In assuming this position, no Step III meeting as provided in Article III(3) Step III(b) was scheduled within ten days after receipt of the grievance.

6. In addition to its arguments declining jurisdiction, the State maintained in its Step III answer that the matter being grieved was time-barred as it was not grieved at the appropriate step within ten days after receipt of Commissioner Philbrook's May 23, 1980, notification of reprimand to Trooper Yustin.

#### MEMORANDUM

The jurisdictional issue here is dispositive. We conclude we lack jurisdiction and dismiss the grievance.

We note in passing, however, several procedural issues raised by this grievance. We do so only to point out to the parties the necessity for meticulous adherence to time requirements and other procedures in the contract, if a matter within our jurisdiction is to be considered. First, an issue exists as to whether the grievance is defective by virtue of the fact Trooper Yustin failed to initiate the grievance at the Step III level within ten days of his receipt of Commissioner Philbrook's May 23, letter of reprimand; or whether his (Trooper Yustin's) June 5, 1980, letter notifying the Commissioner of his "intention to appeal the written reprimand" fulfilled the timeliness requirements for initiating his grievance. Second, did the Department of Personnel fail to respond to the Step III grievance in a timely manner, where the facts before us indicate that the State may have responded on July 15, three days late. Third, is the grievant barred from claiming discriminatory disciplinary action in his petition before the Board where he did not make that allegation either in his grievance at the Step III level or

his June 5 "appeal" to the Commissioner. Cf.: Grievance of Vermont Technical College Chapter of the Vermont State Colleges Faculty Federation, 2 VLRB 22 (1979) (grievance dismissed for failure to meet the contractual timeliness requirements); and Grievance of Vermont State Colleges Faculty Federation on behalf of Catherine Wheeler, 2 VLRB 289 (1979) (sex discrimination aspect of grievance filed with the Board was not raised in the initial Step I grievance and therefore was timebarred from the Board's consideration). Finally, is the grievance properly before us at the Step IV level where the Department of Personnel declined jurisdiction.

As to the last procedural issue enumerated above, the State Police Unit Agreement (hereinafter, the "Agreement") is silent as to a required time frame for responding to a Step III grievance in the event the Department of Personnel declines jurisdiction over the matter and refuses to schedule a Step III grievance meeting. However, we would assume the grievance would then proceed to the Step IV level, an appeal before the Board. This course of action seems reasonable where the employee has received a final decision from the Department of Personnel. We would not decline to hear an appeal based solely on the State's position in a prior step that the matter was not grievable.

We conclude however, after reviewing the pleadings, the Agreement (Article III(2)(c), and the pertinent statute (3 V.S.A. §1004), that this matter is a disciplinary action involving a State Police Trooper and as such is not subject to the contractual grievance procedure and review by the Board. For this reason, we are compelled to grant the State's Motion to Dismiss this matter.

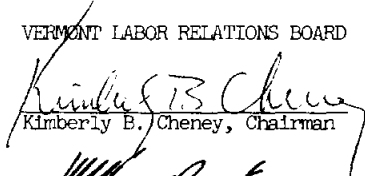
All disciplinary actions could be viewed by the person punished as discriminatory, in that the punishment given is not precisely the same as punishment for similar conduct of another employee. Nevertheless, the root of the complaint is discipline. We are not inclined to circumvent a clear legislative policy depriving us of authority to consider disciplinary matters by converting them into "discrimination" cases. We believe the current statutes give the Commissioner absolute authority to impose even discriminatory discipline without review. There might be cases where discrimination is so invidious, or is based on race or other impermissible grounds, so as to constitute an unfair labor practice. But this case does not allege such facts. This case involves a disciplinary matter we are forbidden to consider. Therefore, we need not decide whether the grievance was procedurally defective as well.

ORDER


Now, therefore, it is hereby ORDERED that the grievance of David Yustin be dismissed and is DISMISSED.

Dated this 26<sup>th</sup> day of September, 1980, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

  
Kimberly B. Cheney, Chairman

  
William G. Kemsley, Sr.

  
Robert H. Brown