VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 10-20
DAVID JACOBS	)	
GRIEVANCE OF:	)	
	)	DOCKET NO. 10-24
DAVID MARTINSON	)	

MEMORANDUM AND ORDER

The issue before the Labor Relations Board in these grievances over discipline imposed on state employees is what conditions, if any, to place on information provided during discovery by the State to the grievants relating to the consistency of discipline imposed on the grievants compared to other employees.

The Vermont State Employees' Association ("VSEA") filed a grievance (Docket No. 10-20) on May 19, 2010, on behalf of David Jacobs, an employee of the Vermont Department of Liquor Control, contending that his dismissal was without just cause and was in retaliation for his complaint and grievance activity. Among Grievant's contentions supporting his claim that he was dismissed without just cause is that the employer failed to apply discipline with a view toward uniformity and consistency in violation of Article 14 of the collective bargaining agreement. Grievant was dismissed for allegedly failing to follow appropriate procedures for time reports and schedule changes, submitting a false time report, and failing to answer truthfully during the investigation of the alleged misconduct.

On July 1, 2010, VSEA filed a grievance (Docket No. 10-24) on behalf of David Martinson, a Vermont Department of Corrections employee, contending that his disciplinary demotion from Assistant Superintendent to Corrections Service Specialist II

was without just cause and was in retaliation for his complaint and grievance activity. Upon demoting Martinson, the employer assigned him to work outside of Vermont in the out of state unit of the Department of Corrections. Among Grievant's contentions supporting his claim that he was demoted without just cause is that the employer failed to apply discipline with a view toward uniformity and consistency in violation of Article 14 of the collective bargaining agreement.

On October 25, 2010, VSEA filed Motions to Compel in Docket Nos. 10-20 and 10-24. Therein, VSEA requested the Board to issue an order compelling production of documents and information pertinent to the employers' investigation and discipline of other employees, without limitation or any other condition. The State filed responses to the motions, as well as Motions For a Protective Order, on November 1, 2010.

Oral argument was conducted on November 4, 2010, in the Labor Relations Board hearing room in Montpelier before Board Members Richard Park, Chairman; Gary Karnedy and Louis Lacroix. Michael Casey, VSEA General Counsel, and Abigail Winters, VSEA Associate General Counsel, represented Grievants. Steven Collier, Department of Human Resources General Counsel, and Assistant Attorney General Marie Salem represented the State. The parties narrowed the issues in dispute during the oral argument.

In Docket No. 10-20, VSEA specifically sought in discovery, through interrogatories and requests for production of documents, information on all instances in the past five years in the Department of Liquor Control in which: 1) the employer investigated an employee for an alleged violation of the procedures, policies and rules alleged to have been violated by Grievant Jacobs; 2) the employer investigated an

employee for falsification of a time sheet, daily report, expense reimbursement request, and/or any other documentation of performance of the employee's job duties; 3) an employee allegedly provided false testimony during a personnel investigation; 4) an employee provided inaccurate information in a time sheet, daily report, expense reimbursement, itinerary and/or any other documentation of performance of the employee's job duties, and the Department did not impose discipline on the employee for providing inaccurate information; and 5) an employee allegedly failed to follow supervisory instruction.

VSEA seeks for each instance identified in the above five categories the following information: a) the identity of the employee, and the employee's length of employment with the employer; b) the conduct of the employee and any allegations made against him or her; c) the findings and outcome of any investigation; d) the supervisory feedback, corrective action or discipline which was issued to the employee, if any, including the date thereof; and e) the identity of all persons who participated in the decision.

The State agrees that VSEA has a right to this information. However, the State contends that VSEA is only entitled to this information after an agreement between the parties or a protective order is in place to protect the confidentiality of the information with respect to investigation and discipline of other employees.

In Docket No. 10-24, VSEA initially requested information which the State contended was unduly burdensome because it would have involved providing information on approximately 1,700 investigations. As a result of the parties' agreement on the scope of discovery at the November 4 oral argument, VSEA now seeks instead responses to the following questions directed to the Agency of Human Services Human

Resources Manager, the Facilities Executive of the Department of Corrections, and three staff of the Agency of Human Services Investigative Unit: 1) any memory they have of Rule 13 violations that do not involve romantic/sexual relations or business relations; 2) awareness of any other relevant cases in administering uniformity and consistency of discipline; and 3) any other employees that have been transferred out of state due to disciplinary reasons as well as records involving such transfers.

VSEA asserts that it needs the above information in Docket No. 10-20 and Docket No. 10-24, without condition, in processing the grievances of its members to examine whether the employer has failed to impose discipline in a uniform and consistent manner. VSEA contends that the employer's refusal to provide the information without condition is inappropriate because it: 1) violates the rules of discovery, 2) violates Article 6 of the parties' collective bargaining agreement; 3) is contrary to the parties' past practice, 4) constitutes a unilateral change in a matter subject to bargaining, and 5) amounts to refusal to bargain and a violation of the State Employees Labor Relations Act.

The State recognizes that VSEA has a right to the information which it seeks as set forth above as modified through the parties' agreements during the oral argument. However, the State contends that VSEA is only entitled to this information after an agreement between the parties or a protective order is in place to protect the confidentiality of the information with respect to investigation and discipline of other employees. The State expresses a concern that the grievants will be free to make public the confidential information without restriction if there is no agreement or protective order in place to ensure that the information remains confidential. The State asserts that,

if no limitations are put on how and when the personnel information will be used, then a grievant may use the information for improper purposes.

In determining what conditions, if any, to place on information provided during discovery by the State to the grievants relating to the consistency of discipline imposed on the grievants compared to other employees, we have precedents to guide us. In Grievance of Vermont State Employees' Association (Re: Refusal to Provide Information), 15 VLRB 13 (1992), the Labor Relations Board addressed whether VSEA, in representing a dismissed state employee, was entitled to information on disciplinary action taken against other employees. The employee was dismissed following an investigation into allegations that he and other employees of the Department of Motor Vehicles had engaged in misconduct with respect to an incident occurring during training. VSEA contended on behalf of the dismissed employee that he had been treated more harshly than the other employees. VSEA sought, among other things, copies of all tape-recorded interviews regarding the investigation of the other employees and records of the disciplinary action taken against them.

In reaching a decision, the Board interpreted Article 6 of the contract between the State and VSEA, which provided that "(t)he State will . . . provide such . . . information as is reasonably necessary to serve the needs of the VSEA as exclusive bargaining agent and which is neither confidential nor privileged under law". The Board concluded that access to the information which VSEA requested was relevant to the issue of whether the State applied discipline in a uniform and consistent manner, and held that providing the information to VSEA was reasonably necessary to allow VSEA to properly represent its members in grievance proceedings. Grievance of VSEA, 15 VLRB at 22. The Board

recognized the validity of confidentiality concerns with respect to investigations of other employees and disciplinary actions taken against them, and held that such concerns would be accommodated through redaction of the names of the employees involved. Id.

More recently, in interpreting a similar provision of a contract between the University of Vermont and United Academics, the Board determined whether the University violated the collective bargaining contract by denying the union access to the tenure files of other faculty members in connection with a pending grievance concerning denial of tenure to a faculty member. The Board stated that the provision "involves a right central to the obligation of the bargaining unit representative to represent its members – the presenting and processing of employee grievances," and held that the union was entitled to access to the requested information which was relevant to issues in the case. Grievance of United Academics, AAUP/AFT and Campo, 29 VLRB 1, 5-6 (2007). The Board further stated:

> In providing such access, though, we must balance the right to the information with faculty members' confidentiality rights. A union's assertion that it needs information to process a grievance does not automatically oblige the employer to supply all the information in the manner requested. Detroit Edison Co. v. NLRB, 440 U.S. 301, 314 (1979). The type of disclosure that will satisfy the duty to supply information turns upon the circumstances of the particular case. Id. at 314-315. The type of disclosure needs to take into consideration legitimate concerns for employee confidentiality. Id. at 315-320. 29 VLRB at 9.

In balancing confidentiality concerns with rights of employees and unions to information necessary to seek to establish allegations of contract violations, the Board cited the decision in Grievance of VSEA, discussed above, and held:

> (T)he University can reproduce the materials and provide them to United Academics after redacting the name(s) of the involved faculty member(s). Alternatively, the parties may agree to other methods to provide the pertinent information while protecting the anonymity of the involved faculty member(s). 29 VLRB at 10.

Redaction of identifying information on involved employees in balancing the need for information with confidentiality concerns is consistent with Vermont Supreme Court treatment of Public Records Act request cases. The Court has indicated that it is appropriate to consider redaction of confidential references in documents as an alternative to non-disclosure of the entirety of documents. Norman v. Vermont Office of Court Administrator, 179 Vt. 593 (2004). Just as balancing disclosure and privacy interests under the Public Records Act may warrant redaction of confidential references based on the facts of a case, so too may balancing of the need for information with confidentiality concerns justify redaction of identifying information on involved employees based on the facts of our cases.

Our precedents provide a framework to guide our decision in this case. The Article 6 provision in the State-VSEA contract cited in the 1992 decision remains in the contracts applicable to the grievances before us. The information requested by VSEA is relevant to the issue of whether the State applied discipline in a uniform and consistent manner, and providing VSEA with the information is reasonably necessary to allow VSEA to properly represent its members in grievance proceedings. The confidentiality concerns raised by the State can be accommodated through redacting identifying information on the employees covered by VSEA's information request. This does not preclude the parties from agreeing to other methods to provide the pertinent information while protecting the anonymity of the involved employees.

We so conclude in these cases, but this does not preclude alternative methods being employed in future cases to provide pertinent information based on the circumstances. We encourage the exploration of these methods in the future, and our

decision here should not be construed as hindering such efforts to balance the need for information with legitimate confidentiality concerns.

We deny the Motions to Compel filed by VSEA requesting the Board to issue an order compelling production of documents and information pertinent to the employers' investigation and discipline of other employees to the extent that VSEA requests that the order contain no limitation or condition. The redaction of identifying information on the involved employees provides a condition on their release. So too does the provision that the parties may agree to other methods to provide the pertinent information while protecting the anonymity of the involved employees.

We also decline to issue protective orders as requested by the State in the cases before us. The issuance of a protective order here creates the potential of the need for such orders to be issued by the Board in every grievance contesting the dismissal of an employee where disparate treatment of the grievant is alleged. Such grievances are frequent in our experience. We are not inclined to encourage such regular insertion by the Board in the parties' discovery process. It will exacerbate an undesirable trend of State-VSEA grievance cases becoming more formal and time-consuming. It is not necessary to head down this route as a matter of course when redaction of identifying information on involved employees, or some other method devised by the parties, generally should address confidentiality concerns.

We also note that the State has a remedy other than a protective order to redress improper disclosing of confidential information by grievants insofar as the grievants remain state employees. Section 5.45 of Vermont Personnel Policies and Procedures, which is applicable to all state employees, provides that employees with access to

confidential employee information – which includes performance evaluation ratings and history of disciplinary action – may use such information only in carrying out a "legitimate State business need and should not be disclosed to others who do not have a legitimate business-related need to know". Failure to comply with these provisions "may result in appropriate disciplinary action up to and including dismissal". We interpret Section 5.45 to provide for the potential discipline of employees if they improperly disclose outside the grievance process confidential information on the investigation and discipline of other employees that they obtain in the processing of a grievance.

We recognize that there is a question whether the remedy provided by Section 5.45 is applicable if grievants are no longer state employees, most notably if they have been dismissed and seek their reinstatement by the Board. Nonetheless, this does not warrant issuance of a protective order in Docket No. 10-20, which involves a grievance filed by a dismissed employee, since redaction of identifying information with respect to the investigation and discipline of other employees should address confidentiality concerns.

Based on the foregoing reasons, it is ordered:

1. The Motions to Compel filed by Grievants requesting issuance of an order compelling production of documents and information pertinent to the employers' investigation and discipline of employees other than Grievant is denied to the extent that such motions request that the order contain no limitations or conditions.
2. The Motions For Protective Order filed by the State of Vermont are denied; and

3. The State of Vermont forthwith shall provide Grievants with the information requested in the Motions to Compel, as set forth in this decision, after redacting identifying information on the employees covered by the information request unless the parties agree to other methods to provide the pertinent information while protecting the anonymity of the involved employees.

Dated this 12th day of November, 2010, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

Richard W. Park, Chairperson

/s/ Gary F. Karnedy

Gary F. Karnedy

/s/ Louis P. Lacroix

Louis P. Lacroix