VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 16-62
EDWARD VON TURKOVICH	)	

MEMORANDUM AND ORDER

The issue before the Labor Relations Board is whether to grant a motion filed by the State of Vermont Department of Buildings and General Services ("Employer") to dismiss the grievance filed in this matter. On January 5, 2017, Edward von Turkovich ("Grievant") filed a grievance, stating:

> "On November 28, 2016, Grievant was advised that his position as Director (of) Governmental Services . . . was to be subject to a reduction in force effective at the close of business December 31, 2016 'as a result of lack of work and/or lack of funds at BGS.' The effect of this alleged reduction in force is to terminate the Grievant's employment. The purported reason for the reduction in force is pretextual. As a tenured public employee, the grievant is entitled not to be terminated without just cause and due process."

Grievant contends that the action by the Employer violated Rules and Regulations for Personnel Administration §3.03, which prohibits discrimination against an employee based on any non-merit factor, and §12.01, which provides that a managerial employee shall not be subject to dismissal or suspension except for cause.

On February 27, 2017, the Employer filed an Answer to the grievance and a motion to dismiss it. The Employer asserts that the Labor Relations Board should dismiss the grievance as improperly filed at the Board because Grievant needed to first file a grievance at Step II of the grievance procedure before filing a grievance with the Board, and he failed to do so. Grievant filed a memorandum in opposition to the Employer's motion to dismiss on March 22, 2017. The Employer filed a reply to Grievant's opposition to the motion to dismiss on March 24, 2017.

Pertinent Facts

Following are the pertinent facts necessary to decide this motion. These facts are undisputed by Grievant and the Employer.

On November 28, 2016, Grievant received a letter from the Commissioner of the Department of Buildings and General Services which provided in part:

> In accordance with the Extension of Certain Contract Benefits to Classified Service Managerial and Confidential Employees document ("EOB"), this letter is to officially notify you that your position as a Director (of) Governmental Business Services . . . will be subject to a Reduction in Force ("RIF") effective at the close of business on December 31, 2016, as a result of lack of work and/or lack of funds at BGS.
>
> You have permanent status with RIF Reemployment Rights in accordance with Article 64 of the Non-Management Unit Collective Bargaining Agreement between the State and the Vermont State Employees' Association ("CBA"), as extended to designated managers by the EOB. You do not have within class, horizontal or vertical displacement rights within your department and geographic area.
>
> As such, you will be laid off effective at the close of business on December 31, 2016. Your mandatory Reemployment Rights will begin on December 2, 2016, provided you establish your reemployment parameters with the Department of Human Resources, and may continue for two years from the effective date of the RIF . . .
>
> Please refer to Articles 63 and 64 of the CBA for a more complete explanation of your RIF and Reemployment Rights and responsibilities.
> . . .

Among the provisions of the Non-Management Unit Collective Bargaining Agreement between the State and the Vermont State Employees' Association extended to managerial employees such as Grievant are the following provisions of Article 15, Grievance Procedure:

> **3. GRIEVANCE PROCEDURE**
> The following procedures are established for settlement of complaints and grievances.
> (a) **STEP I (Immediate Supervisor Level)**
> (1) The employee . . . shall notify his/her immediate supervisor of a complaint within fifteen (15) 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. . .
> . . .

(b) **Step II (Department Head Level)**

(1) If no satisfactory settlement is reached at Step I, or if the Step I is bypassed, the complaint shall be reduced to writing . . . and shall be submitted by the aggrieved party or representative to the administrative head of the department in which the aggrieved is employed within the time frames outlined in Section 3(a) above, otherwise the matter shall be considered closed. . .

. . .

(c) **STEP III (Department of Human Resources Level)**

(1) A grievance . . . shall be submitted to the Department of Human Resources within ten (10) workdays of receipt of the Step II decision if the employee wishes to pursue a matter not resolved at Step II. Otherwise, the matter shall be considered closed. . .

. . .

(d) **STEP IV (Board Level)**

The appeal from the Department of Human Resources decision shall be to the Vermont Labor Relations Board in accordance with the rules and regulations established by the Board and such appeal shall be filed within thirty (30) days after receipt of the Step III decision or the matter shall be considered closed.

. . .

4. GENERAL PROVISIONS

(a) Grievances may be initiated at Step II if the subject matter of the complaint is clearly beyond the control of the immediate supervisor, or at Step III if the subject matter of the grievance is clearly beyond the control of the agency, department or institution head.

(b) Grievances initially filed at Step II or Step III shall be submitted within fifteen (15) workdays of the date upon which the employee could reasonably have been aware of the occurrence of the matter which gave rise to the grievance.

(c) An employee may appeal his or her dismissal directly to the Vermont Labor Relations Board.

. . .

Grievant did not file a grievance at any of the three steps of the grievance procedure regarding the November 28, 2016, letter which he received. Instead, he filed a grievance directly with the Labor Relations Board.

Discussion

The Employer contends that this grievance must be dismissed pursuant to Article 15, Section 3(b)(1), and Section 4(b) of the Contract because Grievant was required to file a Step II grievance over his reduction in force within 15 workdays of receiving the November 28, 2016,

letter, and he chose not to file a Step II grievance. Grievant asserts to the contrary that he was not subject to a good faith reduction in force; instead, he maintains that he was subject to a dismissal in the guise of a reduction in force. Grievant contends that his claim of discharge means he was governed by the provision of Article 15, Section 4(c), of the Contract that an employee may appeal his dismissal directly to the Labor Relations Board.

The Board will resolve an issue on the merits unless the collective bargaining agreement requires it to be dismissed on procedural grounds. Grievance of Kimble, 7 VLRB 96, 108 (1984). Grievance of Amidon, 6 VLRB 83, 85 (1983). Under contracts providing that grievances must be filed within specified times at earlier steps of the grievance procedure, the Board previously has dismissed grievances for failing to follow the contractual filing timeframes at an earlier step of the grievance procedure. Grievance of Boyde, 18 VLRB 518 (1995); *Affirmed*, 165 Vt. 624 (1996). Grievance of Dyer, 4 VLRB 306 (1981). Also, the Board has dismissed grievances contesting issues other than discharge from employment where employees bypass earlier steps of the grievance procedure and seek to bring an issue directly to the Board. Grievance of McCort, 19 VLRB 319 (1996); *Affirmed*, Unpublished decision, Sup.Ct.Dock.No. 96-540 (1997). Vermont State Employees' Association and Barney v. Department of Public Safety, 21 VLRB 224 (1998).

In applying these standards here, we conclude that the Employer's motion to dismiss this grievance should be granted. In Grievance of Day, 14 VLRB 229 (1991), the Board addressed the issue that also is involved in this case – i.e., whether an action termed by management as a reduction in force can be pursued as a grievance over a dismissal. In Day, the Board determined that the elements of dismissal were not present, on the grounds, among other things, that the grievant had reemployment rights. The Board stated: "If Grievant had been dismissed, he would

have no such rights." 14 VLRB at 279-80. Here too, if Grievant had been dismissed, he would not have reemployment rights.

The fact that Grievant was granted reemployment rights when he was notified of a reduction in force means that he could not file a grievance directly with the Board. Instead, he was required to initially pursue a grievance over the reduction in force at Step II of the grievance procedure. His bypassing earlier steps of the grievance procedure and bringing his grievance directly to the Board forecloses our deciding his grievance on the merits.

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

Dated this 13th day of June, 2017, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Gary F. Karnedy

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Gary F. Karnedy, Chairperson

/s/ Richard W. Park

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Richard W. Park

/s/ Edward W. Clark, Jr.

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Edward W. Clark, Jr.