VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 17-27
JOHN SUMMA	)	

MEMORANDUM AND ORDER

The issue before the Labor Relations Board is whether to grant a motion filed by the University of Vermont ("Employer") to compel Grievant John Summa to respond to two of the Employer's requests for production of documents pursuant to V.R.C.P. 37(A)(2). These requests and Grievant's initial objections are as follows:

> DOCUMENT REQUEST NO. 13: All emails, text messages, or other written communications, in hard copy or electronic form, sent or received by you concerning, relating, or pertaining to the allegations in your Grievance. If you claim that such information is privileged or otherwise protected, please provide the date and time of such communications, the parties involved, and the basis for your assertion of privilege and/or protection.
>
> **Response:** Grievant . . . objects to REQUEST NO. 13 on the basis this request is not proportional to the needs of the case, is overly broad, and is not reasonably calculated to lead to the production of admissible evidence in this grievance case. . . . Grievant objects to REQUEST NO. 13 on the basis that this request is unduly burdensome, duplicative, expensive, and irrelevant to the merits of the case.
>
> DOCUMENT REQUEST NO. 14: All emails, text messages, or other written communications, in hard copy or electronic form, in your custody or control concerning, relating or pertaining to the agents, servants, employees, or representatives of UVM and any of its current or former students, professors, or other affiliated individuals that concern, refer, or relate to the allegations in your Grievance. If you claim that such information is privileged or otherwise protected, please provide the date and time of such communications, the parties involved, and the basis of your assertion of privilege and/or protection.
>
> **Response:** . . . Grievant . . objects to REQUEST NO. 14 on the basis this request is not proportional to the needs of the case, is overly broad, and is not reasonably calculated to lead to the production of admissible evidence in this grievance case. . . Grievant objects to REQUEST NO. 14 on the basis that this request is unduly burdensome, duplicative, expensive, and irrelevant to the merits of the case.

Grievant filed an opposition to the motion to compel discovery on October 11, 2017. The Employer filed a reply in support of its motion on October 16, 2017. Oral argument on the motion occurred on January 4, 2018, before Board Members Richard Park, Chairperson; Alan Willard and Edward Clark in the Board hearing room in Montpelier. Grievant represented himself. Attorney Kendall Hoechst represented the Employer.

The area of dispute between the parties has been narrowed since the motion to compel discovery was originally filed. In his reply to the motion, Grievant acknowledged that, under the Employer's Acceptable Use Policy, neither he nor individuals corresponding with him had any expectation of privacy in email communications sent from University servers. Grievant stated that the Employer can search its own servers without imposing on Grievant the burden and expense involved in so doing. Given this acknowledgment by Grievant, the Employer agreed that the issue with respect to written communications on University servers had been resolved. Also, the Employer agreed at the January 4, 2018, oral argument to limit its request to emails, text messages and other written communication up to the time the decision was made to not reappoint Grievant. This results in the continuing disagreement between the parties being limited to Grievant's discovery obligations with respect to his personal email accounts, text messages and other written communications sent or received by him concerning, relating, or pertaining to the allegations in his grievance up to the time the Employer made the decision to not reappoint him.

The Employer contends that requests for emails, text messages and other written communications are routine discovery requests, and that the Employer seeks to discover only those communications from Grievant's private accounts that concern, refer or relate to the allegations in the grievance. The Employer asserts that communications beyond those included in the dossier on Grievant reviewed during the reappointment process are relevant and

discoverable evidence given that Grievant has indicated he intends to rely on such communications in support of his claims in the grievance. The Employer contends that this discovery is necessary to enable the Employer to prepare its defense, which includes testing Grievant's credibility. The Employer asserts moreover that there is no basis for any fears of Grievant that his friends and colleagues may be subject to embarrassment and retaliation by the Employer if such discovery is allowed.

Grievant responds that the Employer already has access to communications among Grievant and others which are relevant to this case through search of its own servers, and has not justified the "fishing expedition" it seeks to embark upon to review private emails, text messages and other written communications which played no part in the Employer's decision to not reappoint him. Grievant contends that the Employer's motion is inconsistent with the position it took denying his discovery requests for private emails of Employer representatives. Grievant asserts contrary to the Employer's motion that his credibility is not an issue in this case since his grievance is based on objectively verifiable information that is not compromised or discredited through his testimony. Absent any indication that the Employer has a factual basis for believing that prior acts of deception by Grievant will be revealed, Grievant maintains that the Board should deny the motion. Grievant further contends that the reasonable expectation of privacy that inheres in private text messages should be protected and persons should not be exposed to the risk of embarrassment or retaliation by the Employer.

The motion to compel discovery is governed by Rule 26 of the Vermont Rules of Civil Procedure, which has been adopted by the Board in Section 12.1 of Board *Rules of Practice*. A party seeking to compel discovery is required to make a sufficient showing that the information sought is properly discoverable under V.R.C.P. 26(b)(1). Grievance of Westbrook, 25 VLRB

130, 135 (2002). VSEA, Manning, et al v. Department of Public Safety, 20 VLRB 33, 38 (1997). Parties "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or the expense of the proposed discovery outweighs its likely benefit." V.R.C.P. 26(b)(1). "Information within this scope of discovery need not be admissible in evidence to be discoverable." Id.

V.R.C.P. 26(b)(1) was amended in 2017 to adopt verbatim Federal Rule of Civil Procedure 26(b)(1), significantly redefining the scope of discovery under the former Vermont rule. *See* Reporter's Notes to V.R.C.P. 26 – 2017 Amendment. The provisions of F.R.C.P. 26 (b)(1) were inserted to "deal with the problem of overdiscovery. The objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry." Federal Advisory Committee's Note to 2015 amendments of F.R.C.P. 26. "The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes. . . A party claiming undue burden or expense ordinarily has far better information – perhaps the only information – with respect to that part of the determination. A party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as the parties understand them. The court's responsibility, using all the information provided by the parties, is to consider these and all the other factors in reaching a case-specific determination of the appropriate scope of discovery." Id.

In applying these standards here, we have reviewed and considered all the information provided by the parties with respect to this motion. Grievant has provided much information to the Employer during the discovery process concerning the allegations in his grievance. The Employer submitted an Interrogatory to Grievant stating: "Identify all communications, written or oral, that refer, reflect, or relate to the allegations in your Grievance. For each such communication, identify the date of the communication and each individual involved, and describe the substance of the communication." In response to this interrogatory, Grievant listed 30 numbered written or oral communications covering approximately three single-spaced pages (Employer's Interrogatory No. 4 and Grievant's Response). Further, the Employer's Requests to Produce to Grievant during the discovery process included "(c)opies of documents or electronically stored information referenced or relied on in your Grievance, or that were relied upon or consulted in preparing your Grievance." In response, Grievant provided 24 documents (Employer's Document Request No. 2 and Grievant's Response).

Given these extensive communications referenced and produced by Grievant indicating what he is relying on as a basis for the allegations he has made in his grievance, the Employer is required to explain why this is not sufficient to defend against the claims of Grievant. This is particularly so when the information sought by the Employer involves private communications which ordinarily carry a reasonable expectation of privacy. The requirement to show information is discoverable is heightened under such circumstances.

Moreover, the need for the requested information must be explained by the Employer given the position it took in responding to discovery requests made by Grievant. Among the Requests to Produce Grievant served on the Employer were requests for emails and other written communications to and from Employer representatives Sarah Solnick, Department of Economics

Chair; Dean William Falls of the College of Arts and Sciences; and UVM Provost David Rosowsky "related to (Grievant's) teaching" and "grievance" and the Employer's "answer to the . . grievance". The Employer produced some documents in response to these requests but also raised objections. Among the grounds for objection were Grievant: "seeks information that is not relevant or proportional to the subject matter of the pending action" (Grievant's Document Request Nos. 5, 6, 7, 8, 11, 12, and Employer's responses). Grievant's requests extended to private emails and other written communications in the possession of these Employer representatives. It is not evident without fuller explanation the consistency of the Employer's positions that these requests of Grievant are not relevant or proportional to the needs of the case, whereas similar requests by the Employer of Grievant are relevant and proportional.

The Employer has not explained how the information already provided by Grievant, as well as the available information on its own servers, is not sufficient to prepare its defense in this case. The Employer's contention that requests for emails, text messages and other written communications are routine discovery requests falls well short of adequately explaining the ways in which the underlying information bears on the issues in this matter. We conclude likewise with respect to the Employer's assertion that discovery of the requested information will allow it to test Grievant's credibility. Absent any indication that the Employer has a factual basis for questioning Grievant's credibility, granting the motion to compel discovery on these grounds would constitute an unwarranted fishing expedition. Grievant already has indicated in response to discovery requests the communications on which he intends to rely in support of his grievance claims. The Employer has not adequately explained how the further information it seeks is necessary to defend against Grievant's claims. We are not inclined to compel production of the requested information which implicates privacy concerns.

Further, the deficiency of the Employer's motion to compel is reinforced by the failure of the Employer to explain the consistency of its positions that Grievant's discovery requests to produce information are not relevant or proportional to the needs of the case, whereas similar requests by the Employer of Grievant are relevant and proportional. The failure to provide such explanation weakens the Employer's rationale for the need of such information.

In sum, we deny the Employer's motion to compel discovery of all personal emails, text messages, or other written communications, in hard copy or electronic form, sent or received by Grievant concerning, relating, or pertaining to the allegations in his Grievance up to the time the Employer made the decision to not reappoint him. The Employer has not made a sufficient showing of the relevance and importance of the information in resolving the issues in this grievance, and we conclude that compelling such discovery is not proportional to the needs of the case.

Based on the foregoing reasons, it is ordered that the motion filed by the University of Vermont to compel Grievant John Summa to respond to two of the Employer's requests for production of documents Grievant is denied.

Dated this 9th day of January, 2018, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

Richard W. Park, Chairperson

/s/ Alan Willard

Alan Willard

/s/ Edward W. Clark, Jr.

Edward W. Clark, Jr.