"Actual Controversy" Requirement

The jurisdiction of the Board in grievance proceedings is limited by the requirement that there be an "actual controversy" between the parties.[1] To satisfy the actual controversy requirement, there must be an injury in fact to a protected legal interest or the threat of an injury in fact.[2] Where future harm is at issue, the existence of an actual controversy "turns on whether the plaintiff is suffering the threat of actual injury to a protected legal interest, or is merely speculating about the impact of some generalized grievance."[3]

The Vermont Supreme Court has applied these standards in two cases in which employees have had grievances pending at the time they resigned from employment. In one case, the Board and the Supreme Court dismissed a resigned state police officer's grievance contesting his last performance evaluation.[4] The Board and the Court reasoned that the potential harm to the employee that may have been caused by an adverse performance evaluation had been eliminated since the employee had obtained satisfactory employment in the Federal service. The Court stated:

> By failing . . to continue his grievance action within the context of a specific job pursuit, (footnote omitted) grievant essentially asked the Board to speculate about what the performance evaluation's general effect might be. The Board correctly declined to do so since there was a lack of an actual controversy under these circumstances. There was no threat of actual injury to grievant's legal interests.[5]

In another case, the Court dismissed an appeal of a former state police lieutenant, who had resigned to take other employment, from a Board decision that

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[1] In re Friel, 141 Vt. 505, 506 (1982).
[2] Id. Grievance of Boocock, 150 Vt. 422, 425 (1988).
[3] Id. at 424.
[4] Grievance of Boocock, 7 VLRB 265 (1984); *Affirmed*, 150 Vt. 422 (1988).
[5] 150 Vt. at 425-26.

the lieutenant had failed to prove that his transfer was disciplinary rather than administrative.[6] The former lieutenant argued before the Court that his future employment prospects were hindered because any prospective employer given access to his personnel file would conclude that the transfer was disciplinary.[7] He further contended that his appeal presented an actual controversy because he might seek reemployment with the State Police. The Court was not persuaded and concluded that there remained no actual controversy:

> The mere possibility that one might seek reemployment is not . . sufficient to transform a nonjusticiable controversy into a justiciable one . . . Moriarty concedes that he does not have any legal right to reemployment. Moreover, he has failed to explain why his application for reemployment would be treated more favorably by the State Police if he should succeed with his appeal. In these circumstances, Moriarty is merely "speculating about the impact of some generalized grievance."[8]

In two other grievances involving employees who had resigned, but unlike the two preceding cases had not obtained full-time employment elsewhere pending the resolution of their grievances, the Board concluded that the employees' circumstances were sufficiently analogous to the above-cited cases to warrant dismissal of their cases.

In one of the cases,[9] the employee grieved alleged harassment and placement of a disciplinary letter in her personnel file. The Board determined that the employee essentially was asking the Board to speculate about what the general effects may be of the alleged harassment and placement of a disciplinary letter in her personnel file on her ability to obtain full-time employment, which the Board concluded was insufficient to present a threat of actual injury to the employee's legal interests.[10]

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[6] Grievance of Moriarty, 156 Vt. 160 (1991).
[7] Id. at 163.
[8] Id. at 164.
[9] Roddy v. CCV, 20 VLRB 186 (1997).
[10] Id. at 189.

The Board also reasoned that the employee had not explained why she would receive a more favorable reference from the employer enhancing her employment prospects if she should prevail in her grievance and unfair labor practice charge. The Board noted that if the Board heard the case on the merits and found for the employee, the Board would be restricted to ordering the removal of the written reprimand from the employee's personnel file; the Board would not have the power to order a more favorable job reference.[11]

In the other case, involving a correctional officer who had retired pending resolution of two grievances he had filed contesting written reprimands, the Board similarly concluded that the officer was asking the Board to speculate about what the general effects may be of placement of disciplinary letters in his personnel file on his ability to obtain other employment. The Board also determined that any potential effect of the disciplinary letters appeared diminished since they would not be released to a prospective or subsequent employer without the officer's permission.[12]

When the employer, through the grievance procedure, has provided as a remedy the most that the Board could award as a remedy, the Board has determined that the "actual controversy" requirement has not been met, and has dismissed the grievance, even though the employer had not admitted to any contract violations.[13] The Board reasoned that, to provide an adequate basis to assert jurisdiction, a

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[11] Id. at 190.
[12] Grievance of Riopel, 25 VLRB 175 (2002).
[13] Grievance of Doheny, 34 VLRB 244 (2018). Grievance of VSEA (Re: Request for Information), 33 VLRB 435 (2016). Grievance of Vermont State Colleges Faculty Federation, AFT, UPV Local 3180, AFL-CIO, 28 VLRB 220, 235-236 (2006). Grievances of Cray, 25 VLRB 194, 216-217 (2002). Grievance of Rennie, 16 VLRB 1, 5-6 (1993). Grievance of Sherbrook, 13 VLRB 359, 362-63 (1990).

grievance must be more that an argument over contract interpretation; it also must be a request for action that the Board has the authority to order.[14]

In a 2015 decision dismissing a state employee grievance contending that adverse comments on her performance evaluation were in retaliation for complaints she made about her supervisor, the Board determined that there was no injury in fact to a protected legal interest of the employee since the employer had removed the comments from her performance evaluation and they played no part in any subsequent performance assessment of her. The Board also held that there was no threat to the employee of an actual injury to a protected legal interest because it was speculative how the amended performance evaluation providing an overall "satisfactory" rating with no supervisor comments would be viewed in the future by those possibly interested in hiring the employee. In sum, the Board concluded that there was no actual controversy remaining between the parties.[15]

[14] Id.
[15] Grievance of Edson, 33 VLRB 198, 202-03 (2015)