Duty to Provide Information During Grievance Process

An employer's duty to furnish information to a grievant and union representative has been at issue in grievances filed with the Board. In one case, the Vermont State Employees' Association sought information in connection with its representation of a grievant contesting his dismissal from state employment. The Board decision in the case provided in pertinent part:

> We . . . consider whether the State has violated Articles 6, 11 and 14 of the Contract. Article 6, Section 5, of the Contract provides in pertinent part 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". Article 11, Section 3, of the Contract provides that "(a)ny material, document, note or other tangible item which is to be entered or used in any . . . hearing before the Vermont Labor Relations Board, is to be provided to the employee on a one-time basis, at no cost to him/her". Article 14, Section 1(b) of the Contract, provides that the State "will . . . apply discipline . . . with a view toward uniformity and consistency".
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> VSEA contends that the State has violated these provisions . . . by failing to provide VSEA with the following materials: 1) copies of all tape-recorded interviews regarding the investigation into the conduct of (the grievant) and the other employees accused of misconduct at the Massachusetts Police Academy, 2) a copy of the investigator's report regarding (the grievant's) conduct, 3) all material relied on by the State in disciplining (the grievant), and 4) a record of the disciplinary action taken against other employees as a result of the investigation. VSEA has indicated that any concern regarding the confidentiality of the records can be accommodated through redaction of the names of the employees involved.
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> . . . We agree, pursuant to Articles 6, 11 and 14 of the Contract, that providing such information to VSEA is reasonably necessary to allow VSEA, as exclusive bargaining agent of employees, to properly represent (the grievant) before the Board. Access to such information is relevant to the issues of whether the State applied discipline in a uniform and consistent manner and, ultimately, whether just cause existed for dismissal. As indicated by VSEA, any concerns regarding the confidentiality of the records can be

accommodated through redaction of the names of the employees involved. . .[1]

In a subsequent decision, the Board held likewise that the State violated the above-cited Article 6, Section 5, of the Contract in a grievance over a classification decision by failing to provide VSEA with information on the classification review of the entire occupational investigator class that was used for comparative purposes in conducting the grievants' classification review.[2]

The Board found a violation of this contract provision in another case in which the State did not respond for many months to VSEA's request for information in a grievance alleging violations of emergency closing, annual leave, sick leave, and work location articles of the contract. The Board held that an employer that has not expressly refused to furnish information requested by a bargaining unit representative in fulfilling its obligation to present and process grievances can violate this article by failing to make a diligent effort to obtain or provide the information reasonably promptly.[3] The requirement is a reasonable good faith effort to respond to the request as promptly as circumstances allow.[4] In evaluating the promptness of the responses, the Board will consider the complexity and extent of information sought, its availability and the difficulty in retrieving the information.[5] The Board concluded that the failure by the State to communicate in any way with VSEA to discuss the issue, accompanied by a nine month period before any

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[1] Grievance of VSEA, 15 VLRB 13, 21-22 (1992).
[2] Grievance of VSEA, West and Cray, 18 VLRB 461, 484-486 (1995).
[3] Grievance of VSEA, et al (Re: Tropical Storm Irene), 32 VLRB 274, 323; *Affirmed*, 2014 VT 56 (2014).
[4] Id.
[5] Id.

information was provided to VSEA, constituted a violation of the obligation to make a diligent effort to provide the information reasonably promptly.[6]

In interpreting a similar provision of a contract between the University of Vermont and United Academics, the Board concluded that the union has the right to request and acquire information necessary to represent bargaining unit members in grievance proceedings. 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."[7] In responding to a claim by the University that another provision of the contract resulted in the union waiving its right to obtain access to personnel files, the Board further stated:

> When an employer contends that a union has contractually waived its right to obtain access to personnel files that are relevant to a grievance, the employer bears the weighty burden of establishing that a "clear and unmistakable" waiver has occurred. A clear and unmistakable waiver may be found in the express language of the collective bargaining agreement; or it may even be implied from the structure of the agreement and the parties' course of conduct. No waiver will be implied, however, unless it is clear that the parties were aware of their rights and made the conscious choice to waive them. A waiver will not be thrust upon an unwitting party. When a provision in a collective bargaining agreement conditions union access to employee personnel files on obtaining consent from employees, that provision must be read in the context of the entire agreement to determine whether the parties clearly intended to restrict union access to information relevant to grievances. "With so basic a right as access to personnel records for the purpose of processing employee grievances hanging in the balance, an ambiguous expression of intent cannot suffice to carry the employer's weighty burden".[8]

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[6] Id. at 323-24.
[7] Grievance of United Academics, AAUP/AFT and Campo, 29 VLRB 1, 5 (2007).
[8] Id. at 6; *citing* NLRB v. New York Telephone Co., 930 F.2d 1009, 1011-1012 (2nd Cir. 1991).