VERMONT LABOR RELATIONS BOARD

APPEAL OF:	)	
	)	DOCKET NO. 19-13
MICHAEL STUDIN	)	

MEMORANDUM AND ORDER

The issues before the Labor Relations Board are whether to grant a motion filed by the State of Vermont Department of Public Safety ("Employer") and a motion filed by the Vermont State Employees' Association on behalf of Michael Studin ("Appellant") in this appeal contesting the demotion, transfer, two 10-day suspensions, and the written reprimand imposed on Appellant. Appellant alleges that the Employer imposed discipline without just cause in violation of Article 14 of the collective bargaining contract, specifically that the Employer inappropriately bypassed progressive discipline and progressive corrective action, failed to impose discipline with a view towards uniformity and consistency, and violated his right of VSEA representation.

On February 10, 2020, the Employer filed a motion to quash the subpoena of Colonel Matthew Birmingham, Director of the Vermont State Police, and for issuance of a protective order. On February 11, 2020, Appellant filed a response to the Employer's motion, and a motion to compel discovery and to hold the Employer in contempt.

The Labor Relations Board held oral argument on the motions on March 5, 2020, before Labor Relations Board Members Richard Park, Chairperson; Alan Willard and David Boulanger in the Board hearing room in Montpelier. Assistant Attorney General William Reynolds represented the Employer. VSEA Counsel Kelly Everhart represented Appellant.

We first address the Employer's motion to quash the subpoena of Birmingham and for issuance of a protective order. The Employer advances various arguments in support of its motion. The Employer relies on the Vermont Supreme Court decision, Monti v. State, 151 Vt.

609 (1989), to support its motion to quash the subpoena of Birmingham. In Monti, a former state employee contesting her discharge from employment sought to depose the Governor in an effort to obtain information about her dismissal. The Court stated that "highly placed public officials are not subject to a deposition absent a showing that the testimony of the official is necessary to prevent injustice to the party requesting it." 151 Vt. at 613-614. The Employer contends that Appellant cannot meet the Monti test of establishing a clear showing that Birmingham's deposition is essential to prevent injustice.

The Employer's argument presupposes that Birmingham is a "highly placed public official" within the meaning of the Supreme Court's Monti decision. We are not inclined to interpret the Monti decision to extend to depositions served on government officials steps below the level of the Governor. This would extend possible immunity from deposition to a significant percentage of government officials, thereby hindering the search for truth essential to a just process. It also would be contrary to the experience of our cases. It is common for the Commissioner of Public Safety, the superior of Birmingham, to testify in cases in which state police members have been disciplined. *See e.g.*, Appeal of Hatch, 34 VLRB 89 (2017). Birmingham's level as a public official is not an appropriate basis to exempt him from a deposition.

Nonetheless, the Employer contends that the subpoena should be quashed because Birmingham's involvement in the internal investigation of Appellant is protected by the statutory privilege set forth in 20 V.S.A. §1923(d). In addition, the Employer moves for a protective order, pursuant to Vermont Rules of Civil Procedure ("V.R.C.P.") 26(c)(1) and (4), to prevent Appellant from inquiring into actions taken with regard to internal investigations, or the

substance of these investigations, including Birmingham's participation in the chain of command review.

V.R.C.P. 45(c)(3)(A) governs the Employer's contention that Birmingham's involvement in the internal investigation of Appellant is protected by a statutory privilege. It provides in pertinent part that, "(o)n timely motion, the court for which a subpoena was issued shall quash or modify the subpoena if it . . . requires disclosure of privileged or other protected matter and no exception or waiver applies." The statute relied on by the Employer, 20 V.S.A. §1923(d), provides in pertinent part:

> Records of the Office of Internal Investigation shall be confidential, except:
> (1) the State Police Advisory Commission shall, at any time, have full and free access to such records;
> (2) the Commissioner shall deliver such materials from the records of the Office as may be necessary to appropriate prosecutorial authorities having jurisdiction;
> . . .
> (4) the State Police Advisory Commission shall, in its discretion, be entitled to report to such authorities as it may deem appropriate or to the public, or both, to ensure that proper action be taken in each case.

In one case involving the dismissal of a state police officer, the Board struggled with the question of how to respect the provisions of 20 V.S.A. §1923(d) requiring the confidentiality of internal affairs records without negating the officer's right to establish her allegations that she received discriminatory and inconsistent treatment in being dismissed in violation of the collective bargaining agreement. Appeal of Danforth, 23 VLRB 51 (2000), 23 VLRB 288 (2000). The Board concluded this could be done by requiring that the employer provide the officer with certain summaries of internal affairs records concerning allegations of misconduct against state police officers. 23 VLRB at 55-57. The Board required that summaries be prepared so that the identity of the involved state police officer was not revealed, and indicated a willingness to issue protective orders as necessary to ensure that the identity of the involved

officer was not revealed. Id. The Board also denied the officer's request to be provided with copies of the chain of command review sheets concerning her dismissal. Id. at 57-58. The Supreme Court affirmed this ruling, stating:

> We deny Danforth's cross-appeal seeking reversal of the Board's order denying her access to the Department's command and review sheets. We agree with the Board that Danforth has failed to make a sufficient showing of need for the information contained in these sheets. Pursuant to Section 111, Art. IV, §2.3 of the Department's Rules and Regulations, a charged member "shall be given a copy of all the statements and other evidence compiled during the course of the investigation into the allegations against him/her" at the time charges are served. The Department's compliance with these rules provides employees with sufficient notification and information relating to allegations of improper conduct made against them, and sufficient protection against unsubstantiated allegations, such that unimpeded access to internal affairs records is not required.174 Vt. 231, 243 (2002).

The Board applied these standards in two other state police discipline cases. Appeal of Barci, 24 VLRB 193 (2001). Appeal of Madore, 24 VLRB 201 (2001). Also, in a subsequent state police dismissal case, the Board issued a protective order to ensure that the identities of involved state police officers in other cases of alleged misconduct were not revealed. Appeal of Danforth, 27 VLRB 79, 81-84 (2004).

The Employer contends in its motion that Appellant is seeking to depose Birmingham about records which are confidential pursuant to 20 V.S.A. §1923(d), including the chain of command review, and asserts that these records are protected by the statutory privilege as set forth in §1923(d) and recognized in the Danforth decision and its progeny. In response to the Employer's motion, and in the Motion to Compel Discovery which it filed, VSEA on behalf of Appellant conceded that it intended to depose Birmingham on matters related to the chain of command review.

Subsequently, VSEA has agreed to refrain from asking questions regarding the following: 1) Birmingham's involvement in the chain of command review; 2) Birmingham's involvement in

any and all Internal Affairs matters relating to Appellant, Trooper Foucher, Trooper Irwin and Trooper Stange; and 3) any changes and policies made to General Order 205 and Watch Command Policy. The first two areas in which VSEA agrees to refrain from asking questions reflects an appropriate acknowledgement that these areas are protected by the statutory privilege as set forth in §1923(d) and recognized in the Danforth decision and its progeny. The third area mentioned by VSEA relates to policies that were developed subsequent to the events that are the subject of this appeal.

These concessions by VSEA on behalf of Appellant result in a need to modify the subpoena issued to depose Birmingham to reflect that VSEA shall not inquire into these areas. It also warrants issuance of a protective order pursuant to V.R.C.P. 26(c), which provides that the Board may issue "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, undue burden or expense". Grievance of Towle, 15 VLRB 506 (1992). Such a protective order may prohibit discovery, limit it, provide that certain matters may not be inquired into or that the scope of the discovery be limited to certain matters. Id. Appeal of Danforth, 27 VLRB 79 (2004). In this case, it is appropriate to issue a protective order to ensure that discovery is limited so that it does not include these areas of inquiry.

In addition to these prohibited areas of inquiry, VSEA indicates in its motion to compel discovery that it intends to depose Birmingham on discussions taking place prior to the opening of any investigation, his knowledge of cases which involve similar misconduct which were not investigated, and other matters. The Employer objects to any deposition of Birmingham on these or other matters because the Commissioner of Public Safety, not Birmingham, imposed the disciplinary actions on Appellant. The Employer further contends that, if Birmingham is required

to answer any questions, it should be done by interrogatories or a deposition upon written questions.

Our decision on these matters is governed by the general provisions of discovery in V.R.C.P. 26, which have been adopted by the Board. The scope of discoverable matter is broad. Pursuant to V.R.C. P. 26(b)(1), 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.

The Board applied these standards in a recent grievance proceeding in which a faculty member was contesting his non-reappointment. In denying the employer's motion to compel discovery of all personal emails, text messages or other written communications sent or received by the faculty member relating to allegations in his grievance, the Board held that the Employer had not made a sufficient showing of the relevance and importance of the information in resolving the issues in the grievance. Grievance of Summa, 34 VLRB 200 (2018).

In applying these standards here, we conclude that it is appropriate that VSEA have the ability to depose Birmingham with respect to certain matters. Discussions that Birmingham had with others, concerning the incident for which Appellant ultimately was disciplined, prior to the opening of any investigation, and his knowledge of cases which involve similar misconduct which were not investigated, constitute appropriate areas of inquiry in a deposition. Although Birmingham was not the management official deciding whether to impose discipline in this case, sufficient information was presented at the oral argument to indicate that, as Director of the State Police, questions of him in these areas are relevant and proportional to the needs of the case.

In addition, VSEA has presented an extensive list of questions regarding various areas and topics. VSEA has provided us insufficient information in these areas for us to reach valid conclusions as to whether they are discoverable pursuant to V.R.C.P. 26. The discovery rules are designed so that most discovery takes place between the parties without the involvement of the Board. Parties "have the obligation to make good faith efforts among themselves to resolve or reduce all differences relating to discovery procedures and to avoid filing unnecessary motions".

V.R.C.P. 26(h). The party filing the motion has the obligation to confer with the other party about "the discovery issues between them in detail in a good faith effort to eliminate or reduce the area of controversy" Id.

VSEA has not provided us with information relating to the efforts made in detail with the Employer to resolve or reduce differences relating to the extensive list of questions regarding various areas and topics that VSEA is now seeking to present to Birmingham in a deposition. Moreover, similar to the employer in the Summa case, VSEA has not made a sufficient showing of the relevance and importance of the information in resolving the issues in the grievance. We are left as a result with insufficient information to make valid conclusions on whether the extensive questions VSEA is intending to ask Birmingham are subject to discovery.

This does not mean that VSEA is necessarily precluded from asking Birmingham questions during the deposition regarding any of the areas and topics addressed in its extensive list of questions but, as set forth above, there are certain areas where questions are prohibited. The list of questions needs to pared down to exclude inquiry into those areas. As set forth above, however, there are other areas where questions are appropriate. The list of questions is appropriate to the extent it includes inquiry into those areas.

Otherwise, questioning is appropriate generally to the extent it is within the scope permitted by the provisions of V.R.C.P. 26(b)(1) discussed above. This is subject to the proviso that questioning through the deposition of Birmingham is inappropriate if: 1) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient and less burdensome; or (2) VSEA has had ample opportunity to obtain the information by other channels of discovery in the action. V.R.C.P. 26(b)(2)(B). Such questioning is unreasonably cumulative or duplicative only if VSEA has been able to obtain complete and

unambiguous answers elsewhere. Similarly, VSEA will not be considered to have had ample opportunity to obtain the information elsewhere if they did not obtain complete and unambiguous answers to the same questions.

Finally, we address VSEA's motion that the Employer be held in contempt because the Employer failed to file a motion to quash the subpoena before the scheduled deposition of Birmingham on February 10 and Birmingham failed to attend the scheduled deposition. VSEA contends that the Employer has waived any right to present any defense to the subpoena and should be held in contempt and ordered to produce Birmingham for deposition. VSEA also requests that the Board impose such sanctions, including but not limited to attorney fees, as it deems just and proper.

V.R.C.P. 45(e) governs VSEA's motion that the Employer be held in contempt. It provides that "(f)ailure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court for which the subpoena issued."

The Employer contends that it should not be held in contempt under the following circumstances: The parties were attempting to settle the case around the time of the deposition. The Employer's attorney informed the VSEA's attorney that he was meeting with his clients on February 10 to discuss settlement of the case. VSEA's attorney had mentioned February 11 as a date for the deposition. The VSEA Attorney was aware that the Employer was contemplating filing a motion to quash the subpoena. The Employer's attorney did not give the subpoena a closer look when it was delivered since he assumed the subpoena was scheduled for February 11, and he did not notice it was scheduled for February 10. The VSEA Attorney did not call the Employer's Attorney on the date of the deposition asking why he was not there. There was no court reporter at the scheduled deposition, and Appellant was not there.

VSEA did not present contrary information at the oral argument to these circumstances presented by the Employer. We decline under the circumstances to find the Employer in contempt for failure to attend the February 10 deposition. Obeying subpoenas to attend depositions is of obvious importance to the effective and fair processing of cases. However, it is evident that the Employer understandably operated under an incorrect assumption of the date of the deposition and did not act intentionally without adequate excuse in failing to appear during the scheduled time of the deposition. VSEA has not indicated any expenses that it incurred as a result of the misunderstanding and made no effort to contact the Employer's Attorney when he failed to appear at the deposition. Moreover, even assuming for the sake of argument that the Employer should be held in contempt for failing to appear for the deposition, VSEA has presented no legal authority for its position that the Employer has waived its right to contest the deposition by not appearing on its scheduled date.

Based on the foregoing reasons, it is ordered:

1. The motion filed by the State of Vermont Department of Public Safety to quash the subpoena of Colonel Matthew Birmingham, Director of the Vermont State Police, and for issuance of a protective order, is granted to the extent that the subpoena is modified, and a protective order is issued, to prohibit the Vermont State Employees' Association on behalf of Appellant Michael Studin from inquiring into the following areas during the deposition of Colonel Birmingham: 1) Birmingham's involvement in the chain of command review; 2) Birmingham's involvement in any and all Internal Affairs matters relating to Appellant, Trooper Foucher, Trooper Irwin and Trooper Stange; and 3) any changes and policies made to General Order 205 and Watch Command Policy; the motion is not granted in other respects.

2. The motion filed by VSEA to compel discovery is granted to the extent that Colonel Birmingham is subject to deposition by VSEA concerning discussions that Birmingham had with others, concerning the incident for which Appellant ultimately was disciplined, prior to the opening of any investigation, and his knowledge of cases which involve similar misconduct which were not investigated; the motion is not granted in other respects.

3. Otherwise, Birmingham is subject to deposition generally to the extent that inquiry is within the scope permitted by V.R.C.P. 26(b)(1). This is subject to the proviso that

questioning through the deposition of Birmingham is inappropriate if: 1) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient and less burdensome; or (2) VSEA has had ample opportunity to obtain the information by discovery in the action.

4. The motion filed by VSEA on behalf of Appellant to hold the Employer in contempt due to the failure of Birmingham to appear at the scheduled deposition February 10, 2020, is denied.

Dated this 10th day of April, 2020, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

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Richard W. Park, Chairperson

/s/ Alan Willard

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Alan Willard

/s/ David R. Boulanger

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David R. Boulanger