VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 19-17
ASIF KALIM	)	

MEMORANDUM AND ORDER

The issue before the Labor Relations Board is whether to grant the Motion to Alter and Amend Findings of Fact, Opinion and Order filed by the State of Vermont Department of Mental Health ("Employer") on January 22, 2020. Grievant filed a response to the motion on February 3, 2020. Upon review and consideration of the motion, we address four contentions of the Employer to ensure clarity as to the holding of the Board in this matter.

First, in contending that the Board should amend its findings of fact and opinion relating to the charge that Grievant was dishonest about calling a co-worker "retarded", the Employer relies on statements made by two other employees that Grievant was referring to the co-worker when he used the word "retarded" following an interaction with the co-worker. The Board has considered the employees' statements, as set forth in Findings of Fact Nos. 16 and 17, along with the other considerations set forth on pages 316-317 of the Opinion. The Board has concluded upon review of the entire record that the Employer has not established by a preponderance of the evidence the charge that Grievant was dishonest during the investigation about calling the co-worker a derogatory name.

Second, the Employer contends amendment is warranted because the Board failed to find that Grievant was dishonest in his continual denial that he used the word "retarded" in reference to a person, and instead claiming that he used the word in reference to a situation. In so contending, the Employer is not accurately stating the actual charge made against Grievant that was addressed by the Board. As set forth in the *Loudermill* letter, which was incorporated in the

dismissal letter, the Employer charges Grievant with being "dishonest about calling your colleague a derogatory name". It was this charge - that Grievant called the co-worker "retarded" - that the Board examined to determine whether it was proven, not whether he used the word "retarded" in reference to a person.

The evidence was too ambiguous for us to determine whether Grievant referred to the co-worker as "retarded" or the situation as "retarded". Our statements on pages 323 and 325 of the Opinion that Grievant made "derogatory comments about a co-worker" would be more accurately expressed as Grievant made derogatory comments following an interaction with the co-worker. As we held in our original decision, Grievant's comments were unprofessional. However, the Employer did not demonstrate by a preponderance of the evidence that Grievant was dishonest during the investigation with respect to these comments.

Third, the Employer asserts that amendment of the Board's findings of fact is warranted because "the Board found that Grievant was not on notice of the subject of his investigative interview with (Charles) Kirk, but this finding also is not supported by the record". In so contending, the Employer misstates the Board's Findings of Fact. The Board stated in Finding of Fact No. 41: "Grievant did not realize when he went into the interview that he would be questioned about the April 14, 2018, incident."

This finding of fact is supported by the record. We recognize that Grievant went into the August 29, 2018, investigative interview having received a letter that he would be asked about "some interactions that have been reported with staff" (State Exhibit 6, pages 2 – 3). This general notice is a long way from being informed that he would be asked about a specific incident occurring on April 14, 2018, more than four months previously.

Fourth, the Employer contends that the Board disregarded previous Board decisions by concluding that, because Grievant was not told prior to his investigative interview about the specific statements under review, his denial of those statements is weak proof of dishonesty. The Employer is attributing to the Board a conclusion based on more narrow grounds than is provided in the Board decision. As detailed by the Board at pages 316-317 of the Opinion, the Board conclusion that the charge of dishonesty was "substantially weaken(ed)" actually was based on three grounds: 1) passage of time, 2) lack of notice that the incident would be discussed, and 3) the fact that Grievant admitted to his supervisors on the evening of the April 14 incident that "this whole mess is just retarded".

Further, the Board was not disregarding previous Board decisions in reaching this conclusion. The decisions referenced by the Employer elaborated on the extent of employee rights stemming from the U.S. Supreme Court Weingarten decision. 420 U.S. 251 (1975). The Board addressed the notice that must be provided to an employee under investigation concerning the nature of the investigation, an employee's right to consult with a union representative prior to an investigative interview, and the role of the union representative at the investigative interview.

In these decisions, the Board recognized that the extent of notice to employees of the nature of an investigative interview, meaningful prior consultation between the employee and union representative, and the role of the union representative at the investigative interview are intertwined and necessarily dependent on each other. Grievance of VSEA, 27 VLRB 1, 28 (2004); *Affirmed,* 179 Vt. 578 (2005). The Board held that the investigator needs to provide the employee with notice of the general nature of the potential misconduct being investigated to ensure meaningful prior consultation between the employee and union representative. Id. The

representative is present at the investigative interview to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them. Id.

The employer, however, is free to insist on only being interested at that time in hearing the employee's own account of the matter under investigation. Id. It is reasonable for an investigator to seek an unrehearsed answer to a question on an issue for which the employee had received advance notice would be a subject of the investigative interview before allowing the employee and union representative to consult during a break. Grievance of VSEA and Dargie, 27 VLRB 32, 62-64 (2004); *Affirmed*, 179 Vt. 228 (2005).

The Board decision in this case is not ignoring or disregarding these important and long-standing precedents concerning the nature of an investigative interview, prior consultation between the employee and union representative, and the role of the union representative at the investigative interview. The Board simply is concluding that the lack of notice a specific incident would be the subject of an investigative interview is a factor, along with other factors, that substantially weaken a charge of dishonesty against Grievant concerning the incident. There is no diminishing the precedents concerning the extent of Weingarten rights with respect to obtaining an unrehearsed answer to a question or anything else.

Based on the foregoing reasons, it is ordered that the Motion to Alter and Amend Findings of Fact, Opinion and Order filed by the State of Vermont Department of Mental Health is denied.

Dated this 6thday of March 2020, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

Richard W. Park, Chairperson

/s/ David R. Boulanger

David R. Boulanger

/s/ Karen F. Saudek

Karen F. Saudek