

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF PHILLIP FERNANDEZ)	
)	Docket No. 22-33
)	

ORDER ON STATE’S MOTION TO DISMISS

The State of Vermont, Vermont Agency of Human Services (“AHS”), Department of Corrections (“DOC”), and Department of Human Resources (“DHR”) (collectively “the State”) has filed with the Vermont Labor Relations Board (“Board”) a motion to dismiss the Grievance filed by Phillip Fernandez (“Grievant” “Mr. Fernandez”). Because the Grievance below was untimely and fails to identify an injury in fact to a protected legal interest, the Board grants the Motion to Dismiss. In addition, to the extent the Grievance complains about the conduct of the management representatives Chris McConnell or John Berard at the Step II or III Grievances, the Board lacks jurisdiction to consider the Complaint because the Collective Bargaining Agreement (“CBA”) does not permit Stage IV Grievances of management decisions to the VLRB.

Background Facts

1. On June 17, 2022, Philip Fernandez filed with the VLRB a Step IV Grievance against AHS, DOC, and DHR.
2. The Grievant claims the State violated Articles 5, 14, and 76 of the CBA, “through retaliation and discrimination for filing complaints against my employer.” He also alleges the employer violated AHS Policy 3.3, 5.4, 5.6, 8.0, 8.1, and DOC Directive 118.02. Grievant maintains the policies and directives have been violated “by repeated retaliation, discrimination and harassment directed at me after I began to file my complaints with the DOC/AHS/DHR.”

3. The Grievance also summarizes the denials of his Stage II and III Grievances that “[s]ince May of 2019, Grievant has filed multiple formal complaints with his employer regarding employment discrimination, namely a blacklisting by then Commissioner Lisa Menard of the Department of Corrections (DOC).” ¶ 4. Grievant alleges he filed a Step II grievance on 2/22/22, which was denied. He also claims he filed a Step III grievance that was denied on 6/1/22. Grievant alleges the State violated Articles 5 and 67 of the CBA through its retaliation in response to whistleblower reports filed by the Grievant.
4. In the narrative to the Grievance, Grievant identified his remedy as resumption of settlement talks that began back in 2019 with a former Deputy DOC Commissioner and “a full investigation into my allegations to better determine the damages I have suffered due to the retaliation, discrimination and harassment I have been forced to accept for the past five years or more.”
5. On August 3, 2022, the State filed a Motion to Dismiss and Motion for a More Definite Statement.
6. On September 22, 2022, the Board granted the State’s Motion for a More Definite Statement ordering the Grievant to file a more definite statement including the dates of any alleged conduct, the contract, statutory, or regulatory provision violated by such conduct, and the specific remedy he seeks. The Order provided that Grievant must provide this information by September 30, 2022, or the Grievance would be dismissed.
7. On September 30, 2022, the Grievant filed a “Response to Order for More Definite Statement and A modified Motion to Compel Following State’s Objections in Record Production” (“Statement”). Grievant dedicated sixteen pages of that filing to his more definite statement. The Statement recounts Grievant’s claim of retaliation and

discrimination dating back to 8/27/17 and his repeated requests for an investigation. “What had begun as whistleblowing about the blacklisting started by Lisa Menard had morphed into a concerted attack by Jim Baker to have the grievant fired without any cause.” Statement, page 15. Grievant summarizes the 2/22/22 Step II Complaint that detailed “the entire backstory of the retaliation and discrimination.” The Step III Grievance also involved the entire history of Grievant’s claims dating back to 2017.

8. Grievant’s Statement acknowledges that by 11/01/21, Interim Commissioner Baker had left DOC and a new Commissioner, Nicholas Deml, had been appointed to the DOC. Statement, page 13.
9. In his Statement, Grievant has not requested a remedy other than a determination of whether “violations of articles, rules, policies, procedures or rules have occurred.”
10. On October 3, 2022, the State renewed its Motion to Dismiss.
11. On October 5, 2022, the Grievant filed a Response to the Renewed Motion to Dismiss. Grievant provided conflicting information regarding the remedy requested. He summarized the two remedies he had previously requested, full investigation of the complaints filed since 2019, and a resumption of financial settlement discussions. He also asserted that he did not require a remedy other than a determination of whether any alleged violations occurred “and to save the remedy phase for another time.”

OPINION

The State moves to dismiss the Grievance on the following grounds: 1) the Grievance is untimely because Mr. Fernandez failed to file a grievance within fifteen days of the conduct or

actions about which he complains; and 2) the Board lacks jurisdiction to hear the Grievance. The Board considers the jurisdictional issues first.

The jurisdiction of the Board to adjudicate Grievances is limited by the Vermont State Employment Labor Relations Act and the applicable Collective Bargaining Agreement. 3 V.S.A. § 901, 928 (b)(1). See also VLRB Rules of Practice 18.1. The jurisdiction of the Board applies “under the collective bargaining agreement where an actual controversy between the parties exists.” In re Friel, 141 Vt. 505, 506 (1982) (citing, Town of Cavendish v. Vermont Public Power Supply Authority, 141 Vt. 144 (1982)). To satisfy the actual controversy, the Grievant must allege “an injury in fact to a protected legal interest or the threat of an injury in fact.” Grievances of Cray, 25 VLRB 194, 215 (2002) (citing, In re Friel, 141 Vt. at 505). The Grievance must also include a requested remedy which the Board can award. See Cray, 25 VLRB, at 216.

Despite being afforded multiple opportunities, through his Grievance, and responses to the Motion to Dismiss, Order for a More Definite Statement, and Renewed Motion to Dismiss, the Grievant has failed to allege an injury in fact or the threat of an injury in fact to support an actual controversy the Board can adjudicate. The Grievant claims Mr. Baker or others sought to fire him, but Grievant has suffered no adverse employment action. He defended his actions at Loudermill hearings and prevailed against any claims of his alleged misconduct. Because Grievant has failed to allege an injury in fact to a protected legal interest, there is no actual controversy, and the Grievance is dismissed.

Dismissal is also warranted because Mr. Fernandez has failed to identify a remedy the Board can award. See Grievance of Sherbrook, 13 VLRB 359, 362-63 (1990) (Board dismisses grievance where include a request for action or remedy the Board has authority to order). In

response to the Board's Order for a More Definite Statement which expressly ordered the Grievant to identify a remedy, the Grievant stressed that he is not seeking a remedy. Instead, he merely requests the Board resolve the question whether the State violated the CBA, Policies, Procedures or other governing rules or directives. The Grievant must request more than resolution of whether there has been a contractual or regulatory violation for past alleged conduct to invoke the jurisdiction of the Board. "[T]here also must be a request for action that the Board is able to order." See Grievances of Cray, 25 VLRB 194, 216 (2002).

The remedy Grievant requests in his response to the State's Renewed Motion to Dismiss, an investigation into his discrimination and retaliation claims and resumption of financial settlement discussions, also fails to identify a remedy which the Board can order. The Board cannot compel the State to investigate or to engage in financial settlement discussions.

Because the Grievance and the sixteen-page Response to the Order for a More Definite Statement fail to provide clarity on the claims alleged by Mr. Fernandez, it is unclear whether Grievant's complaint is about the actions of management generally since 2017, or the actions of management in the 2022 grievance process, or both. To the extent the Grievance includes the alleged misconduct of management representatives during the Grievance process, the Board lacks jurisdiction over this issue, because such claims are not appealable to the Board. The CBA explicitly provides that grievances concerning the conduct of management representatives are not grievable beyond Step III. CBA Article 15, ¶ 4(d). "Complaints concerning the conduct of the management representative shall be grievable directly to, but not beyond, Step III." Because the CBA prohibits or does not allow a process for appealing the conduct of management representatives beyond Step III, the Board lacks jurisdiction to consider this claim.

Further support for dismissal is found in the Grievant's failure to conform to the procedures and timelines for filing a Grievance provided in the CBA. See Grievance of McCort, 19 VLRB 319, 323-24 (1996) (granting employer's motion to dismiss where Grievant failed to adhere to the Contract requirement for filing Grievances and bypassing timely filing of Step II Grievance). The CBA requires a Grievant to file a Step II Complaint "within fifteen (15) workdays of the date upon which [he] could have reasonably been aware of the occurrence of the matter which gave rise to the complaint." CBA Article 15, ¶ 4 (b). Failure to comply with the timelines for filing a Step II or III Grievance means, "the matter shall be considered closed." CBA, Article 15, Sections 3 (b) (1) and 3 (c)(1). See also McCort, 19 VLRB, at 323.

In his original Grievance filed with the VLRB, and in his Response to the Order for a More Definite Statement, Grievant stresses that the actions that form the basis of his Complaint occurred in 2017 through 2019. "What had begun as whistleblowing about the blacklisting started by Lisa Menard had morphed into a concerted attack by Jim Baker to have the grievant fired without any cause." Statement, at 15. A Grievance filed in 2022, for actions occurring in 2017 or 2019, is not timely. Interim Commissioner Baker was replaced by Commissioner Deml in late 2021. A Complaint based on management decisions by Mr. Baker who left months earlier is also out of time.

Grievant's claim that management failed to investigate his harassment and discrimination complaints also falls outside the deadline for filing Grievance complaints. In January 2020, Grievant filed a Complaint alleging retaliation, discrimination, and harassment by management and requested an investigation. Statement, page 9. On March 31, 2020, the State concluded its investigation and concluded that it did not discover "sufficient evidence of any harassment, discrimination or retaliation. Id. See also State's Exhibit D, March 31, 2020, correspondence

from James Baker to Phil Fernandez (“The investigation did not discover evidence sufficient to establish that you were subjected to harassment, discrimination or retaliation.”). Mr. Fernandez Grievant did not Grieve this decision or file a complaint alleging failure to investigate until February 2022, nearly two years after management’s decision.

For the reasons stated above, it is ORDERED that the State’s Motion to Dismiss is GRANTED, and the Grievance of Phillip Fernandez is DISMISSED.

Dated this 10th day of November, 2022, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

Richard W. Park, Chairperson

/s/ Karen F. Saudek

Karen F. Saudek

/s/ Roger Donegan

Roger Donegan