VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
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VERMONT STATE EMPLOYEES' ASSOCIATION, BILLIE LANGLOIS, MICHELE PERRY, DIANE SALTIS, PAMELA ALEXANDER, MARISSA NEMERGUT, AND PETER HASELBACKER	)	DOCKET NO. 20-45

MEMORANDUM AND ORDER

This grievance involves whether the Vermont State Colleges ("Employer") violated Articles 3 and 23 of the collective bargaining agreement between the Employer and the Vermont State Employees' Association ("VSEA") when the employee grievants in this matter "and all others similarly situated" in the bargaining unit represented by VSEA were told not to come to work and, since they were unable to telework/work from home, were informed that they would need to use their own accrued leave time to continue to be paid.

The issue now before the Labor Relations Board is what action to take on the Employer's Motion to Dismiss and/or Strike that was filed on August 25, 2020. VSEA filed a response to the motion on September 24, 2020. The Employer filed a reply to Grievant's response on October 8, 2020. Board Executive Director Timothy Noonan met with the parties concerning the motion on February 12, 2021.

There are three grounds to the Employer's motion. One of the grounds, that VSEA's allegation in the grievance that the Employer violated federal law – the Families First Coronavirus Response Act ("FFRCA") – is outside the Board's jurisdiction. The Board need not rule on this issue because VSEA has withdrawn any allegation of a FFCRA violation. This leaves two grounds to the Employer's motion.

The first remaining ground is the Employer contends that the grievance is vague and does not satisfy the standards set forth in the collective bargaining agreement and the Board Rules of Practice. We first address the Employer's contention that the grievance filed at the earlier steps of the grievance procedure does not satisfy the standard set forth in the collective bargaining agreement. The relevant provisions of Article 10, the grievance procedure article of the collective bargaining agreement, provide:

> . . .
> 3. A grievance must be presented at Step One within thirty (30) calendar days following the time at which the grievant(s) could have reasonably been aware of the existence of the situation created by the College which is the basis for the grievance . . .
>
> STEP ONE
> a) . . The grievance shall state the nature of the grievance including relevant facts, the provision(s) of the Agreement alleged to have been violated, where relevant, and the adjustment sought.
> b) The President or his/her designee shall hold a meeting among the grievant(s), the Federation representative(s) and the President or his/her designee . . .
>
> STEP TWO
> a) In the event the grievance is not settled in Step One, . . the grievant may present his/her grievance in writing at Step Two . . . to the Chancellor. The Chancellor or his/her designee shall hold a meeting among the grievant(s), the Federations Representative(s) and the Chancellor or his/her designee . . .
> 4. In cases involving . . grievances resulting solely from directions or actions of the Chancellor, . . the grievance shall be filed within the same schedule for . . Step One grievances at the Colleges . . with the Chancellor. . . (T)he Chancellor or his/her designee shall arrange a meeting . . among the grievant(s), the Federation representative(s), and the Chancellor . . . The grievance may thereafter be processed directly to arbitration in accordance with the arbitration provisions.
> . . .
> 6. Failure of the grievant or grievants to comply with the time limitations of . . Steps One or Two shall preclude any subsequent filing of the grievance by the Federation or grievant . . . The time limitations set forth in this Article may be extended by mutual agreement.
> . . .

We first address the Employer's contention that the grievance filed at the earlier steps of the grievance procedure failed to provide the contractually required notice to the Employer of

"the nature of the grievance including relevant facts" for each of the six grievants named in the grievance later filed with the Board. The Employer's point is well-taken with respect to three of the grievants – Pamela Alexander, Marissa Nemergut, and Peter Haselbacher – who were not identified in the grievance until three weeks after the Step Two grievance hearing.

However, we are not persuaded that is the case with respect to the other three employee grievants – Billie Langlois, Michele Perry and Diane Saltis. The Step One grievance response by the Castleton University Director of Human Resources indicates that the Employer understood the nature of the grievance involved an alleged violation of Article 23 of the collective bargaining agreement "by requiring the named employees to use leave time during their COVID-19 related absences." Further, there was no indication in the Step One response of a lack of information on the facts concerning the named grievants.

Similarly, the Step Two decision by the Employer's hearing officer indicates an understanding of the nature of the grievance, stating that the VSEA representative "clarified that the VSEA's view was that designating an employee essential or non-essential, particularly when that designation during the Stay Home/Stay Safe Order meant the non-essential employees who could not telework were therefore without work and required to use leave, constituted a change in the employee's schedule, in violation of Article 3, and resulted in a decrease in the contractually-required workweek, in violation of Article 23." Also, there was no indication in the Step Two response of a lack of information on the facts concerning the named grievants that hindered the ability to respond to the grievance.

We next address the Employer's contention that the grievance filed with the Board is vague and does not satisfy the standard set forth in the Board Rules of Practice. Section 18.3 of Board *Rules of Practice* requires that a grievance contain a "concise statement of the nature of

the grievance" and a "brief statement of facts concerning the grievance". It is Labor Relations Board policy expressed in Section 12.18 of the Board *Rules of Practice* that all pleadings shall be liberally construed, and a variance between pleadings and proof is not material unless it substantially prejudices the proceedings. Grievance of Madru, 2 VLRB 203, 210 (1979.

The grievance contained a concise statement of the nature of the grievance required by Board *Rules* by alleging that the Employer violated Articles 3 and 23 of the collective bargaining agreement when the employee grievants in this matter were told not to come to work and, since they were unable to telework/work from home, were informed that they would need to use their own accrued leave time to continue to be paid.

The statement of facts contained in the grievance weas not detailed, but was sufficient to meet the requirement to provide a brief statement of facts concerning the grievance seeking the restoration of leave balances for the named grievants. The Employer contends that VSEA should be required to state with more clarity the relevant information such as the dates and type of leave involved. The general requirements of our Rules and the policy of liberal construction of pleadings do not mandate the level of specificity in filing grievances that is asserted by the Employer. The concerns of the Employer can be addressed through Section 12.12 of Board *Rules*, providing that "(u)pon order of the Board setting a pre-hearing conference, . . . the Board or Board's agent shall hold a pre-hearing conference for the purpose of clarifying issues and stipulating to facts". We conclude it is appropriate here to assign the Board Executive Director to hold such a pre-hearing conference.

We turn to the second ground of the Employer's motion to dismiss: the objection to the inclusion of Pamela Alexander, Marissa Nemergut and Peter Haslebacher in this grievance since they were not added until three weeks after the Step Two grievance hearing. In Grievance of

VSEA, Perkins, et al, 23 VLRB 67 (2000), the Board addressed the issue of whether employees not included in a grievance filed at earlier steps of the grievance procedure are entitled to be included in the grievance when it reaches the Board. The Board stated:

> Grievants contend that the Employer violated Article 31 of the Contract by failing to provide BCI Lieutenants with standby pay during off-duty hours. Before deciding the merits of this issue, we need to rule on a motion for partial summary judgment made by the Employer. At the beginning of the January 20 hearing in this matter, the Employer moved to limit any relief in this case to Grievant Clayton Perkins because Lieutenant Perkins was the only individual named in the earlier steps of the grievance procedure prior to the grievance being filed with the Board. As a result, the Employer contends neither the Employer nor hearing officers at earlier steps were given sufficient notice or information to make a fair determination with respect to other individuals.
>
> Grievant contends that the Employer had sufficient notice because the grievance was filed at earlier steps on behalf of Perkins and "any and all similarly affected" individuals. . .
>
> Upon review of the Grievance Procedure article of the Contract and the state of the evidence before us, we grant the Employer's motion. Article 15, Section 1, of the Contract, in referring to methods to settle grievances, provides that "(i)t is expected that employees and supervisors will make a sincere effort to reconcile their differences as quickly as possible at the lowest possible organization level." Article 15, Section 2, requires that a "grievance shall contain . . . the full name and address of the party or parties submitting the grievance." These contract provisions reflect a recognition that the goal of resolving grievances at the lowest possible level is best served when individual grievants are identified and the facts relative to their particular situation are examined at the outset of the grievance process. 23 VLRB at 76-77.

The Board has made only one exception to this standard of providing a remedy only to employees specifically identified at earlier steps of the grievance procedure. In a split decision, the Board majority concluded that there are circumstances where it is appropriate for a collective bargaining representative to pursue a grievance which seeks a remedy on behalf of a class of employees who are not specifically identified. Grievance of VSEA (re: Compensatory Time Credit), 11 VLRB 300 (1988). One such instance was a case where affected individuals were a potentially large number of employees scattered throughout the State, whose identity could not be easily ascertained by the union within the time allowed to grieve, and who were affected by a common question of contract interpretation. Id. at 307. In that case, the Board concluded that 20

days between a statewide reduced work force situation in state government due to a snowstorm and the filing of a grievance resulted in VSEA not being able to easily ascertain the affected employees. Id.

In applying these precedents to the case now before us, we conclude that the rationale of the Perkins decision applies equally here. The grievance procedure of the collective bargaining agreement requires that grievances be filed within specified timeframes of when "the grievant(s) could have reasonably been aware of the existence of the situation created by the College which is the basis for the grievance". The grievance procedure provisions explicitly include "grievants" in Step One and Step Two grievance meetings. The grievance procedure provisions further provide that "(f)ailure of the grievant or grievants to comply with the time limitations of . . Steps One or Two shall preclude any subsequent filing of the grievance".

These provisions reflect a recognition that individual grievants need to be identified at the outset of the grievance procedure, thereby providing sufficient notice to the employer and an opportunity for the employer to examine the particular circumstances of an individual at earlier steps of the grievance procedure to possibly resolve it, or the right to seek redress for unidentified employees is waived. The introduction of Pamela Alexander, Marissa Nemergut and Peter Haslebacher as grievants three weeks after the Step Two hearing, and their subsequent inclusion in the grievance filed with the Board, was in violation of these contract requirements that individual grievants are identified and the facts relative to their particular situation are examined at the outset of the grievance process.

This case is not similar to Grievance of VSEA (re: Compensatory Time Credit), where the identity of affected employees could not be easily ascertained by the union within the time allowed to grieve. Here, there was a period of approximately two and one-half months between

the time VSEA was aware of those employees who were not required to work on campus and had not requested to telework, and accordingly were potentially required to use accrued leave, and the Step Two grievance. VSEA has provided no information justifying why the three employees could not be identified until three weeks after the grievance hearing.

Thus, we grant the Employer's motion to exclude employees Pamela Alexander, Marissa Nemergut and Peter Haslebacher from this grievance. We further hold that "all others similarly situated" also are excluded from the grievance filed with the Board. In a previous case, a named grievant brought an action on behalf of himself and "other similarly situated employees". Grievance of Beyor, 5 VLRB 222 (1982). The Board agreed to grant a remedy to the named grievant, but not to the "other similarly situated employees". In reference to 3 V.S.A. § 1002(c), which provides in pertinent part that "(a)ny number of employees who are aggrieved by the same action of the employer may join in an appeal with the consent of the board", the Board stated:

> We think this statute prevents us from including similarly-situated employees in the grievance absent actual appeals by named and identified employees. The statute appears designed to avoid the complexities of class actions, allowing the Board to act only when specific employees are aggrieved by the same action of the employer. Id., at 232.

This statutory provision also is applicable in this case and prevents us from including similarly situated employees in the grievance absent appeals by named and identified employees.

ORDER

Based on the foregoing reasons, it is ordered:

1) The motion to dismiss filed by the Vermont State Colleges is granted to the extent that Pamela Alexander, Marissa Nemergut, Peter Haslebacher, and all other similarly situated employees are removed from this grievance;
2) The motion to dismiss is denied in all other respects;

3) The parties shall meet with the Labor Relations Board Executive Director in a pre-hearing conference for the purpose of clarifying issues and stipulating to facts.

Dated this 4th day of March 2021, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

Richard W. Park, Chairperson

/s/ David R. Boulanger

David R. Boulanger

/s/ Karen D. Saudek

Karen D. Saudek