

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 22-33
PHILLIP FERNANDEZ.)	

DECISION ON THE MOTION TO ALTER, AMEND, OR MODIFY JUDGMENT
FILED BY THE GRIEVANT

The Grievant, Phillip Fernandez (“Mr. Fernandez” “Grievant”), has filed a Rule 59 Motion to Alter, Amend, or Modify (“Motion”) the November 11, 2022, Vermont Labor Relations Board (“Board”) Order granting the Motion to Dismiss filed by the State of Vermont Department of Corrections (“State” “Employer”). The State filed an Opposition to the Motion on December 19, 2022.

A motion to alter or amend “must clearly establish either a manifest error of law or fact or must present newly discovered evidence.” N. Sec. Ins. Co. v. Mitec Elecs., Ltd., 2008 VT 96, ¶ 44, 184 Vt. 303, 321 (internal quotations and citation omitted). A motion to alter or amend falls within the discretion of the Board. The Motion repeats arguments raised and addressed in response to the motion to dismiss and fails to demonstrate a manifest error of law or fact in the Board decision and fails to identify newly discovered evidence that warrants granting the motion. The Board, therefore, denies the motion.

The Board granted the State’s Motion to Dismiss, because Grievant failed to allege any injury in fact, failed to assert a remedy the Board could award, and failed to conform to the procedures and timeliness requirements for filing a grievance under the applicable Collective Bargaining Agreement. The Board also granted the dismissal to the extent it challenged the conduct of management which is not grievable to the Board under the CBA.

In his motion to alter or amend, Grievant challenges two of the reasons supporting the Board's decision. First, he argues the Board erred in granting the dismissal and made a mistake in ruling the Grievance was untimely and that he was required to demonstrate or assert a remedy. Second, the Grievant claims that newly discovered evidence supports his motion and requires the Board to alter its decision and allow the grievance to go forward.

Grievant's motion fails to demonstrate the Board made a mistake of fact or law supporting an amendment or alteration to its decision. In addition, there is no newly discovered evidence that warrants altering the decision dismissing the appeal.

Timeliness

The Grievance alleges facts arising out of claims of retaliation from 2017-2019, and investigation of Jim Baker who resigned in 2021. Grievant did not grieve these allegations back then and it is well beyond the time for filing a Grievance on these issues now. In his Motion, Grievant acknowledges that his Step II Grievance "outlined the long history of allegations, concerning blacklisting, retaliation, harassment and intimidation that once again had been the motivation for the investigation ordered by Jim Baker." Motion at ¶2. As conceded in the Motion, his Grievance before the Board continued to maintain "the allegations of retaliation, blacklisting, intimidation and harassment as violations of the contract, policies and procedures." Motion at ¶8.

That the State did not raise this issue in the internal grievance process does not bar the Board from dismissing a claim that is out of time. The State raised this issue in its initial response to the Grievance before the Board and in its Motion to Dismiss. Whether the Grievant

complied with the timeliness provisions of the Collective Bargaining Agreement is an issue of jurisdiction, and the State cannot waive that issue.

Grievant conflates the agreement reached with the State regarding the limitations of discovery with the Contract requirements for filing a timely Grievance. Although Grievant claims he acquiesced to the State's "timeliness" issue, the agreement relates to discovery. That Grievant is only seeking information related to the 2/22/22 Grievance does not disguise that the Grievance is based on his original allegations concerning "blacklisting, retaliation, harassment and intimidation that once again had been the motivation for the investigation ordered by Jim Baker." Motion at ¶8

Grievant failed to outline a remedy

The Board did not commit a mistake of fact or law in dismissing the Grievance for failing to outline a remedy. "There must be more than an argument over whether the contract was violated to provide an adequate basis for the Board to have jurisdiction; there also must be a request for action that the Board is able to order." Grievances of Cray, 25 VLRB 194, 216 (2002) (citing, Grievance of Rennie, 16 VLRB 1, 6 (1993); Grievance of Sherbrook, 13 VLRB 359, 362-63 (1990)).

Contrary to Grievant's claim, the remedy question was not resolved at the initial conference. Nothing that was said in the scheduling conference limited or expanded the jurisdiction of the Board. To the extent Grievant misunderstood or misapprehended statements made at the scheduling conference, any confusion was resolved by the Board's Order for a More Definite Statement. In its order, the Board outlined the deficiencies with the Grievant's filing, including the failure to identify a remedy.

As a remedy, Grievant asks the Board to determine “the Department” [which Department is not specified] violated Article 5 and 67 of the Contract and order the State to cease and desist from the above-mentioned violations and such other relief as the Board deems just and fair.

The Board cannot discern whether the Grievance is timely, the alleged Employer, the alleged Employer action or offense that is being grieved, the contract provisions that have been violated, and the requested remedy Grievant is seeking. The Grievance does not comply with VLRB Rule of Practice 18.3(C) and does not alert the Board or the State of the nature of the Grievance, the alleged contract provisions violated, and the remedy requested.

9/16/22 Order For a More Definite Statement, at 2

The Board Order for a More Definite Statement clearly provided that Grievant was required to detail the remedy he seeks. Moreover, Grievant was directed to specify a remedy or face dismissal of his Grievance. Grievant chose not to follow the directions of the Board and the dismissal properly followed.

No Newly discovered evidence

Grievant’s claim that there is newly discovered evidence is also unavailing. There is no newly discovered evidence. Prior to the Board dismissing the appeal, Grievant was aware of Mr. Eckrote and the information he may have relative to the Grievance. He identified Mr. Eckrote as someone with whom he was discussing an affidavit. In his opposition to the renewed motion to dismiss Grievant mentioned the willingness of a witness to provide an affidavit.

The “newly discovered evidence” about the lost overtime is not newly discovered. The staffing shortages at DOC have been known since 2020. Despite being directed by the Board in its Order for a More Definite Statement to specify a remedy, Grievant elected not to include lost overtime potential as a remedy. Because the evidence is not new, the Board need not rule on whether it could award such a remedy in this Grievance.

For the reasons stated above, it is ordered that Grievant's Motion to Alter, Amend, or Modify the November 11, 2022, Board Order granting the State's Motion to Dismiss the Grievance, is DENIED.

Dated this 27th day of January, 2023, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

Richard W. Park, Chair

/s/ Karen D. Saudek

Karen D. Saudek

/s/ Roger P. Donegan

Roger P. Donegan