

Vermont Labor Relations Board

GRIEVANCE OF]	
]	DOCKET # 77-26S
DIANNA NAGELY GAGE]	

MODIFICATION OF ORDER UNDER 3 V.S.A., SECTION 924 (b)

Statement of the Case.

On 17 November 1977 Findings of Fact, Opinion and Order were filed in the above captioned cause. On 16 December 1977 Notice of Appeal dated 15 December 1977 was filed. On 11 March 1978 Motion to Modify Findings of Fact, Opinion and Order pursuant to 3 V.S.A., Section 924 (b) was filed by the Grievant. An undated Motion to Deny Grievant's Motion to Modify together with a Motion to Modify Findings and Set Aside Certain Findings was filed by the State on 17 March 1978. Hearing was held on both motions the 17th day of March, 1978, and arguments presented by each side. The grievant was represented by Alan S. Rome, Esquire, General Counsel for VSEA, Inc., and the State of Vermont was represented by the Honorable Jeffrey L. Amestoy, Assistant Attorney General.

The record and the files do not disclose that the appellant has ever ordered the transcript in the above captioned cause. In any event, the transcript has not been received on the date of the filing of the Grievant's motion, nor has it since been received.

Opinion and Conclusions of Law.

3 V.S.A., Section 924 (b) states as follows:

"(b) Until a transcript of the record in a case is filed in a court under this chapter the board at any time upon reasonable notice and in such manner as it considers proper may modify or set aside wholly or partially a finding made or order issued by it."

This section has specific reference to the Vermont Labor Relations Board, and the Board finds that all of the conditons have been met, and therefore that it is appropriate to modify the findings of fact and order, but not necessarily as requested by either the Grievant or the State. In Paragraph 7 of the Grievant's Motion, there is a request that we add a new Finding No. 27. Having in mind the leading case on reasonableness and "just cause", Carter v. United States, 407 F. 2d 1238, 1244 (D.C. Cir. 1968), the Board will modify the findings so as to add the sentence requested. The Board points out, nevertheless, that the Findings of Fact, Opinion and Order, page 8, line 10, do indeed contain specific reference and a finding of the absence of "just cause". The Board does not believe that its Conclusions of Law require a mandate for either progressive discipline or the use by the employer of the Vermont Employees' Assistance Program, so that the request contained in Paragraph 7(B) is granted in part and denied in part. The request contained in Paragraph 7 (C) will be granted in part and denied in part. We do not see that whether or not Mrs. Machia knew of the grievance problems in weaning her child is relevant to whether or not the Grievant contacted or attempted to contact Mrs. Machia. We do agree that the evidence is quite clear that other workers were indeed able to obtain extensions of leave as a result of rather informal telephone conversations rather than the mailing procedure required of Grievant. The substance of the last sentence of the request is already included in the findings. The provisions of Paragraph 7 (D) were not argued by the Grievant, so the Board has not been acquainted with the precise nature of the Grievant's grounds for this request, which is therefore denied.

As to the requests of the State of Vermont, the request to add to Finding 19, the same is denied. It is not clear from the evidence whether

the Grievant actually asked Mrs. Fadden to contact Mrs. Machia. The request to add a sentence to Finding 20 is also denied, on the ground that the Board's recollection of the evidence does not permit it to find whether or not other workers who were referred to had records of excessive absenteeism or were under warning at the time they sought the extensions. State's request to strike Finding 21 is denied on the grounds that the finding does not state that an opportunity to discuss the circumstances of her extended maternity leave and unexplained absence with her supervisor or other supervisory personnel is a contractual right. It may or may not be. In any event, the specific paragraph in the Non-Management Agreement was not pointed out to the Board. The request to strike Finding 22 is denied. There is no reference to "progressive discipline" in this finding even assuming that some of the language of In Re Grievance of Albert Brooks, 135 Vt. ____ (1977), is applicable. The Court in the Brooks Case states,

"Appellee argues that progressive discipline is inherent in the concept of just cause. We disagree."

Nothing in that statement by the Court would indicate that it is not proper to find and to consider in connection with the discharge of an employee whether or not that employee has been reprimanded, suspended or otherwise punished for previous infractions of the rules or misbehavior. On the contrary, the Court in the Brooks Case, page 6, held, "The basis of the just cause for dismissal here is the grievant's past misconduct, ..." We must infer that past good conduct or simply unremarkable conduct on the part of an employee should also be considered in connection with discharge, if misconduct may. The request to strike

Finding 23 is granted, although the Board sees no reason why Finding 23, while not controlling, should not be permissible. Nevertheless the Supreme Court, In Re Grievance of Albert Brooks, op. cit, which was decided after the date of the Findings of Fact, Opinion and Order in this matter, on page 7 stated that "...the Board exceeded its powers when it included these provisions in its order", referring to counseling. This does not appear to say that a finding that the Vermont Employees' Assistance Program was not used is inappropriate, but merely that such assistance cannot be ordered by the Board.

For the time being, the State's request to strike Finding 24 is denied. In the event that when the transcript is furnished to the Board, and it discloses that the Board did indeed unfairly restrict the State's right to present evidence as to the Grievant's absenteeism, the Board will, upon appropriate request from the State, hold an additional hearing limited to such evidence and will confirm or modify its Findings of Fact as a result of any such hearing. It was not the intention of the Board to restrict such evidence, unless purely cumulative.

ADDITIONAL FINDINGS OF FACT

1. By adding a new finding 26 to read as follows:

"26. The Board is unable to find that Grievant was dismissed for 'just cause', under the provisions of Article XI (1) of the Non-Management Agreement, and therefore finds that the dismissal was without just cause.

2. By adding a new finding 27 to read as follows:

"27. The Non-Management Agreement, an extremely bulky document, was not introduced into evidence. It is a part of the files of the Board and of this case, being required by law to be filed with the Board, and so the Board takes judicial notice of its contents, particularly with respect to discharge and just cause as provided in Article

XI thereof.

3. By adding a new finding 28:

"28. Finding 26 is renumbered 28, and repeated in full herein."

Conclusions of Law and Opinion.

The Conclusions of Law and Opinion are amended to read as follows:

"This is a difficult case for the Board to decide for several reasons. The testimony is quite clear to the effect that the Grievant was punctual, even though frequently absent. She was receiving welfare assistance at the same time as being employed by the Department of Social Welfare, full time. The general quality of her work seems to have been good. She had a serious problem, there is no doubt, even a mental block, if you will, feeling it necessary to absent herself quite frequently from work on a pay basis as well as a non-pay basis. The circumstances of her Thanksgiving holiday absence are still unclear. We know that she did not return to work on the 29th, as ordered, but it is not quite clear why she did not or what attempts she made to reach her supervisor, except through Mrs. Fadden.

Nevertheless, the discharge of an employee is not a matter to be lightly considered, and probably should be a last resort only. The Board notes in passing that no efforts were made to suspend the Grievant or to administer discipline short of the very final solution of termination of employment. It seems likely that the Grievant could have profited from the guidance and counseling offered by the Vermont Employees' Assistance Program, though of course this is not a mandatory service offered by the Department of Personnel. We feel that because of the expense in training an employee, the State, as a public employer, has some responsibility to advise and assist its employees in improving their work habits and performance as well as in admonishing them and

warning them of deficiencies in performance. There were numerous warnings in this case, but these were rendered somewhat meaningless and fruitless by a failure to follow through with specific advice and suggestions. We hold that the Grievant was discharged without just cause, and ought to be reinstated, but under special terms and conditions."

ORDER.

NOW, THEREFORE, it is hereby ORDERED that the Grievant be reinstated to her former position as Income Maintenance Specialist with full pay and privileges, and that she be reimbursed for back wages and benefits retroactive to 1 July 1977; further, it is recommended but not ordered that she be placed under an additional 120-day period of warning or probation, during which time she could be counseled or offered such other assistance as is provided by the Departments of Social Welfare or Personnel; further, it is suggested that she should submit medical justification for any leave taken, either for herself or on account of any member of her family, because of illness or other medical problem, such submission to be within five days of the leave requested; further, it is suggested but not required, that she make any request for annual leave in writing well in advance of the date of such intended leave, a failure so to do being considered a violation of her period of probation or warning.

Commissioner Robert H. Brown took no part in these proceedings. Commissioner H. James Wallace participated in the proceedings, but has since resigned his position on the Board.

Dated at Waterbury, Vermont this 21st day of April, A.D. 1978.

VERMONT LABOR RELATIONS BOARD

By

John S. Burgess
JOHN S. BURGESS, CHAIRMAN

William G. Kemsley, Sr.
WILLIAM G. KEMSLEY, SR.

*Order reversed by
Sup. Ct. Oct. 1978*