

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF)
) DOCKET #78-60S
)
VALERIE A. MICKEWICH)
)

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

This matter came before the Board on the Grievance of Valerie A. Mickewich dated March 23, 1978 and filed March 24, 1978. The State's Answer was dated April 24, 1978 and filed April 25, 1978. A brief hearing was held on May 5, 1978. Ms. Mickewich was not represented by an attorney and she indicated that she wanted a continuance in order to talk to an attorney. This continuance was granted. The hearing was held May 12, 1978. Request for Findings of Fact was filed by the State. The Grievant represented herself and the State was represented by the Honorable Jeffrey L. Amestoy, Assistant Attorney General.

Issue

The issue considered by the Board was whether or not the Grievant's dismissal from State employment for failure to comply with the lawful, reasonable orders of her supervisor was the result of discrimination on the part of said supervisor in requiring the Grievant to adhere to the normal working hours of employees while not requiring other employees under his supervision to do likewise.

Findings of Fact

1. Grievant was employed by the State of Vermont, Department of Budget

and Management, Division of State Information Systems, Information Systems Development Sections.

2. Grievant began employment as a Temporary Computer Programmer B on September 27, 1976, became a Permanent Computer Programmer B. on November 29, 1976, and was promoted to the position of Permanent Computer Analyst/Programmer on July 11, 1977, successfully completing the positional probationary period on January 11, 1978.

3. The position of Computer/Analyst Programmer is a pay scale 16 position. At the time of her dismissal, Grievant was being paid \$268.00 a week.

4. The normal working hours for employees within the Information Systems Development Section of the State Information Systems Division are from 7:45 A.M. to 4:30 P.M. with a 45 minute lunch break.

5. Approximately five employees within the Information Systems Development Section have made arrangements with Donald K. Landergren, Chief of Information Systems Development, to work other than the normal 7:45 A.M. - 4:30 P.M. work hours. Each of these employees works a 40-hour week, their deviations from the normal work hours generally being that they arrive at work 15 minutes early and depart at 4:15 P.M. in order to meet car pool obligations. Each of these employees work a regular predictable 40-hour week. Each of the employees received approval from Mr. Landergren prior to changing their schedules from the normal working hours of 7:45 A.M. - 4:30 P.M.

6. At all times pertinent to this Grievance, the immediate supervisor of Grievant was Ms. Susan Borel, Systems Analyst. Ms. Borel's immediate supervisor was Mr. Rod Halsted, Senior Systems Analyst.

7. The Grievant's supervisors did not dispute the technical competence of Grievant and evaluated her overall performance as "3" ("consistently meets job requirements/standards") in the "annual" evaluation (11/29/76-11/29/77) and

in the "promotional probationary" evaluation (7/11/77 - 1/11/78). (State's Exhibits #1 and #2)

8. Grievant's "annual" performance evaluation for the period 11/29/76-11/29/77 (State's Exhibit #1) rated Grievant's performance in the factor of "work habits" as "3" with the comment "work schedule needs to be more consistent with shop standards".

9. The "annual" performance evaluation was discussed with Grievant by Ms. Borel on approximately December 1, 1977. Grievant did not dispute Ms. Borel's statement that Grievant needed to improve in the matter of compliance with the work schedule.

10. On January 23, 1978, Grievant received a "promotional probationary" performance evaluation for the period ending January 11, 1978. In the factor of "work habits" Grievant received a "2" ("inconsistently meets job requirements/standards") with the comment "work schedule inconsistent with shop standards". Under the evaluation section entitled "Areas for improvement...", Grievant's immediate supervisor, Ms. Borel, noted "(i)nconsistent work schedule causes problems in the team environment". Under the evaluation section entitled "Comments of Rater's Immediate Superior...", Mr. Halsted commented:

"Ms. Mickewich's performance during the past six (6) months has been acceptable in most regards. She must maintain a more normal work schedule if she is going to be a benefit to the shop. If this continues to be a problem action will be required on our part." (State's Exhibit #2)

11. Grievant resides in Marshfield, Vermont. Her home is approximately two miles from the village of Marshfield and 1.5 miles from Route 2. There is one bus from Montpelier to Marshfield in the afternoon which leaves Montpelier at 3:20 P.M.

12. Grievant's transportation problems arose from mechanical difficulties with her own vehicle. During the period of January, 1978 through March, 1978, Grievant was frequently without the use of her vehicle. Grievant's transportation

problems were well known to her co-workers.

13. On March 1, 1978, Mr. Halsted gave Grievant a memorandum which stated in pertinent part:

"This is to inform you that the hours you have been working are not acceptable... Should you continue to work as you have in the past few weeks, I will have no option other than to suspend without pay for some period of time. The other option open to me is to recommend you be discharged from state service."
(Grievant's Exhibit #1)

14 Mr. Halsted discussed this memorandum with Grievant on March 1, 1978. Grievant did not dispute the assertion that she was failing to adhere to normal working hours. Grievant did not offer any excuse or reason as to why it might be difficult for her to observe regular working hours. Grievant did not request that she be allowed to work different or part-time hours.

15. Between the period of March 1, 1978, and March 9, 1978, Grievant informed Mr. Halsted that she was having transportation difficulties. Grievant requested that she be allowed to work a 40-hour work week which deviated from the normal working hours. Her proposed schedule included a request to work three hours a week on Saturdays.

16. Mr. Halsted denied Grievant's request on the grounds that her work could not be supervised on Saturdays and that Saturday work hours were inconsistent with the team approach required by the technical project to which Grievant was assigned.

17. In response to Grievant's assertion of transportation difficulties, Mr. Halsted suggested that Grievant look into a "van pool" which was being formed in her area. Mr. Halsted also suggested to Grievant that she talk to a co-worker who had indicated that he could supply transportation to Grievant.

18. Between the period of March 1, 1978 and March 9, 1978 Grievant did not regularly adhere to normal working hours.

19. On March 9, 1978 Mr. Halsted sent a memorandum to the staff advising them of the normal working hours of the Section. (State's Exhibit #3) Ms.

Borel and Mr. Halsted had received complaints from the staff about Grievant's failure to adhere to normal working hours.

20. On March 10, 1978 Mr. Halsted gave Grievant a letter of reprimand and notified Grievant of his recommendation that Grievant be suspended. The letter stated in pertinent part:

"Your work hours over the past few weeks leave me no alternative other than to take some action. You have continued to work no standard hours without permission... I am recommending that you be placed on suspension without pay for the period 3/13/78 thru 3/17/78... After your return from suspension, should you continue to work as you have in the past, I will recommend you be discharged from State service." (Grievant's Exhibit #2)

21. On March 10, 1978, Mr. Landergren, Chief of the Information Systems Development Section, notified Grievant that she would be suspended without pay for the period March 13-17, 1978, inclusive. (Grievant's Exhibit #3)

22. On March 10, 1978, Grievant submitted a request to work part-time hours, beginning March 13, 1978. (Grievant's Exhibit #4) That request was not acted upon for the reason that the decision to suspend had been made.

23. On Monday, March 20, 1978, Grievant's first day of work after her suspension, Grievant attended a staff meeting in the State Office Building. As members of the staff were leaving the meeting at approximately 3:00 P.M. to return to their work location at the Information Systems Development Section, Grievant told co-workder Sandy Desilets that she would return to work shortly after she spoke with someone.

24. Ms. Desilets informed Mr. Halsted that Grievant would return to the office shortly.

25. Grievant did not return to work on March 20, 1978.

26. On March 21, 1978, Grievant was dismissed for failing to comply with lawful reasonable orders of her supervisor, i.e. failure to adhere to the normal working hours of state employees in the face of repeated directives to do so. (Grievant's Exhibit #5 and #6)

27. Grievant's notice from D. K. Landergren (Grievant's Exhibit #6) informing her of her dismissal from State service cites Article IX of the Vermont State Employee's Non-Management Unit Contract which relates to "Contracting-Out". The appropriate article of said Contract is Article XI relating to "Employee Dismissals".

28. Under Section 13 relating to Performance Evaluation of the Rules and Regulations for Personnel Administration, Subsection 13.01 states in pertinent part:

"Each agency shall evaluate the performance of each employee... upon separation from the agency." (Grievant's Exhibit #7)

29. The Department of Budget and Management failed to give Grievant a performance evaluation upon her dismissal from State employment on March 10, 1978.

Conclusions of Law and Opinion

The Laws of Vermont, Acts of 1977, Public Act No. 109, Section 1 (d) states in pertinent part:

"The normal work schedule of employees...shall be 40 hours per week through June 30, 1979. Classified employees scheduled to work additional hours as provided for in this subsection may work those additional hours during their lunch period, or other time, as arranged with their appointing authority."

The normal work hours for employees within the Information Systems Development Section of the State Information Systems Division are 7:45 A.M. to 4:30 P.M. with a 45 minute lunch break. It is the employee's responsibility to adhere consistently to the regular shop hours established by his or her department.

Grievant's inability to adhere to the regular shop hours established by her department was the result of transportation difficulties. It was, however, her responsibility to either find a reliable means of transportation or to make

alternate arrangements with her supervisor to work a schedule which deviated from the normal work hours which was satisfactory to him. At no time during her employment with the State, did Grievant have the authority to deviate from the normal work schedule without the prior approval of her appointing authority.

Article IX, Section 2 (b) of the Vermont State Employee's Non-Managerial Unit contract states in pertinent part that:

"An employee may be dismissed immediately without prior notice or pay in lieu of notice for: refusal to obey lawful and reasonable orders given by supervisors."

The Board finds that the request of Grievant's supervisors that Grievant adhere to the normal working hours of the Division of State Information Systems, Information Systems Development Section was a lawful and reasonable order, and that Grievant's failure to comply with that order after having been disciplined by a suspension without pay from March 13-17, 1978 was reasonable grounds for her dismissal.

The Rules and Regulations for Personnel Administration, Subsection 12.06 of Section 12 relating to Tenure, Separation and Reinstatement, states that:

"In dismissals and suspensions for cause like penalties shall be imposed for like offenses." (Grievant's Exhibit #8)

It is conceded by the State that if Grievant were able to show that the order to adhere to the normal working hours of her division had been discriminatorily applied by her supervisor, Grievant would have grounds for her reinstatement as a State employee. However, the case presented by Grievant failed to show as a matter of fact that there were other employees in her division who consistently worked irregular hours without the prior approval of their supervisor.

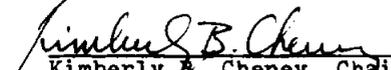
The Board finds that the failure of the State to cite the correct article of the Vermont State Employee Association's Non-Management Unit Contract in Grievant's dismissal notice, as well as the failure of the State to provide Grievant with a performance evaluation upon her dismissal were not prejudicial to Grievant's case, and therefore, constitute harmless error.

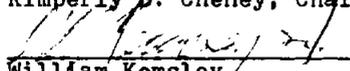
Order

Taking the evidence in the light most favorable to the Grievant, the Board grants the State's motion to dismiss the grievance of Valerie A. Mickewich on the grounds that upon the facts and the law, Grievant failed to present a case of discrimination on the part of her supervisor in dismissing Grievant from State Service. Compare Vermont Rules of Civil Procedure 41(b).

Now, THEREFORE, it is hereby ORDERED the grievance be, and it hereby is, DISMISSED. It is requested that the State, in accordance with its own rules and regulations, provide Grievant with the performance evaluation which was due to her upon her dismissal.

Dated at Montpelier this 26th day of May, 1978.


Kimberly B. Cheney, Chairman


William Kemsley


Robert Brown

Chairman Cheney, Commissioner Kemsley and Commissioner Brown were all present at the May 12, 1978 hearing.