

Vermont Labor Relations Board

GRIEVANCE OF]	
]	DOCKET # 77-13S
SETH PELTON and MICHAEL]	
MARDEN]	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case.

This is a grievance proceeding initiated by Seth Pelton and Michael Marden pursuant to 3 V.S.A., Section 926. The grievance concerns the dismissal of both grievants, who were then Food Service employees at the Vermont State Hospital in Waterbury, Vermont. Both Grievants were discharged for alleged use of a regulated drug on duty or on the grounds of the Vermont State Hospital, viz.: marijuana. The hearing was held in the Board Room of the State Administration Building, 133 State Street, Montpelier, Vermont at 10:00 A.M., Friday, the 19th day of January 1977. The Grievants were both present in person and were represented by Alan S. Rome, Esquire, counsel for Vermont State Employees' Association, Inc. and by Ms. Beverly Ryan, Staff Representative. The State was represented by the Honorable Louis P. Peck, Chief Assistant Attorney General, and by James N. Hunt, Hospital Manager. Following the date of the hearing, memoranda were filed by both parties.

Findings of Fact.

1. The Grievant, Michael Marden, was employed by the

State of Vermont as a Food Service person at the Vermont State Hospital, Waterbury, Vermont, until September 26, 1976, and had been so employed for approximately one year until terminated.

2. The Grievant, Seth Pelton, was employed for about one and one-half years in the Food Service Department at the Vermont State Hospital in Waterbury. The general duties of these personnel were as assistants, largely in the care of dishes and floors and other parts of the premises.

3. The Grievant Marden had had one performance evaluation report, which rated him 4-fully satisfactory (meets and occasionally exceeds standards). The Grievant Pelton had two performance evaluation forms, one probation and one regular, both being marked 3-adequate. These forms were signed by David Lamos, the Assistant Food Service Manager, immediate supervisor for both Grievants, and by James M. Hunt, Hospital Manager (Grievant's Exhibits 2, 4 and 5).

4. The Grievant Pelton had had a previous written warning from Mr. Hunt dated September 23, 1975 (State's Exhibit C) for smoking marijuana, which warning stated that "... a repetition will result in further disciplinary action up to and including dismissal."

5. Both Grievants had signed a statement marked "CONDITIONS OF EMPLOYMENT".

6. Both Grievants had acknowledged receipt of the Vermont State Hospital Personnel Handbook which contained language prohibiting the use of marijuana or intoxicating

liquors while on duty or on hospital grounds (State's Exhibits D and E).

7. The Grievants had come to work on the morning of Friday, August 27, 1976, worked half a day, and then went out on their lunch break. They were sitting under a tree on the hospital grounds smoking a cigarette of undeterminable content, and passing it back and forth between them. The evidence suggests that the cigarette was a "home rolled" variety, but is not conclusive. Mr. David Lamos, Food Service Supervisor, and Mr. Dennis Carey, a fellow employee, came by, also on their lunch breaks, and observed the smoking of what they believed to be a marijuana cigarette by the two Grievants. Mr. Lamos asked, "Does it taste good?", but no further action was taken at the time. There was no odor of marijuana present, nor was the cigarette or a part of it obtained for evidence.

8. After considerable discussion with Mr. Gilette, his immediate superior, Mr. Lamos asked the two Grievants to come to his office. At this time Mr. Lamos charged the Grievants with smoking marijuana on their lunch hour, and they did not deny this fact although they did not admit it either. They were suspended for five days without pay, but warned that there might be "other action later".

9. After the five day period, they came back and on August 31, 1976 they each received letters signed by James M. Hunt informing them "...of the Hospital's intent to

dismiss you September 18, 1976, at the end of your regularly scheduled shift for the possession and use of a regulated drug while on duty on hospital grounds." They were informed of their rights to appeal the dismissal and of other matters (Grievant's Exhibits #3 and 6). It is from these letters of dismissal that a Step IV grievance proceeding was initiated before this Board.

10. At a later date, the Grievant Pelton came to the office of Mr. Lamos and reapplied for a job. He told Mr. Lamos that he was indeed smoking marijuana at the time, but that there was no way that Mr. Lamos could prove it. He also agreed to drop the grievance if he was re-hired.

11. The Board was asked to and did take judicial notice of the Vermont statutory definition of marijuana (18 V.S.A., § 4201 (15)) which reads as follows:

"(15) "Marijuana" means cannabis sativa, or cannabis indica, or any preparation, compound or mixture thereof."

12. Mr. Lamos made up his mind to suspend the Grievants after lunch, and after talking with them. He did not notice any odor of marijuana or anything unusual about the speech or actions of the Grievants.

13. The exhibits and the transcript are made a part of these Findings for purposes of review by the Supreme Court.

Conclusions of Law and Opinion.

The issues presented to the Board were, first, could the Grievants, or either of them, be suspended first and

then later dismissed? The second issue was as to the sufficiency of the evidence against each Grievant. Article XI of the Agreement between the State of Vermont and the Vermont State Employees' Association for the Non-Management Unit, covering the period July 5, 1975-June 30, 1976, controls. The dismissal must be made by the appointing authority or his authorized representative for just cause and with two weeks' notice or two weeks' pay in lieu of notice. The appointing authority shall state the reasons for dismissal and inform the employee of his right to appeal. With the exception of the question of just cause, which will be discussed below, all the requirements of Article XI have been scrupulously observed. The contract does not specifically discuss the question of suspension, but in general dismissal is not the prerogative of a lower supervisory personnel, and can be ratified, reversed, or altered by the appointing authority or his authorized representative, as in the case of the suspension of a teacher by the Superintendent of Schools which must be confirmed by the School Board. Accordingly, it is our opinion that there is no prohibition against the suspension of an employee who is later dismissed on account of the same set of facts.

A much closer question exists as to dismissal with just cause. The Board in effect has found a difference between the facts relating to the Grievant Marden and the facts

relating to the Grievant Pelton. Mr. Marden did not directly reply to any charge of marijuana smoking, nor was any discussion held with him at the time or at a later date. There was no evidence whatsoever, except the evidence of the smoking of a home rolled cigarette, to directly associate Mr. Marden with marijuana during the noonhour of August 27, 1976. On the other hand, Mr. Pelton, for all practical purposes, admitted the smoking of marijuana to Mr. Lamos when he applied for another job. Further, Mr. Pelton had received a prior written warning couched in rather strong language.

Order.

NOW, THEREFORE, it is hereby ORDERED that the grievance of Michael Marden be sustained, and that he be reinstated as a Food Service worker with full pay and allowances dating back to November 18, 1976, less any wages or salary which he may have earned during the intervening period. It is FURTHER ORDERED that the grievance of Seth Pelton be dismissed, but it is requested that the State of Vermont offer Mr. Pelton other employment within the State provided he shall first qualify for a vacant position.

Dated at Burlington, Vermont this 25th day of March, A.D. 1977.

VERMONT LABOR RELATIONS BOARD

By


JOHN S. BURGESS, CHAIRMAN

H. JAMES WALLACE