

Vermont Labor Relations Board

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

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case.

This is a grievance filed in accordance with 3 V.S.A., Section 926 by the Vermont State Employees' Association, Inc. in behalf of Dianna Nagely Gage, a member of the Non-Management Bargaining Unit, alleging that Mrs. Gage was improperly dismissed from her position with the Vermont Department of Social Welfare. The grievance was filed 13 December 1976 and the State's Answer dated 4 January 1977 was filed 6 January 1977. Notice of hearing was mailed to all parties of record on 18 March 1977. A Petition for Subpoenas was filed, Memoranda of Law and Arguments were filed by the State and by the grievant. The first hearing was held on 15 April 1977 in the City Council Room, City Hall, St. Albans, Vermont, and an adjourned hearing held 22 April 1977 in the Highway Board Room, Montpelier, Vermont. The grievant was represented initially by Douglas L. Molde, Esquire, Staff Attorney, Vermont Legal Aid, Inc. and at the hearing by Alan S. Rome, Esquire, Staff Attorney for Vermont State Employees' Association, Inc. The State was represented by

Jeffrey L. Amestoy, Assistant Attorney General.

Discussion of Evidence and Credibility of Witnesses.

In this matter there was some inconsistency in the testimony of the witnesses. This inconsistency was most obvious in the testimony of Mrs. Mulvey and Mrs. Machia. There is also some reason to believe that the facts are still not absolutely clear as to the receipt of certain important correspondence by the grievant herself during the regular course of the mails. In general, however, there was no serious conflict in the testimony.

Findings of Fact.

1. The grievant was employed as an Income Maintenance Specialist, Vermont Department of Social Welfare, at the St. Albans, Vermont office for approximately three years.
2. The Vermont State Employees' Association, Inc (VSEA) is a duly certified bargaining representative for the Non-Management Unit, of which the grievant is a member.
3. From 1 October 1974 until the date of her dismissal, the grievant's immediate supervisor was Mrs. Betty Machia.
4. During the period 24 May - 14 August, 1974 grievant received communications from Commissioner Paul Philbrook urging the grievant to improve her performance by adhering to certain guidelines, especially as they related to absenteeism (State's Exs. 3 & 4).
5. Grievant was recommended for permanent appointment as an Income Maintenance Specialist upon completion of an extended probationary period ending 30 December 1974 (State's Ex. 6).

6. The State became concerned with the grievant's absenteeism during the period 1 July, 1974-2 May 1975, and the conclusion was reached that the leave record of the grievant was excessive by comparison with others. Her supervisor met with her several times to discuss the absentee rate and her performance (State's Ex. 7 & 8).

7. On 31 March 1976, Mrs. Machia, the Supervisor, met with the grievant and told her that from then on all sick leave must be medically substantiated and prior approval would be necessary before any annual leave could be taken. This was followed by a letter the next day to the same effect.

8. The grievant's next Performance Evaluation Report was marked "unsatisfactory" as to work habits, particularly because of excessive absenteeism, and over use of on-payroll status. The evaluation recommended that a warning period be commenced of not less than 120 days.

9. This performance evaluation was reviewed by Commissioner Philbrook and by Grant Taylor, Personnel Administrator, in June 1976 and again reviewed in August of the same year, and the 120 day warning period approved.

10. Grievant was placed under warning on 23 August 1976 at a meeting with Mrs. Machia and District Director Norton. Certain written rules were also set down concerning sick leave, annual leave and other absences. She was warned that her "...failure to consistently meet these requirements within the 120 day warning period will result in your dismissal." (State's Ex. 11-A)

11. Grievant requested maternity leave on 27 August 1976 (State's Ex. 12). This maternity leave was granted for the period 17 September - 19 November 1976 and the warning period extended by the same amount of time.

12. Grievant did not attend to her work for the period 13 September through 17 September 1976, the date of the commencement of her maternity leave.

13. A letter was sent to grievant concerning the discussion as to medical substantiation, but the Board is unable to find whether the letter was received or not.

14. On 18 November 1976 Mrs. Machia spoke to the grievant about returning to work on 29 November, but was told that grievant was uncertain that she would be able to return then because of problems with the transition from breast feeding to formula feeding of the new baby.

15. The grievant was mailed a letter requiring that she request any extension of her leave which was due to end on the 29th of November. She was informed in that letter that any further absence would be considered "absent without leave" and would be grounds for disciplinary action. The Board is unable to find whether this letter was or was not received by the grievant.

16. The grievant did not report to work on the 29th of November as scheduled and did not contact her supervisor or any other persons in the Department of Social Welfare office with a request for an extension of her leave of absence.

17. The agreement between the State of Vermont and the

VSEA for the Non-Management Unit contains the following language:

"Article III - Off payroll and administrative leave of absence

2. Policy

(1) "All leaves of absence must be approved in advance and must be for a definite period of time with an established date for return of duty." (p. 45)

3. Responsibilities.

a. The employee shall:

ii. Submit a request for a leave of absence as much in advance of the effective date as possible.

4. Procedures

- a. When a leave of absence or off payroll time can be anticipated in advance, the employee shall request such leave or time off as soon as possible. If the employee cannot report to work due to an accident or other emergency, he shall inform his supervisor as soon as possible in order that he not be considered "absent without leave" and subject to possible disciplinary action.
- h. If an employee is off the payroll excessively and an absenteeism problem develops, or appears to be developing, the supervisor shall discuss the employee's record of absences with him. Each situation must be dealt with on an individual basis. When an agency or department is confronted with a problem or potential problem, the Department of Personnel should be consulted for advice and guidance."

18. Grievant did not receive approval to extend her leave of absence beyond 8:00 A.M. on Monday, 29 November 1976 and she did not report on that day.

19. Grievant made an attempt during her leave of absence to get hold of her Supervisor, Mrs. Machia, by telephone. She succeeded in reaching a co-worker, Mrs. Fadden, but not her Supervisor.

20. Other workers in the St. Albans office were able to obtain an extension of leave pursuant to informal telephone conversations rather than mail procedure which was required of the grievant.

21. The grievant was dismissed and was not afforded an opportunity to discuss the circumstances of her extended maternity leave and unexplained absence with her supervisor or other supervisory personnel.

22. Grievant was not suspended prior to being discharged, and had received no suspensions in the past for her absenteeism or for any other reasons.

23. Grievant was not given an opportunity during the 120-day warning period to participate in the Vermont Employees' Assistance Program.

24. Other than her absenteeism, which was considered a serious problem, grievant was generally considered a good employee.

25. The letter of termination from Commissioner Philbrook dated 21 December 1976 advised grievant that "The specific reason for your termination is your failure to report for work on Monday, November 29, 1976 at the end of your leave of absence."

26. The transcript of the proceedings are made a part of this record. The issue is whether grievant was discharged for just cause under Article XI (1) of the Non-Management Agreement.

Conclusions of Law and Opinion.

This is a difficult case for the Board to decide for several reasons. First, the testimony is quite clear that the grievant was punctual, even though frequently absent. She was receiving welfare assistance while employed by the Department of Social Welfare, for herself and her family. The general quality of her work seems to have been good. She had this one great problem, or mental block, if you will, feeling obligated to absent herself quite frequently from work on a pay basis as well as on a non-pay basis. The circumstances of her Thanksgiving Holiday absence are somewhat shrouded by mystery. It is clear that she did not return to work on the 29th but it is not exactly clear why she did not, or why she was unable to reach her Supervisor, or even whether she really attempted to reach the Supervisor except for the telephone call to Mrs. Fadden.

The Board is of the opinion that the discharge of an employee must not be taken lightly and must be as a last resort only. The Board notes that no efforts were made to suspend the grievant or administer discipline short of the very final solution, termination of employment. The grievant might well have taken advantage of the Vermont Employees' Assistance Program offered as a guidance and counseling

service through the Department of Personnel, but this was not suggested or offered. We feel that because of the expense in training an employee, the State as a public employer in this case has some responsibility to advise and assist its employees in improving their work habits and performance as well as to admonish them and warn them of any failure or deficiency. There were numerous warnings but these warnings were rendered somewhat meaningless and fruitless by the failure to follow through with specific advice and suggestions. We find that the grievant was discharged without just cause. The grievant 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; further, that she be placed under an additional 120-day period of warning or probation, during which she shall accept any counseling or assistance provided by the Department of Social Welfare or the Department of Personnel, whether the Vermont Employees' Assistance Program or otherwise; further, that she shall submit medical justification for any leave taken, either for herself or on account of any member of her family, on account of illness or other medical problem, within five days of such leave, and shall 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 as a violation of her

period of probation or warning; further, that she be reimbursed for back wages and benefits retroactive to 1 July 1977.

Commissioner Robert 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 Rutland, Vermont this 17th day of November, A.D. 1977.

*Order reversed
& dismissal reinstated.
Oct 1978*

VERMONT LABOR RELATIONS BOARD

By

John S. Burgess

JOHN S. BURGESS, CHAIRMAN

William G. Kemsley Sr

WILLIAM G. KEMSLEY, SR.