

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF ADELE STACEY

DOCKET NO. 78-102S

FINDINGS OF FACT, OPINION AND ORDER

Statement of the Case

On October 20, 1978 William G. Martin, attorney for Vermont Legal Aid, Inc., filed a grievance on behalf of Adele Stacey, a Vermont State employee. On November 8, 1978 the State filed a motion to dismiss the grievance. After a hearing on the motion on October 16, 1978, the Board denied State's motion to dismiss. On November 22, 1978 the State filed an answer and a motion to dismiss.

On December 14, 1978 the Board held a hearing on the grievance of Adele Stacey. Present for the Board were William G. Kemsley, Sr. and Robert H. Brown (Acting Chairman). Prior to the commencement of the hearing Mr. Kemsley advised the parties that he had once appointed the grievant and for a short period of time had supervised her as Coordinator of Manpower Affairs which was the predecessor of CETA. For that reason he agreed to disqualify himself from hearing the case if either party objected. Both parties stipulated they had no objections. The grievant was represented at the hearing by William G. Martin, Esquire, Vermont Legal Aid, Inc. and the State was represented by Louis P. Peck, Chief Assistant Attorney General. At the close of the hearing the Board ordered requests and briefs due on or before December 28, 1978.

#### FINDINGS OF FACT

1. Grievant was employed for approximately five years by the State of Vermont Comprehensive Employment Training Office (hereinafter "CETO") as a Clerk B. Her duties included opening and delivering mail, xeroxing, preparing bills, expense accounts and purchase orders.

2. Vermont CETO is funded entirely by federal CETA funds. Grievant, however, was considered a classified employee for the State of Vermont and her contract was subject to the provisions of the Agreement between the Vermont State Employees Association and the State of Vermont for the Non-Management Unit (hereinafter "Agreement").

3. The last day on which Grievant worked for CETO was August 29, 1978. On or about August 31, 1978 Grievant called her supervisor who was the head clerical worker at the office and informed her that she was ill with phlebitis and was not sure when she would be able to return to work. Grievant did not return to work that week and as of Friday, September 1, she had exhausted all of her sick/annual leave.

4. On or about September 5 Grievant again called her supervisor and asked her about a sick leave since she had exhausted all available accumulated sick/annual leave.

5. Her supervisor referred Grievant to Nils Andersen, the chief account of the CETO office. Grievant discussed her illness with him and asked him whether there was anything she could do about getting additional sick leave. Mr. Andersen told her he would

speak to Ed Clarke, the business manager for CETO and Grievant's appointing authority and personnel officer. Mr. Andersen was not Grievant's supervisor and had no knowledge of contract provisions relating to off-payroll leave or administrative leave of absence.

6. On September 10, 1978 Grievant was admitted to the hospital and on September 12 Grievant's daughter, Rosemary DeForge, called the CETO office and told Leona Wells, Mr. Clarke's secretary, that her mother was in the hospital. Grievant remained in the hospital until September 20, 1978.

7. On September 12 Mr. Clarke wrote a letter to the grievant in which he informed her that as of September 15, 1978 she would have been "off payroll" for ten working days and that due to the fact that one clerical staff worker was currently on maternity leave and that recent staff turnover had impaired the office's ability to accomplish its workload: "It is impossible for us to continue you in an off-payroll status nor to grant you a leave of absence at this time". Mr. Clarke requested that Grievant either return to work on September 18 or submit her resignation. If Grievant was not physically capable of returning to work by that date, her termination would be processed administratively (Grievant's A).

8. Sometime between September 12 and September 18 Dr. John Perry, the grievant's doctor, contacted Mr. Clarke and informed him that the earliest Grievant would be able to return to work would be in two to three weeks. Subsequently Dr. Perry wrote a note stating that Grievant would be able to return to "sedentary work" on October 11, 1978 (Grievant's C).

9. On September 18 Mr. Clarke wrote a letter to Grievant stating that her employment was terminated as of that date (Grievant's B).

10. Grievant's sick leave records reveal that she had a pattern of taking sick leave days as soon as she accumulated them. However, there is no evidence to support a conclusion that Grievant was abusing her sick leave days and Mr. Clarke stated that at the time he decided not to grant Grievant a leave of absence he was unaware of this pattern although he knew she had no sick leave days left.

11. Mr. Clarke's major reason for not granting a leave to the Grievant was the fear of aggravating the shortage of clerical staff in the CETO office.

12. Full clerical staff at the CETO office is five employees. When Grievant became ill one staff member was on maternity leave and a temporary had been hired to replace her. Shortly thereafter the temporary left and another clerical worker resigned.

13. On September 18 Mr. Clarke hired a temporary clerical worker for the CETO office. Since that date he has made no further attempts to hire additional clerks either on a temporary or permanent basis.

#### OPINION

Grievant's position as clerk for the CETO office was terminated by the State for failure to return to her assigned duties on or before September 18, 1978. Given Grievant's illness and the fact that all of her sick/annual leave had expired prior

to this date, the only way that she could retain her job during her illness was to be granted an administrative leave of absence.

The policy and procedures for obtaining an administrative leave of absence are defined in Article XXX of the Agreement.

Section 2.b.111 of the Article states:

An administrative leave of absence may be granted:  
To enable a permanent status or limited status  
classified employee to recover from an illness or  
injury when his accumulated sick/annual leave has  
expired;

Section 2.J. of Article XXX further states:

An employee granted a leave of absence for medical reasons...must have used up all sick leave to his credit.

There appears to be no dispute that Grievant met all the foregoing criteria for administrative leave: She was ill with phlebitis and she had exhausted all of her sick/annual leave.

The questions to be answered by the Board are twofold:

1. Did Grievant follow to the best of her knowledge and ability the correct procedures for applying for administrative leave; and
2. Did the State follow the correct procedures for denying Grievant an administrative leave?

Section 4 of Article XXX outlines the procedures for granting an administrative leave. Subsections a. and b. relating to an employee's request for an administrative leave state in pertinent part:

- a. 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.
- b. The employee's request for leave shall include the reason for the absence and the anticipated period of absence.

Grievant's supervisor at CETO was the head clerical worker at the office. Prior to using up her remaining days of sick leave, Grievant called her supervisor and informed her that she was ill. Subsequently having determined that she would continue to be unable to return to work because of her illness and realizing that she had exhausted all of her sick/annual leave, she again called her supervisor to find out if there was some other type of leave which would cover her absence during the period of her illness so that she would not lose her job. Apparently her supervisor was unclear as to what kind of leave might be available to Grievant given her situation, so she referred Grievant to Nils Andersen, the head accountant. Mr. Andersen was also unclear as to what type of remedy might be available to Grievant but told her that he would speak to Ed Clarke about it.

It is unclear from the evidence why Grievant's supervisor did not refer Grievant directly to Ed Clarke who, as Grievant's personnel officer, was the appropriate person to explain to the Grievant the policies and procedures contained in the Agreement relating to administrative leaves of absence. We believe that the Grievant requested such a leave to the best of her ability. While she did not have sufficient knowledge of the Agreement to specifically request an administrative leave of absence, it would be unfair to assume that she should have knowledge of specific provisions in the Agreement of which even her supervisor was apparently unaware. She did keep her supervisor informed as to the status of her illness and her subsequent hospitalization, and her doctor did contact Ed Clarke directly to confirm her illness and told him that she would not be able to return to work for at least two to

three weeks. Furthermore, it can be presumed from Mr. Clarke's letter to her dated September 12 denying her a leave of absence, that he was aware that she wanted such a leave.

The Agreement does not require that a request for an administrative leave of absence by an employee be formal or written. The terms only require that the employee inform her supervisor that she cannot return to work, the reason for the absence and the anticipated period of absence. In our view, Grievant's phone conversations with her supervisor and with Mr. Andersen, and her doctor's phone conversation with Mr. Clarke satisfied these requirements.

Having found that Grievant requested a leave of absence, we must now consider whether that request was properly denied. As the State points out in its Memorandum, the language of Article III is somewhat ambiguous. Section 2.a. of the Article states:

- a. A leave of absence may be granted to a permanent status or limited status classified employee who can be expected to return to work provided that, in the opinion of the Commissioner of Personnel upon advice of the appointing authority, the leave of absence is in the overall best interests of the employee and clearly not detrimental to the State of Vermont. [emphasis added]

In previous decisions the Board has ruled that the use of the word "may" in a contract is permissive rather than mandatory, and thus the terms of Section 2.a. appear to give the State some discretionary power in determining whether or not an administrative leave of absence should be granted. The provisions, however, do imply that some consideration be given to the employee's "overall best interests" and to whether a leave of absence would be "detrimental to the State of Vermont". It also implies that whatever discretion the State may have in either approving or denying a

request for an administrative leave of absence is vested with the Commissioner of Personnel.

This interpretation is supported by the mandatory language in Section 4.c. and e. relating to the procedures to be followed by the employee's supervisor and appointing authority in considering a request for administrative leave. These provisions are as follows:

4.c. The supervisor shall consider the request and, if it is permitted under the provisions of this article, shall authorize the leave.

1. He shall then notify the department's personnel officer, and they may jointly make arrangements to cover the job through limited appointment or temporary help.

11. The personnel officer shall submit a personnel action form (AA PER 2) to the Department of Personnel, checking under "Leave of Absence (Without Pay)", "Other Leave of Absence", and under "Remarks" indicating the reason for leave, the duration, and anticipated date of return to duty.

4.d. The Department of Personnel shall review the action and approve it if it is in accordance with the provisions of this article.

[emphasis added]

As stated earlier, it is clear from the evidence that the Grievant's request for administrative leave was permitted under the provisions of Article XXX. There is, however, no evidence that Mr. Clarke, as the personnel officer, either submitted the required personnel action form AA PER 2, or that any final determination was made by the Commissioner of Personnel or by Mr. Clarke as to whether the effect of granting the leave would have been detrimental to the interests of the State of Vermont.

While the State in its request for findings states in Paragraph 8, "continuing the employment of a person with an



absentee record like that of grievant would be detrimental to the State", Mr. Clarke stated at the hearing that his reasons for denying the Grievant a leave of absence were not because of her absentee record, but because the clerical pool at the CETA office was understaffed. Since Mr. Clarke was able to hire a temporary clerical worker on September 18, the date on which Grievant was told to return to her assigned duties, and since subsequently he made no further attempts to hire additional clerical help, it would appear that Grievant's absence from work was not detrimental to the State because of staffing problems. In absence of any further evidence that prior to denying the Grievant a leave of absence, a determination was made by the Commissioner of Personnel or by Grievant's appointing authority that granting such a leave would be detrimental to the State, we find that the Grievant was improperly denied an administrative leave of absence and, therefore, improperly terminated by removal from her position for failure to report to duty under Rule 2.0383 of the Personnel Rules and Regulations.

Since there was some confusion as to whether Grievant would be able to perform her nonsedentary duties (e.g. xeroxing) on the date on which her doctor said that she could return to work, we deny Grievant's request for a backpay award from the date of her termination. However, assuming that Grievant is now able to perform all of her prior duties both sedentary and nonsedentary, we order that she be reinstated in her former position and at her former rate of pay, and that she be awarded backpay from the date


of the filing of this order to the date of her reinstatement.

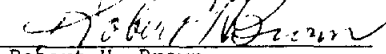
ORDER

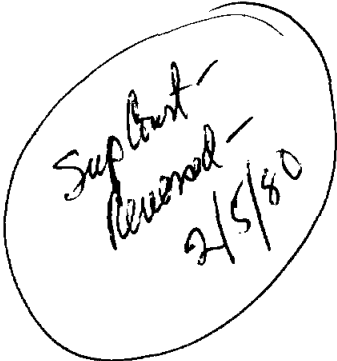
For the reasons stated above the grievance of Adele Stacey is hereby ALLOWED and it is hereby ORDERED that she be reinstated in her former position at her former rate of pay. It is further ORDERED that Grievant be awarded backpay from the date of the filing of this order to the date of her reinstatement.

Dated this 25<sup>th</sup> day of January, 1979 at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

  
William G. Kemsley, Sr.

  
Robert H. Brown

  
Sup Court -  
Reversed -  
2/5/80