VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 00-2
THOMAS SIKORA	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On January 11 and 19, 2000, Thomas Sikora ("Grievant") filed a grievance against the State of Vermont, Agency of Transportation ("Employer"). Grievant alleged that the Employer violated Article 34, Section 1(l) of the collective bargaining agreement between the State of Vermont and the Vermont State Employees' Association, Inc. for the Non-Management Unit, effective for the period July 1, 1999 to June 30, 2001 ("Contract"). Specifically, Grievant alleges that the Employer incorrectly claimed that Grievant had voluntarily quit his position.

A hearing was held in the Vermont Labor Relations Board hearing room in Montpelier before Board Members Edward Zuccaro, Acting Chairperson; Carroll Comstock and John Zampieri on June 23, 2000. Attorney James Jamele represented Grievant. Special Assistant Attorney General David Herlihy represented the Employer. The Employer and Grievant filed post hearing briefs on July 10 and 12, 2000, respectively.

FINDINGS OF FACT

1. Article 34, Section 1 (l) states in pertinent part:

ARTCLE 34
OFF PAYROLL AND ADMINISTRATIVE
LEAVES OF ABSENCE

1. POLICY

. . .

(l) An employee who fails to return from a leave of absence, paid or unpaid, for five (5) consecutive days after a leave is terminated, or an employee who is absent from work for five (5) consecutive workdays without notifying management shall be considered a voluntary quit, except when returning from military leave. This section does not prevent discipline for absenteeism.

2. Grievant worked for the Employer for approximately 14 years. He performed various jobs working out of the District 6 garage for several years until he injured his back while working on the back of a paint truck. As a result of this accident, Grievant was out of work for a period of time and filed a workers' compensation claim. When he returned to work in 1996, Grievant was no longer able to perform his prior duties and the Employer transferred him to the traffic shop in Montpelier, where he worked for approximately two years.

3. Grievant worked with Tom Gauthier in the traffic shop until the project they were working on ended. Grievant's position in the traffic shop was a Pay Grade 12. In the fall of 1998, the Employer transferred Gauthier and Grievant to account clerk positions in the cashier's office, located in the Montpelier office of the Department of Motor Vehicles.

4. The cashier's office is responsible for such duties as encoding and endorsing checks, entering credit card transactions, and reviewing batches of motor vehicle transactions to ensure they balance. There are approximately five employees in the cashier's office. The unit processes hundreds of transactions each day and the employees are under a great deal of pressure to meet daily deadlines. It is not uncommon for employees to make mistakes in processing the large number of daily transactions; they are expected to correct their own mistakes once such mistakes are discovered. In addition to correcting their own mistakes, cashier office employees also are required to

correct mistakes made in the motor vehicle department before they arrived at the cashier's office.

5. Motor Vehicle Cashier Supervisor Patricia Jones trained Grievant. Grievant became proficient in certain aspects of his job, specifically the data entry portion.

6. Jones often had difficulty with Grievant not accepting responsibility for mistakes he made. He often blamed others and claimed that they changed his work. At one point, co-worker Debbie Hempstead asked Jones to excuse her from working with Grievant because he often blamed her for his mistakes. Jones did not permit this because she felt it was important that all the employees in the unit learn to work together.

7. Grievant worked "out of class" for a long period of time, performing account clerk duties but retaining the title and pay grade of his previous traffic shop position. At some point in the Fall of 1998 the Department of Personnel classified and assigned a pay grade to the job Grievant was performing in the cashier's office. The position was downgraded to Pay Grade 11. Grievant's pay was not immediately affected by this downgrade.

8. Jones assisted Grievant in grieving the Pay Grade 11 classification. The grievance was denied and Grievant remained at Pay Grade 11. Grievant was upset about this reclassification because his wage increases would be less in the future. He also was upset because it had been his understanding when he left the traffic shop that he would receive a classification upgrade in his new position in the cashier's office.

9. Grievant's attitude deteriorated after he received the classification downgrade. He became rude to unit employees and other employees who interacted with

the cashier's office. He yelled and threw objects upon making mistakes. He blamed his mistakes on other employees. He made comments to the effect that the other employees were stupid and should be fired.

10. *In October 1998, Grievant requested to work half days for 60 days. The* Employer denied the request but offered to allow Grievant to use 20 days of annual leave. Jones stated in her response to Grievant's request that "20 days away from the office should give you sufficient time to unwind and relax so when you return you will be able to complete your duties in a polite and courteous manner". Grievant rejected this offer (State Exhibit 1).

11 After that time, Grievant became more belligerent to employees and occasionally stated to motor vehicle department employees who brought transactions to the cashier's window, "Take that work and get the hell out of here", or words to that effect. He threw things on his desk, accused people of changing his work and intentionally disordered items on other employees' desks. Jones verbally reprimanded *Grievant and asked him to be polite to other employees. One day he came into the office* and announced that the office was no longer going to be run by Jones because he was going to run the office. He detained a co-worker after work and reprimanded her because she had said "good morning" to him. At some point, Operations Division Manager Bonnie Rutledge told Jones' supervisor that Jones would lose her job if she did not do something about Grievant's behavior.

12. On January 21, 1999, Jones greeted Grievant with a "good morning" and he screamed at her and used inappropriate language. On or about January 26, 2000, Jones informed him that she was scheduling a disciplinary meeting regarding his behavior. She

told him that he could bring a union representative to the meeting. Jones wrote a letter of reprimand that she intended to give Grievant at the meeting. The letter of reprimand stated in pertinent part:

> On Thursday, January 21, 1999, I greeted you with a good morning. You became defensive, very agitated, loud and verbally abusive. I attempted several times to ask you to calm yourself and to stop yelling. You failed to respond to my entreaties and I was required to raise the volume of my own voice in order to be heard and was impelled to give you a direct order to stop screaming and return to work.
>
> This is not the first incident in which you have exhibited loud, profane, disruptive and rude behavior in the workplace. I have addressed this issue with you on several occasions clearly identifying that all employees are expected to behave with a common courtesy toward each other and to our customers and to be professional in demeanor at all times.
>
> I further instructed you that you are to bring workplace issues, problems and concerns to me as the unit supervisor and not confront employees. This resulted from you presuming authority you do not have in requesting that an employee remain at work after hours where you confronted her and directed her to conform to your wishes regarding common salutations. . . (State Exhibit 6).

13. The disciplinary meeting initiated by Jones took place on January 27, 2000. Jones offered Grievant anger management classes. Grievant did not respond to the offer. Jones gave Grievant the letter of reprimand. He did not say anything and folded the letter and put it in his pocket without reading it. He asked if the meeting was over and left (State Exhibit 6).

14. Between January 21 and 27, 1999, Grievant filed harassment charges against Jones and his co-workers with Tom Trahant, a personnel administrator in the Employer's Human Resources unit. Grievant complained that his co-workers were harassing him and attempting to get rid of him. He told Trahant that his co-workers were all incompetent and should be fired.

15. Grievant cleaned out his desk and never returned to work after January 27, 1999. Grievant went to a family physician, Dr. Stuart Williams, on January 28. He

previously had visited Dr. Williams' colleague, Dr. Christopher Jensen, on November 9, 1998, because he was experiencing feelings of anxiety. During Grievant's January 28, 1999, appointment with Dr. Williams, Grievant displayed signs of stress and anxiety and was tremulous. He told Dr. Williams that the stress he was feeling was directly related to his working situation. Dr. Williams wrote a note for Grievant which stated:

> Please excuse [Grievant] from work for 2 weeks due to medical reasons. He has a return appointment for evaluation in 2 weeks (State Exhibit 3).

16. Grievant's father delivered the doctor's note to the unit. Jones attempted to contact Grievant many times but was unable to reach him. She left messages at his home asking him to call her, but he failed to do so. She sent him a certified letter on February 4, 1999. Such letter stated in pertinent part:

> I have been trying to reach you since Friday afternoon, 1/29/99. The doctor's note that your father brought to me doesn't provide sufficient medical information for me to approve your medical leave. The note states that you will be out for two weeks due to "medical reasons". The doctor must provide more specific information as to the diagnosis, prognosis and the reason for your inability to work. Upon your return to work you will also need to furnish this office with evidence provided by a physician of your good health and ability to perform work without risk to yourself or others.
>
> Please provide me with an updated doctor's certificate as soon as possible. Until I receive further information, I am unable to approve your use of sick leave for this absence. . . (State Exhibit 4).

17. A note from Dr. Williams appeared on the counter at the cashier's office dated February 5, 1999. The note reinstated the request for two additional weeks off due to "medical reasons". Dr. Williams also indicated that he would be following Grievant closely at his office until his "medical condition improves". Dr. Williams wrote four additional notes for Grievant during the next four months. The first one was dated February 11, 1999, and requested that Grievant remain out of work for two weeks

because he was "presently disabled due to prolonged work related stress reaction". The additional three notes requested either two or four week extensions of Grievant's absence; these notes were dated February 25, March 26, and April 28, 1999 (State Exhibits 7, 8, 9, 12).

18. Psychologist John Penoyar wrote a letter dated February 18, 1999, to Grievant's attorney. This letter was not received by the Employer until April 5, 1999. Such letter stated in pertinent part:

> I met with [Grievant] on three occasions in the two and a half weeks. It is my impression that [Grievant] exhibits signs of extreme anxiety that I would characterize as symptomatic of an Adjustment Disorder with Anxious Features. What this suggests is that his symptoms are likely the result of situational factors. This seems plausible in light of the fact that [Grievant] reports no previous experience of anxiety related difficulties (State Exhibit 11).

19. Penoyar's letter appeared at the counter of the cashier's office on April 5, 1999, along with complete typed notes of Grievant's January 28, 1999, appointment with Dr. Williams, as well as typed notes from Grievant's visit with Dr. Jensen in November 1998. The notes provide detailed descriptions of the doctors' observations of Grievant's condition (State Exhibits 10, 11).

20. Jones had no further involvement with Grievant after February 1999. Acting Financial Service Administrator Lisa Larivee took over this responsibility, with the assistance of Trahant.

21. Trahant interviewed approximately 12 employees in his investigation of Grievant's harassment complaint. He determined that the complaint did not have merit. Trahant worked with Larivee in drafting a May 17, 1999, letter informing Grievant of the results of his investigation (State Exhibit 22).

22. Trahant and Larivee reviewed the various doctors' notes which had come into the office. Trahant determined that they were insufficient because they did not adequately state a diagnosis which would show a nexus to the job that Grievant was required to perform. Larivee's May 17, 1999, letter also addressed this issue and stated in pertinent part:

> A second issue that must be addressed is your continued absence from work without sufficient medical documentation. We have requested that you provide us with more specific information regarding your absence from work. . . . The information you have provided is insufficient and does not merit approval of your continued excused absence from work. You have been advised in weeks past to submit to this office specific information regarding your inability to work and a physicians statement that addresses diagnosis, prognosis and a projected return to work date. We will be more than willing to supply your treating physician with a copy of your job description and the essential functions of your position to assist him in making a determination regarding your return to work.
>
> You are directed by this letter to provide this office with specific medical information as to diagnosis, prognosis and the reason for your inability to work. The requested information must be received in this office no later than Monday May 24, 1999. Failure to comply with this directive will result in your request for sick leave being disapproved and you being carried in an "off payroll" status. You should be advised that prior to your return to work you are required to provide evidence provided by a physician of your good health and ability to perform work without risk to yourself or to others (State Exhibit 13).

23. Dr. Williams continued to submit notes for Grievant requesting that he not work due to medical reasons. On June 29, 1999, Larivee wrote an additional letter to Grievant restating her request that he submit adequate information relating to his continued absence from work. She referenced Jones' February 4, 1999, letter and her previous May 17, 1999, letter. Her letter also stated in pertinent part:

> Let me be perfectly clear. You must either present yourself for work with a physician's clearance to do so, or submit adequate documentation of a medical condition, if you are unable to work due to health reasons. If you fail to provide documentation or appear for work, you will be considered absent from work without authorization from the first regular workday after you receive this letter (State Exhibit 16).

24. Dr. Williams sent another note to the Employer on July 2, 1999, stating that Grievant would be "unable to work at his usual occupation due to a medical condition for an indefinite period of time" (State Exhibit 17).

25. On or about July 6, 1999, Grievant's attorney sent Larivee a letter indicating that Grievant would sign a release so that she could speak with Grievant's doctor. Trahant did not see this letter and it is not known if Larivee ever saw the letter, although it was received by the Employer.

26. On July 14, 1999, Larivee sent Grievant a letter in which she informed him that he had failed to comply with her June 29, 1999, letter. She informed him he was being placed in an "off payroll" status as he was considered absent from work without authorization, effective July 2, 1999. She also stated:

> Article 31 of the labor contract outlines conditions under which sick [leave] may be authorized and the conditions under which a certificate from a physician may be required. Effective immediately any use of paid sick leave will require you to provide a doctor's certificate that justifies your inability to work because of illness or injury. The certificate must contain the diagnosis, prognosis and any work restriction.
>
> . . .
>
> Off payroll absences will be considered absence without leave and unauthorized. You will be subject to discipline in the future. If you need time for medical absences you can request a leave of absence under the terms set forth in the labor agreement, and if the request qualifies, it will be approved.
>
> . . .
>
> (State Exhibit 19).

27. On July 22, 1999, Dr. Williams sent a letter which was received by the Employer on August 2, 1999. Such letter stated in pertinent part:

> [Grievant] has been unable to work in his occupation at the Department of Motor Vehicles because of work-related stress and adjustment disorder with anxiety. His medical leave of absence began when I saw him on January 28, 1999, and continues to this date and is expected to continue indefinitely. At this time, I do not feel it advisable for him to return to his previous work environment. He has symptoms of tremulousness, chest pains, sleep impairment, difficulty concentrating, and difficulty interacting with people as a direct result of his work-related stress. In addition, he has psoriasis which is exacerbated by a stress reaction.
>
> I would be happy to answer any further questions about [Grievant's] condition to any party that is legally privy to such information (State Exhibit 20).

28. On August 30, 1999, Larivee wrote a letter to Dr. Williams requesting that he elaborate on his July 22, 1999, letter. She also stated that the Employer was going to request that Grievant undergo a fitness for duty ("FFD") medical and psychological exam and evaluation. She provided the names of two Burlington doctors who would perform such tests. She asked Dr. Williams to share Grievant's records with those doctors. She directed him to contact Trahant if he had any questions (State Exhibit 22).

29. On September 2, 1999, Dr. Williams wrote to Trahant and asked for a signed medical release from Grievant; Dr. William's request was received by the Department on September 23, 1999. Trahant did not receive a signed medical release from Grievant, although Grievant's attorney had sent a letter to the Employer or about July 6, 1999, and in such letter stated that Grievant had agreed to sign a release (State Exhibit 25).

30. Dr. Williams wrote a note on September 23, 1999, asking the Employer to excuse Grievant from work for one month "due to medical reasons". Although Larivee had informed Grievant on July 14, 1999, that he was being placed in an "off payroll" status, he continued to remain on payroll, using all his accrued sick, annual and compensatory leave until November 3, 1999. At some point Grievant filed a workers'

compensation claim against the Employer because of his inability to work (State Exhibit 26).

31. On or about November 1, 1999, Grievant's attorney forwarded a release signed by Grievant permitting Dr. Williams to release all his medical records and reports to Trahant. Trahant did not see this release, although it was received by the Employer. At a later time, on or about February 16, 2000, Dr. Williams released Grievant's medical records to the department in connection with Grievant's workers' compensation claim. It is not known if the Employer ever requested Dr. Williams to release Grievant's medical records to the two Burlington doctors, as Larivee had requested in her August 30, 1999 letter.

32. As of November 3, 1999, Grievant had exhausted all of his accrued sick, annual and compensatory leave. Grievant did not request a leave of absence. He was in an off payroll status from November 3, 1999, until the termination of his employment.

33. On December 15, 1999, Human Resources Chief Pamela Gandin Ankuda sent Grievant a Loudermill letter informing him that the Employer was contemplating his dismissal. The letter stated in pertinent part:

> The reasons dismissal is contemplated are:
>
> 1. You have been absent from work and off payroll, with no available balances since November 3, 1999. You have not requested a leave of absence. This unpaid absence is unauthorized.
>
> 2. You have been notified on many occasions that documentation that you furnished was inadequate to justify your absence from the workplace. The last information that you provided to the Agency was a doctor's note dated 8/23/00 that stated "please excuse from work due to medical conditions." You continually disregarded repeated written and oral directions to provide documentation that would justify your absence based on health condition, or to return to work.

> 3. *Article 34, Section (I), (on page 76 of the Non-management Bargaining Unit* agreement between the State and VSEA) states, "An employee who is absent from work for 5 (five) consecutive workdays without notifying management shall be considered a voluntary quit, except when returning from a military leave".
>
> You must notify either me or Thomas Trahant within twenty four (24) hours after receiving this letter whether you wish to respond to the above allegations. You must also indicate whether you wish to respond in writing or orally in a meeting. If you do not respond within that time frame, a decision will be finalized based on the information available . . . (State Exhibit 32).

34. Grievant gave his attorney a copy of this letter. He did not respond to Ankuda's letter because he had exhausted his sick leave balance and thought he had no options.

35. *Ankuda considered Grievant's absence without authorization a serious* matter. Ankuda decided to terminate Grievant because he did not respond to her December 15, 1999, letter and because of the seriousness of the allegations made against him.

36. On December 23, 1999, Ankuda sent Grievant a letter of termination which stated in pertinent part:

> A letter was sent to you on December 15, 1999, advising you that the Agency of Transportation was contemplating your dismissal. The letter stated that you had 24 hours after receipt of the letter to notify either me or Tom Trahant if you wished to respond to the letter. You signed for receipt of the letter on December 18, 1999, and as of 12/22/99, you have not notified either one of us.
>
> As outlined in the letter dated December 15, 1999, you have been absent from work and off payroll, since November 3, 1999. You have not requested a leave of absence. This unpaid absence is unauthorized.
>
> *You have been notified on many occasions that documentation that you furnished* was inadequate to justify your absence from the workplace. The last information you provided to the Agency was a doctor's note dated 8/23/99 that stated "Please excuse from work due to medical condition." You continually disregarded repeated written and oral directions to provide documentation that would justify *your absence based on health conditions, or to return to work.*

Article 34, Section 1.(k) (on page 76 of the Non-management Bargaining Unit agreement between the State and VSEA) states, "An employee who is absent from work for 5 (five) consecutive workdays without notifying management shall be considered a voluntary quit, except when returning from a military leave".

You are dismissed from your employment with the State effective at the close of business today, December 23, 1999. You will not receive two weeks pay in lieu of notice because your present extended unauthorized absence constitutes a voluntary quit as stated in Article 34 of the collective bargaining agreement. This action is taken after considering all aspects of your employment and taking into account factors including the nature of the job, your time with the State and your work record, and the fact that you had adequate notice as to the seriousness of this behavior. It is my opinion that there is just cause for dismissal . . (State Exhibit 33).

OPINION

The Employer contends that Grievant's dismissal is warranted because he voluntarily quit his job under Article 34 of the Contract. The Employer bases this voluntary quit on the fact that Grievant had been absent from work and off payroll since November 3, 1999, and had failed to request a leave of absence. Article 34, Section 1(l) states: "An employee who is absent from work for 5 (five) consecutive workdays without notifying management shall be considered a voluntary quit, except when returning from a military leave." Grievant contends that he continually provided the Employer medical information, as well as a medical release, and that such information kept the Employer informed as to his medical condition and his inability to work.

We conclude that Grievant voluntarily quit his job. Given his exhaustion of leave balances by November 3, 1999, Grievant needed to make some attempt to communicate to the Employer that he was interested in maintaining his job. He could have requested a leave of absence. However, there was no evidence that Grievant made any effort to contact the Employer between the time he went off payroll on November 3, 1999, until his dismissal on December 23, 1999. On December 15, 1999, approximately six weeks

after Grievant went off payroll, the Employer sent him a Loudermill letter. Therein, the Employer clearly set forth the contractual definition of a voluntary quit and stated that Grievant's absence from work was unauthorized and was considered a voluntary quit. The Employer gave Grievant an opportunity to respond to this allegation and warned him that a final decision would be made on whether he would be dismissed if he did not respond to the letter. Grievant's failure to make an effort to preserve his entitlement to his job leads us to conclude that Grievant voluntarily quit his job and the Employer was justified in dismissing him.

ORDER

NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the Grievance of Thomas Sikora is DISMISSED.

Dated this 7th day of September, 2000, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Edward R. Zuccaro, Acting Chairperson

Carroll F. Comstock

John B. Zampieri