

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	
HAROLD JANES)	DOCKET NO. 81-11

FINDINGS OF FACT, OPINION
AND ORDER

Statement of Case

On February 25, 1981, the Vermont State Employees' Association, Inc. ("VSEA") filed a petition with the Vermont Labor Relations Board on behalf of Harold R. Janes ("Grievant"), who was dismissed from his position as Correctional Counselor Supervisor B at the St. Albans Correctional Facility. The petition alleged that no just cause existed for Grievant's dismissal and requested the Board order Grievant reinstated to his position.

A hearing was held September 17, 1981, in the Board hearing room in Montpelier. The full Board was present. The State was represented by Scott Cameron. Michael Zimmerman, Counsel for VSEA, represented Grievant. Findings of Fact and Memoranda of Law were filed by the State and VSEA on October 1, 1981, and October 2, 1981, respectively.

FINDINGS OF FACT

1. From March 16, 1969, to January 29, 1981, Grievant was continually employed by the State of Vermont, Department of Corrections ("Department"). He was, at all times relevant, a permanent status employee and was covered by the collective bargaining agreement in effect between the parties effective from January 1, 1979, until June 30, 1981 ("Agreement").

Grievant held a number of positions with the Department: 1) Correctional Officer, Pay Scale 8 (1969-71); 2) Correctional Counselor A-B, Pay Scale 11 (1971 - May 4, 1974); and 3) Correctional Counselor B, Pay Scale 13 (May 5, 1974 - January 29, 1981).

2. Except for a brief period of assignment to the Chittenden Community Correctional Center at the beginning of his career with the Department, and a six-month training assignment to the Department's central office in Waterbury in 1977-78, Grievant's workplace was the St. Albans Correctional Facility, which is Vermont's maximum security facility, and houses the most serious offenders of any of the Department facilities.

3. During his employment by the Department, Grievant always received overall performance evaluation ratings of at least fully satisfactory (Grievant's Exhibit #3). Also, Grievant received a number of letters of praise or commendation (Grievant's Exhibit #4, Pages 1-5). In addition, in 1977, Grievant established, and received approval from the National Rifle Association for, a training course in the use of firearms at the St. Albans facility (Grievant's Exhibit #4, Page 6).

4. As Correctional Counselor Supervisor B ("CCSB"), Grievant supervised subordinate employees. When he was assigned to the night shift at the facility, as he was during the last few months of his career, he had total responsibility for the facility during that shift.

5. Another of Grievant's duties as CCSB was the training of subordinate personnel. He was active in providing such training.

6. In September, 1977, Grievant was placed in a special assignment at the Department's central office in Waterbury for the purpose of establishing a new training program for the Department. Grievant was temporarily assigned to Waterbury for a six-month period, and at the

end of the period a decision would be made whether to have Grievant continue as prime Training Coordinator for the Department (Grievant's Exhibit #5).

7. From September 7, 1977, to March 13, 1978, Grievant was assigned to the central office in Waterbury. That assignment was the first time Grievant had worked outside of an institutional setting, and he enjoyed the assignment. For his work during the period, Grievant received an overall rating of 3 - "consistently meets job requirements/standards" (Grievant's Exhibit #3, Pages 24-25).

8. Grievant was not made Coordinator at the end of this temporary assignment. Instead, he was sent back to his regular duties as CCSB at St. Albans. This disappointed Grievant, who felt he had put everything he had into the training program. He felt the "people in power" had deserted him, and gone back on the promises they made to him.

9. Upon his return to the St. Albans facility, Grievant took sick or annual leave in order to look for new work and "to collect himself together". He was absent from work from March 3, 1978, to April 15, 1978.

10. On March 13, 1978, Grievant's physician, Dr. John Janick, advised Grievant would not be able to return to work for one month. On March 28, 1978, Janick, in a letter to St. Albans Superintendent Richard Bashaw, stated the reasons why Grievant was not able to work :

He(Grievant) was seen by me on 3/13/78. At that time he related a story conveying his emotional liability and facilitating the diagnosis of anxiety neurosis... He was also given tranquilizers to try to contain his anxiety neurosis. It was based on his particular problems at that time that he be given a leave of absence, in that his work would have aggravated his medical condition (Grievant's Exhibit #8).

This letter was placed in Grievant's personnel file.

11. Grievant returned to work after that absence until November, 1978. Beginning in November, Grievant began suffering from a condition diagnosed as depression (Grievant's Exhibit #9; Grievant's Exhibit #14, Page 1) and, as a result, did not work for the period November 11, 1978, to January 29, 1979. Grievant was treated by Dr. John Sheppard during this period. Sheppard provided Grievant with three sick slips, which were placed in Grievant's personnel file (Grievant's Exhibit #9). On January 3, 1979, Dr. Sheppard stated Grievant was unable to work in the Corrections Department, but "other areas of work would be possible" (Grievant's Exhibit #9, Page 3).

12. Grievant returned to work on January 29, 1979.

13. On February 2, 1979, G.C. Greenan, Administrative Assistant for the Department of Corrections, forwarded to Jeannine Wood of the Department of Labor and Industry a First Report of Injury on Grievant. In the report, Grievant submitted his job injury was "job stress" and that it began March 13, 1978. Greenan informed Wood the Corrections Department "intends to contest the claim". That report was placed in Grievant's personnel file.

14. By letter dated February 8, 1979, Superintendent Bashaw requested Dr. John O. Ives, who would be acting on behalf of the Department of Corrections, examine Grievant, and to submit his opinion concerning whether Grievant's injury was job-related (Grievant's Exhibit #13). That letter was placed in Grievant's personnel file.

15. On February 28, 1979, Dr. Ives, of the Department of Psychiatry, College of Medicine, University of Vermont, examined Grievant, and wrote his report (Grievant's Exhibit #14), which was sent to Bashaw, and

placed in Grievant's personnel file. In his report, Dr. Ives stated Grievant had a classical depressive illness from which he was now largely recovered. He further stated there was no way of proving, given the current state of knowledge, whether Grievant's grievance relative to the loss of his training position the previous March caused his depression. Ives observed it would be much simpler for the State to help Grievant find a new job within State government rather than pay Workmen's Compensation.

16. On March 7, 1979, Superintendent Bashaw wrote a letter (Grievant's Exhibit #15) to Kathie Gayer, of the Department's Central Office. In his letter, Bashaw recommended, after having reviewed the information relative to Grievant's Workmen's Compensation claim, the Department refuse to pay Workmen's Compensation benefits to Grievant. Bashaw stated his reasons for his recommendation as follows:

I base this decision on the fact that he (Grievant) was well aware that the training position that he held in Waterbury was not a permanently assigned position. I made it clear to him on numerous occasions that it was not a permanent position. It is my feeling that Mr. Janes did not want to return to the normal staffing pattern when he initially left for the assignment in Waterbury.

This letter was placed in Grievant's personnel file.

17. On March 13, 1979, Grievant filed a Notice of Injury and Claim for Workmen's Compensation, and an Application for Hearing with the Department of Labor and Industry (Grievant's Exhibits #17 and #18). Copies of each were placed in Grievant's personnel file. In his application, Grievant claimed compensation for two periods of temporary total disability, i.e., from March 13, 1978, to April 15, 1978, and from November 11, 1978, to January 29, 1979. The injury claimed was "chronic unipolar endogenous depression".

18. In response to a request by Superintendent Bashaw for a "diagnosis and prognosis" of Grievant's condition (Grievant's Exhibit #16), Dr.

Sheppard, in a letter to Bashaw dated March 17, 1979, wrote the following:

His diagnosis is unipolar depression, etiologically originating from employment stresses, his prognosis good (Grievant's Exhibit #19).

This letter was placed in Grievant's personnel file.

19. In July of 1980, Raymond Pilette transferred from the Chittenden Community Correctional Center to the St. Albans facility to assume the duties of Assistant Superintendent. A few weeks later, Pilette became acting Superintendent of that facility, and in November of 1980, assumed the title of Superintendent. He was Superintendent of that facility from that time forward. At some point between July of 1980 and January 29, 1981, Pilette read Grievant's entire personnel file.

20. After Pilette transferred to the St. Albans facility, he came to know Grievant and his work. Pilette considered Grievant's performance to be more than satisfactory.

21. During the summer and fall months of 1980, Grievant began feeling irritable and anxious, and started having difficulty in sleeping. In October of 1980, Grievant requested 10 days paid leave (which request was granted by Pilette) to go trapping. After the expiration of that 10-day period, Grievant requested another 10 days paid leave (which request was granted) to go deer hunting. Following the expiration of that 10-day period, Grievant called in sick and remained on sick or annual leave until January 21, 1981.

22. On December 11, 1980, Grievant paid a visit to Dr. Ronald Green, a psychiatrist at the Veteran's Hospital in White River Junction, Vermont. In a report written that day, Dr. Green wrote as follows:

There is good evidence that Mr. Janes is once again developing depressive disease in the setting of work stress. It is highly likely that if he remains in this work setting, he will become increasingly disabled with signs and symptoms of depression. I strongly recommend that he not continue to work in that setting for medical reasons (Grievant's Exhibit #20).

Pilette received that report and read it prior to January 19, 1981. The report was placed in Grievant's personnel file.

23. In a report dated January 13, 1981, Dr. Sheppard stated: "...for the long term prognosis, I feel that his job situation is too stressful for his capacity," and recommended that Grievant seek another job as his present job was "injuries (sic) to his health" (Grievant's Exhibit #21). Pilette received that report and read it prior to January 19, 1981. The report was placed in Grievant's personnel file.

24. Between November, 1980, and the end of January, 1981, Grievant and Pilette spoke to each other on a number of occasions. As a result of this and as a result of Pilette's familiarity with Grievant's personnel file, Pilette was well aware of Grievant's condition, as well as Grievant's claim the condition was work-related.

25. At several times during this period, Pilette offered to let Grievant have the perimeter job at the facility, which would have involved working in a guard shack, away from the institution proper, watching for escaping prisoners. Grievant refused for two basic reasons: 1) the job change would have involved a demotion from his then-Pay Scale 13 position to a Pay Scale 8 position (Correctional Officer); and 2) Grievant did not trust Pilette's supervisors, and feared that if Pilette were transferred, Grievant would find himself back inside the facility again.

26. Grievant's accumulated sick and annual leave days expired on January 20, 1981, a fact both Grievant and Pilette were aware of.

27. On January 19, 1981, Grievant personally delivered to Pilette a letter, which states: "I hereby respectfully request three months leave of absence to begin January 21, 1981." (Grievant's Exhibit #22). The letter did not state the reasons why Grievant was requesting the leave of absence.

28. When Pilette was handed the letter, he asked Grievant if he planned to return to work at the end of the three months. Grievant responded he had no intention to return to work, and told Pilette it was very doubtful he would return to work at the St. Albans facility. Although Grievant assumed Pilette realized he would go back to work at the facility if the doctors allowed him to, he did not expressly tell Pilette this.

29. By letter dated January 20, 1981, Pilette informed Grievant that his request for leave of absence was denied. In his letter Pilette cited two reasons for denial, as follows:

(B)efore a leave of absence may be granted the employee must be expected to return to work following the leave and in your case you told me verbally on several occasions that you had no intentions of returning to work at this facility. Also, according to the agreement between the State of Vermont and the Vermont State Employees' Association, Article XXXII, Page 60, Paragraph C, it states the employees (sic) request for leave must include the reason for the absence and in your request you did not state the reason for the absence.
(Grievant's Exhibit #23)

30. When Grievant requested a leave of absence on January 19, 1981, Pilette was aware the reason the absence was being requested was because Grievant claimed he was depressed.

31. Pilette personally delivered the January 20, 1981, letter to Grievant on that date and, at that time, ordered Grievant to return to work the next day (the day Grievant's sick and annual leave expired), and that failure to do so could result in his dismissal. Pilette asked Grievant if he would return to work; Grievant said no. Pilette asked Grievant if he wanted to resign; Grievant said no.

32. Grievant did not report to work on January 21, 1981, nor did he report for work on any of the following days.

33. On January 29, 1981, Pilette informed Grievant he was dismissed from his position as CCSB, effective immediately. The reasons given for the action were:

You failed to report for duty at 2300 hours on January 21, 1981, as ordered by myself personally on January 20, 1981...You are also absent without authorization. Your sick and annual leave time was exhausted on January 20, 1981...and you are not on an authorized leave of absence without pay. You were notified in a personal interview with me on January 20, 1981, that this action could be taken.

(Grievant's Exhibit #24)

34. At the time he dismissed Grievant, Pilette did not know the difference between removal and dismissal.

35. Pilette is willing to remove the dismissal letter from Grievant's personnel file, and replace it with a letter indicating Grievant was removed from service for the failure to report for duty due to Grievant's medical problems. Alternatively, Pilette would accept Grievant's resignation back-dated to January 29, 1981.

36. Pilette stated he is willing to reinstate Grievant immediately, and put him on the perimeter.

37. While employed by the State, Grievant sought lateral transfers to other positions within State Government.

OPINION

There are three issues before the Board: 1) whether Grievant should have been granted the leave of absence he requested on January 19, 1981; 2) whether just cause existed for his dismissal; and 3) the determination of the proper remedy due Grievant.

I. LEAVE OF ABSENCE

Article XXXII of the Agreement provides:

Section 2(a) - A leave of absence may be granted to a permanent status...employee who can be expected to return to work.

Section 2(f) - All leaves of absence must be approved in advance and must be for a definite period of time with an established date for return to duty.

Here, Grievant submitted a request for a three-month leave of absence, but when asked by Pilette if he planned to return to work at the end of the three months, Grievant responded he had no intention of returning at the end of the three months. He informed Pilette it was doubtful he would return to work at the St. Albans facility. Based on this, Pilette determined it would be a violation of the above-cited provisions to grant the request for leave. Clearly, he cannot be faulted for denying the leave, for he had no reason to expect Grievant would return to work at the end of his leave of absence.

Nonetheless, Grievant contends that Article XXXII makes special provision for employees eligible for Workmen's Compensation benefits, and, since Grievant had a pending claim for such benefits, Pilette should have considered Grievant for the extended leave of absence allowed by the Agreement for employees "eligible" for such benefits.

Article XXXII(g) provides:

An employee injured on the job and eligible for benefits under Workmen's Compensation or the State Board on State Employee Benefits may be granted leave for up to two years in a five-year period.

The key words here are "eligible" and "may". Grievant apparently claims he was eligible for benefits because he had a pending claim. Section 2.023 of the Personnel Rules and Regulations defines eligible as "the state or condition of satisfying all requirements for a process raised". In order to satisfy all requirements for being granted Workmen's Compensation benefits, Grievant would have to be deemed entitled to such benefits. Such determination could not be made by Pilette, but can only be made by the Workmen's Compensation Board or the State Board on State Employee Benefits. Article XXVII, Injury On the Job, of the Agreement provides that in all instances "the determination of the Workmen's Compensation Board or the State Board on State Employee Benefits shall govern whether an injury is job-related." Be that as it may, the word "may" makes Grievant's rights discretionary with the appointing authority. In Re Adele Stacey 138 Vt. 68 (1981).

Thus, we cannot find Superintendent Pilette violated the Agreement by not granting Grievant a leave of absence since to do so was not required by the Agreement.

II. JUST CAUSE FOR DISMISSAL

We do not find just cause existed for Grievant's dismissal. Just cause may be found for dismissal because of performance deficiencies or misconduct. Neither exists here. Grievant was dismissed because his sick and annual leave was exhausted and he had no intention of returning to work due to medical reasons.

In his dismissal letter, Pilette stated he was dismissing Grievant because of failure to report to duty and being absent without authorization. The contents of the dismissal letter essentially indicate Grievant was negligent and disobedient. However, the facts of this case make it clear that Pilette did not perceive Grievant as guilty of misconduct, but simply was faced with a situation where an employee, who had exhausted all annual and sick leave and was not eligible for a leave of absence, failed to report to work for medical reasons. It is evident Pilette does not view Grievant as an unsatisfactory employee in any way, since he considers him a "more than satisfactory" employee and is willing to reinstate him at any time. Nonetheless, it is no less clear Pilette had to terminate Grievant since Grievant had no intention of returning to work due to his medical condition. We believe removal, rather than dismissal, would have been the proper action to take in Grievant's case.

Removal is defined, in Section 2.0383 of the Personnel Rules and Regulations, as "the separation of an employee from a position for failure to report to duty".

In Grievance of Richard Harrison, 2 VLRB 304 (1979), at 317-318, we stated:

If in the estimation of the appointing authority, the employee's return is unlikely, "removal" is not only proper, but probably necessary to the efficient operation of any particular State agency or department. In a "removal", an employee has implicitly consented to separation by his election not to report to work (without authorized leave) and, in turn, the State responds by officially terminating that employee.

In Harrison, *supra*, we found management at fault for "removing" Harrison after unauthorized absences from work because the facts indicated management's "toleration of a racially hostile working

atmosphere that came to be significantly responsible for the rapid deterioration of a once exemplary employee" (at 323). In the case before us, management is not at fault. The problem is the nature of the job, which, evidently to a person of Grievant's sensibilities, is inherently dangerous. This case is similar to Grievance of Dennis Murphy, 3 VLRB 265 (1980). There, Murphy, a Psychiatric Technician at Vermont State Hospital, was dismissed because prior on-the-job leg injuries made him unable to do his job. The Board found:

Grievant's misfortune is that his prior on-the-job injuries made him physically unable to do his job. There is no avoidable and correctable working condition which the employer could devise to protect Grievant from harm. The job is inherently risky and Grievant, because of his disability, inherently subject to severe injury. Therefore, we fail to see how Grievant can be a "qualified handicapped person" since he cannot "perform the essential function of the job in question" without undoubted risk of aggravating his pre-existing injury.
(at 278-79)

The same considerations apply here. There is nothing Pilette could have done to protect Grievant from harm, since, as to him the job was inherently risky. The employer was not at fault for this condition, rather it appeared inherent in corrections work for this individual. Pilette, then, had no choice but to remove Grievant from his position, since he could not change the nature of Grievant's job and since Grievant could not perform the functions of his job due to his medical condition.

In sum, we find no just cause existed for Grievant's dismissal, and that management had no choice but to terminate Grievant, since he could not perform the functions of his job. Management simply chose the wrong method of terminating Grievant; we believe removal, rather than dismissal, was the proper way to proceed in Grievant's case.

REMEDY

Grievant asks not that we reinstate him to his former position, but that we put him in Reduction in Force status. We are not able to place Grievant in Reduction in Force status, since to do so would be in violation of the Agreement. Article XIV, Reduction in Force, provides:

Section 1 - The purpose of this Article is to provide a system to ensure equitable and consistent treatment of classified employees when a reduction in force occurs.

Section 5 - The procedures in reduction in force are as follows: 1. The appointing authority shall notify the Department of Personnel which positions are to be eliminated...

Clearly, Reduction in Force applies to situations where management eliminates positions by laying off employees. Reduction in Force status is granted to the employees who are laid off. Here, Grievant's position was not eliminated and he was not laid off. His employment was terminated because he no longer could perform the functions of his job. 3 VSA §1002(d) provides: "The Board shall not modify, add to, or detract from a collective bargaining agreement...by any order or decision". To place Grievant in a Reduction in Force status would be to modify the provisions of the Agreement.

Further, we have no authority to place Grievant in any other position in State government. Accordingly, our remedy is limited to having the dismissal letter removed from Grievant's personnel file, and replaced with a letter indicating his termination was effected by removal due to medical reasons beyond his control. Such letter will remove the stigma of dismissal from Grievant, and should not be disparaging toward Grievant.

ORDER

Now, therefore, based on the foregoing findings of fact and for all the foregoing reasons, it is hereby ORDERED:

- 1) the Grievance of Harold R. Janes is allowed; and
- 2) the dismissal letter of January 29, 1981, is to be immediately removed from Grievant's personnel file and be replaced with a letter reflecting Grievant was removed from his position due to his medical condition and the exhaustion of all his earned leave. This letter shall be submitted to the Board within two weeks of the date of this Order.

Dated this 30th day of October, 1981, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney
Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.
William G. Kemsley, Sr.

James S. Gilson
James S. Gilson