VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 82-19
KAREN PEPLOWSKI	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On March 12, 1982, the Vermont State Employees' Association ("VSEA") filed a grievance with the Vermont Labor Relations Board on behalf of Karen Peplowski ("Grievant") over her dismissal from State service. Grievant alleged she was a permanent-status employee and there was no just cause for her dismissal pursuant to the collective bargaining agreement, effective July 1, 1981 - June 30, 1982 ("Contract", Joint Exhibit 1). The State filed an answer to the grievance on March 25, 1982, asking the Board to dismiss the grievance; claiming Grievant was a probationary employee not protected by the "just cause" provisions of the Contract.

A hearing was held before Board members James S. Gilson, Acting Chairman, and William G. Kemsley, Sr., on October 7, 1982. Chairman Kimberly B. Cheney was absent. The State was represented by Assistant Attorney General Scott Cameron. Michael R. Zimmerman, VSEA Staff Attorney, represented Grievant. The parties stipulated they had no objection to Chairman Cheney participating in this decision if Members Gilson and Kemsley could not resolve it. Also, the State conceded at the hearing that if Grievant is a permanent-status employee, there was no just cause for her dismissal.

Requested Findings of Fact and Memoranda of Law were filed by the State and VSEA on November 3 and 4, 1982, respectively.

FINDINGS OF FACT

1. On April 12, 1981, Grievant was hired by the State of Vermont, Department of Mental Health, as a Registered Nurse Direct Care Supervisor at the Vermont State Hospital, a Pay Scale 12, permanent classified position.

2. At the time Grievant was hired, she was pregnant although she was not aware of that pregnancy until later.

3. As a new employee, Grievant was required to serve an original probationary period. In this case, Grievant was initially required to serve a six-month probationary period. She was informed of this during the job interview.

4. Grievant began work on April 12, 1981, and was assigned to Ward 1B, a maximum security unit. The number of patients assigned to Ward 1B usually fluctuated between 15 and 20, although sometimes the number dropped to 11 or 12. The kinds of patients on Ward 1B include those convicted of major crimes, those engaged in bizarre behavior, those who are acutely psychotic, those who become aggressive on the other wards and are sent to 1B for punishment, those who have suicidal tendencies, and inmates from correctional centers who are sent to the Hospital for various reasons (eg., for psychiatric evaluation, or to protect them from other inmates).

5. Grievant worked the second shift (2:30 p.m. to 11:00 p.m.) Her position involved both nursing and supervisory responsibilities, with the emphasis on nursing duties. On a typical shift, Grievant

had four-five staff members under her: one Charge, two or three Psychiatric Aides, and one Ward Aide. While Grievant had overall responsibility for the ward, the work of staff members was directly overseen by the Charge. Grievant's immediate operational supervisor was John Taft, Unit Administrator for the Security Unit. Taft worked the first shift (i.e. from 7:00 a.m. to 3:00 p.m.)

6. During a weekly staff meeting which took place sometime during the period of Grievant's pregnancy, some of the male members of the 1B staff told Grievant that it made them "nervous" when Grievant spent so much unnecessary time on the ward floor with the patients, given the potential harm to Grievant and the fetus should one of the patients become violent. Grievant agreed with the staff that thereafter, during her pregnancy, Grievant would not spend unnecessary time on the ward proper, and that she would go onto the ward proper only when necessary to the performance of her duties. Grievant, shortly after that arrangement was made, informed Mr. Taft, who concurred with that course of action. As a result, Grievant, unless her duties required her presence on the ward, spent her time in her office with the door open. Since Grievant's office was separated from the ward by a wire gate, Grievant could still observe what was occurring on the ward (Grievant's Exhibit 6).

7. In July, 1981, Grievant requested a three-month maternity leave of absence (without pay), to begin on the day of the birth of her child. Taft granted that request. At that time, Taft told Grievant that if her leave began prior to the expiration date of her probationary period (ie. October 12, 1981), she would only have to complete that portion of the probationary period she had not completed.

8. Grievant worked on September 24 and 25, 1981. On September 28, 1981, Grievant's child was born, and Grievant began her maternity leave of absence on that date. Upon her return from the hospital on or around October 1, 1981, Grievant first saw a letter, dated September 24, 1981, from Taft, which provided, in pertinent part, as follows:

> Your probationary period was to end October 12, 1981. Because that date will fall while you are on leave of absence and because you have been unable to perform your full job responsibilities while you are pregnant, I am extending your probation for two months from the date of your return.
>
> (State's Exhibit 4)

9. Taft, as Unit Administrator, a management position, is responsible for providing administrative services to all Hospital personnel in his administrative unit. Dr. George Brooks, Superintendent of Vermont State Hospital, has delegated authority to all Unit Administrators to extend original probationary periods and to dismiss employees who do not satisfactorily complete original probationary periods or extension thereof (State's Exhibits 14, 16). This authority has been delegated orally, not in writing.

10. Section 10.065 of the Personnel Rules and Regulations provides:

> The appointing authority, or some member of the agency's staff delegated authority in writing to do so, shall notify a probationary employee in writing that he has (or has not) satisfactorily completed the required probationary period. A copy of such notice shall be filed with the Director.

11. Prior to the time Taft informed Grievant of the decision to extend her original probationary period, Taft discussed his decision with Brooks. Brooks approved the action (State's Exhibit 14).

12. Prior to notifying Grievant of his decision to extend her original probationary period, Taft spoke with Susan Ocker, Personnel Officer for the Hospital, regarding the extension. Ocker, in turn, contacted Will Young, Agency Automated System Specialist, Department of Personnel.

13. Young supervises the records section of the Department of Personnel. Also, he signs payroll and personnel forms within the classified service which require the approval of the Commissioner of Personnel. This authorization was given to him in writing on June 18, 1981, by Jacquel-Ann Chouinard, Commissioner of Personnel (State's Exhibit 15). Part of Young's job duties involve reviewing extensions of original probationary periods contemplated by agencies.

14. Section 10.061 of the Personnel Rules and Regulations provides:

> On recommendation of the appointing authority and with the consent of the Director, the probationary period for a designated individual may be extended for a definite period of time, with written notification to the designated employee of the reason for extension and the definite period thereof. No probationary period may be extended by more than six months beyond the specified period for the class.

(The reference to "Director" refers to the Commissioner of Personnel. Section 2.022 of Personnel Rules.)

The authority of the Commissioner to "consent" to extensions of probationary periods pursuant to Section 10.061 has been delegated to Will Young.

15. In some cases when a State manager wishes to extend an original probationary period, they submit a personnel action form to the Department of Personnel. That form is signed, indicating approval of that action, by Young for the Commissioner. In other cases, no personnel action form is submitted and Young gives oral authorization to extend the original probationary period.

16. In authorizing extensions of original probationary periods, Young does not second-guess the decision of the supervisor. He simply determines whether the action is technically correct; that is, he ensures proper written notification is given to the affected employee in a timely manner. He does not exercise independent judgment on the substance of the decision.

17. Ocker informed Young the Hospital would be extending Grievant's original probationary period, telling him of Grievant's maternity leave and performance problems. Ocker asked Young either for advice on how to proceed or asked if the steps they wished to take were technically correct. Young advised Ocker to provide Grievant written notice of the extension and the reasons for it. He did not exercise any independent judgment on the substance of the decision to extend the probation. Young told Ocker she did not have to submit a personnel action form to accomplish the extension, and, accordingly, none was submitted.

18. When Grievant read the letter from Taft concerning extension of her probation, she telephoned Taft to inquire as to the reasons for the extension. Taft told Grievant he had been unable to adequately assess her performance because of limitations imposed by her pregnancy. Grievant questioned how he was able to judge her performance given the fact that he worked a different shift and, not being a nurse, he could not judge the clinical side of her performance.

19. Grievant did not grieve the extension of her probation.

20. Grievant returned to work on December 22, 1981. Under the terms of the extended probation, Grievant's new probation completion date would have been February 22, 1982 (State's Exhibit 12).

21. Classified employees who successfully complete their original probationary periods automatically receive an increase in their base rate of pay, known as the "end of probation rate" (Contract, Article 25). Grievant never received a pay increase to her end of probation rate, and filed no grievance concerning that lack of pay increase.

22. On January 31, 1982, Grievant did receive a 2 percent increase in her base weekly salary, the same increase received by State employees covered by the Contract (Contract, Article 35, Section 3, State's Exhibit 13).

23. On or about February 8, 1982, Taft orally informed Grievant she would be dismissed, but gave her no reasons for the action. By letter dated February 12, 1982, Taft specified the reasons for Grievant's dismissal. The State, during the hearing of this matter, conceded that the recited reasons do not constitute just cause for the dismissal of a permanent classified employee. Taft's letter also provided, in pertinent part, as follows:

> The purpose of this letter is to advise you that you will not be successfully completing your probationary period and will be terminated from your position effective February 27, 1982.
>
> You may appeal this action at Step IV of the Non-Management Grievance Procedure before the State Labor Relations Board. Your appeal must be filed with the Board within 30 days after receipt of this letter.
>
> (Grievant's Exhibit 4)

24. Prior to notifying Grievant of his decision to dismiss her, Taft discussed the matter with Superintendent Brooks, who orally approved the action (State's Exhibit 14).

25. On February 26, 1982, a personnel action form was submitted, which indicated Grievant's dismissal was effective February 27, 1982 (State's Exhibit 3).

26. Sometime after Grievant's dismissal, Taft told Linda King, a co-worker of Grievant, that Grievant was a "victim of Reaganomics".

27. After Grievant's dismissal, no one was hired to replace her as Registered Nurse Direct Care Supervisor assigned to Ward 1B. The position was either transferred to another unit of Vermont State Hospital or the position still exists but has not been filled.

28. Grievant has been unemployed since her termination (except for part-time work - 16 hours a week - in a flower shop at minimum wage). She has looked for other jobs since her dismissal (i.e. physician's nurse, receptionist, nursing duties in a hospital), but has been unsuccessful up to the time of the hearing. She was offered a night job at Central Vermont Hospital, but declined it because she would have to work nights.

29. Since her dismissal, Grievant received unemployment compensation benefits of $124 per week for six weeks.

30. Grievant's gross hourly rate of pay at time of dismissal was $6.08.

31. The contract defines "original probationary period" and "permanent status" as follows:

> Original probationary period - that working test period, normally six months from effective date of appointment plus any extensions, served by all employees entering State classified service by any means other than restoration and re-employment.
>
> Permanent Status - that condition which applies to an employee who has completed an original probationary period and is occupying a permanent classified position. Rights and privileges of permanent status include, but are not limited to, reduction in force, re-employment, appeal, and consideration for promotion, transfer, and restoration.

32. Section 10.06 of the Rules and Regulations for Personnel Administration provides the probationary period shall not exceed 12 months.

33. Section 10.07 of the Rules and Regulations for Personnel Administration provide: "An employee appointed to a permanent... position... shall gain permanent status upon satisfactory completion of an original probationary period".

MAJORITY OPINION

There are two basic questions to be answered in this matter: 1) does the Board have jurisdiction to determine whether Grievant was a permanent status employee at the time of her dismissal, and 2) was Grievant a permanent status employee at the time she was dismissed? If both questions are answered in the affirmative, Grievant is entitled to reinstatement since the State concedes that if Grievant is a permanent status employee, just cause for her dismissal does not exist.

I. Jurisdiction of Board to Determine Whether Grievant Permanent Status Employee at Time of Dismissal

The State argues the Board does not have juristiction in this matter. Its argument is as follows: If Grievant is a permanent classified employee, then the Board has jurisdiction to hear the grievance of her dismissal. However, the Board cannot conclude that she is a permanent status employee unless it first determines that the extension of the original probationary period was invalid. The Board has no authority to determine the validity of the extension since at the time Grievant was clearly in her original probationary period; and was ineligible to grieve that action. That being so, the Board must presume the extension was valid, and Grievant was in her original probationary period when dismissed.

We recognize that our jurisdiction is limited to what is conferred on us by statute, In re Grievance of Brooks, 135 Vt. 563 (1977), In re Grievance of Guttman, 139 Vt. 574 (1981), and agree with the State that Grievant is ineligible to grieve her dismissal.

The grievance claims Grievant was a permanent status employee at the time of her dismissal because the extension of her original probationary period was invalid, and should be regarded as a nullity, with the consequence she became a permanent status employee after completion of six months of service with the State. Grievant states this claim is reviewable by the Board. We disagree, and believe 3 VSA §1001(a) is dispositive here.

3 VSA §1001(a) provides:

> Persons who are applicants for State employment in the classified service and classified employees in their initial probationary period and any extension or extensions thereof may appeal to the State Labor Relations Board if they believe themselves discriminated against on account of their race, color, sex, age or national origin.

This means the Board may not review grievances of employees, unless "race, color, creed, sex, age or national origin" discrimination is alleged, until an employee actually completes a probationary period or extension thereof. At the time of her probation extension, Grievant was in an "initial probationary period", and at the time of her dismissal she was in an "extension" of that probationary period. Accordingly, her right to grieve at the time of her dismissal was limited to a discrimination claim pursuant to 3 VSA §1001(a).

Thus, the Board is without authority to grant this grievance since no discrimination pursuant to 3 VSA §1001 has been alleged, and her grievance is dismissed.

This does not mean, as the State argues, that the Board never has authority to determine the validity of probation extensions absent alleged violation of 3 VSA §1001(a), and must presume extensions are valid. Section 10.06-10.065 of the Rules and Regulations of Personnel Administration establishes procedures that must be followed regarding probationary periods and extensions thereof. To accept the State's argument would mean substantive rights granted probationary employees in the Personnel Rules, limited as they are, would be totally unreviewable; a proposition we believe is in conflict with even the minimal due process rights due probationers. For us to rule this action as unreviewable would be contrary to the holding of our Supreme Court as expressed in Nzomo v. Vermont State Colleges, 136 Vt. 97 (1978), at 100:

> It is a firmly established principle of administrative law that defined dismissal procedures, although generous beyond the due process requirements that bind the agency, are binding and must be scrupulously observed.

Accordingly, we are uncomfortable with the idea that probationers who are given rights under the Personnel Rules, cannot have those rights protected. Although we recognize the issue has not been raised, we have examined more closely our jurisdiction over probationers and have concluded that if this case were brought before us as an unfair labor practice, we would have no hesitancy in determining whether the regulations

were violated. 3 VSA §961(1) provides "it shall be an unfair labor practice for an employer "to interfere with, restrain or coerce employees in the exercise of their rights guaranteed by any...rule or regulation." We would decide whether Grievant's rights relative to probation extensions guaranteed by the Personnel Rules were interfered with.

We recognize an argument could be made Grievant was not an "employee" covered by this section at the time her rights under the Personnel Rules were allegedly violated. However, we believe a close review of the definition of "State employee" indicates otherwise. 3 VSA §902(4) and (5) provide in pertinent part:

> 4) "Employee" means a State employee as defined by subdivision (5) of this section except as the context requires otherwise.
>
> 5) "State employee" means any individual employed on a permanent or limited status basis by the State of Vermont, or Vermont State Colleges, including permanent part-time employees, and an individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice...

We believe the "context requires otherwise" here. A review of 3 VSA §961 indicates it was intended probationary employees have at least limited unfair labor practice protection. For instance, 3 VSA §961(4) makes it an unfair labor practice to discharge or otherwise discriminate against an employee because he gives testimony under the State Employee Labor Relations Act. We believe the legislature intended this to cover testimony given by probationary employees. If not, the intent of the Act to ensure employees engaged in concerted activity were not discriminated against could be frustrated if a probationary employee could not testify to knowledge s/he had without fear of reprisal. Accordingly, probationary

employees have some protection under the unfair labor practice section, and we believe it extends to the situation here, where Grievant is seeking to protect those limited rights she is given by the Personnel Rules.

Moreover, 3 VSA §902(5) includes among the ranks of "State employees" an individual "whose work has ceases... because of any unfair labor practice". We believe Grievant is potentially embraced within this definition if the Board determined her rights were interfered with under the Personnel Rules.

However, in this case, no unfair labor practice charge has been filed, and the deadline for filing one has passed, since more than six months have passed since the probation period was extended, 3 VSA §965(a), and the filing of a grievance does not toll or relax the responsibility to file an unfair labor practice charge within six months of the occurrence of the alleged unfair labor practice. Champlain Valley Union High School Teachers' Association v. Champlain Valley Union High School Board of School Directors, 4 VLRB 315 (1981).

Accordingly, we are without jurisdiction to determine whether Grievant was a permanent status employee at the time of her dismissal. Thus, we have no jurisdiction over this matter.

We recognize there is a substantial question whether the Personnel Rules were complied with by the State in extending Grievant's probation; that is, whether Will Young's "technical" approval meets the "consent" requirements of Section 10.061 of the Rules. However, we need not decide that under the posture of the case we now have.

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.

CONCURRING OPINION

I agree with my colleagues that Grievant is ineligible to grieve her dismissal since the Board's grievance jurisdiction over classified employees in their original probationary period is limited to 3 VSA §1001(a), and no discrimination pursuant to 3 VSA §1001(a) has been alleged. Accordingly, I concur in the result that the grievance must be dismissed.

However, I disagree with the view that had an unfair labor practice charge been filed, the Board would have no hesitancy in invoking its unfair labor practice jurisdiction and determining whether the probation extension was invalid.

The majority has extended probationary employees broader protection under the unfair labor practice section than the legislature intended. Unfair labor practice protection extends to "employees", and "employee" means any individual employed on a "permanent or limited status" basis by the State "except as the context requires otherwise". 3 VSA §902(4)(5), §961. Grievant is a probationary employee and I do not believe the context requires she be considered an employee here.

I can accept that the unfair labor practice section protects probationary employees when they give testimony under the State Employees Labor Relations Act. Otherwise, as the majority states, "the intent of the Act to ensure employees engaged in concerted activity were not discriminated against could be frustrated if a probationary employee could not testify to knowledge s/he had without fear of reprisal". In such a case, the context requires protection to preserve the express rights granted employees by the Act. Here, no such rights are at stake,

and accordingly, the context clearly does not require protection of probationary employees' rights under the Personnel Rules. This is particularly so where the appeal rights of probationary employees are expressly set out in, and I believe limited by, 3 VSA §1001(a).

I recognize my position means the extension of a probationary period is reviewable only to a very limited extent and management is given broad discretion to extend probationary periods by six months. While this may seem prejudicial to the interests of employees, I believe it is consistent with legislative intent and desirable from a public policy standpoint. This period of limited review allows management to permanently hire those employees who are best suited for positions without involved legal constraints. In my mind, this is necessary for an efficient State service.

Also, I would like to comment on whether the State complied with Section 10.061 of the Personnel Rules, which provide that a probationary period may be extended with the "consent" of the Commissioner of Personnel. The Commissioner's designee, Will Young, in approving the probation extension, simply ensured the State's actions in extending Grievant's probationary period were technically correct and exercised no independent judgment on the substance of the decision.

I believe the "technical" approval here by Young does comply with the Personnel Rules. First, the delegation of authority by the Commissione to Young to "consent" to probation extensions was proper since it is impractical to expect the Commissioner to personally approve all probation extensions in State government, given the broad scope of her duties. Second, the "consent" requirement of the Rules does not require Young to

exercise independent judgment on the substance of probation extension decisions. An employee's supervisor or supervisors are much better equipped than Young to decide whether an employee's performance warrants extension of a probationary period, given their day-to-day dealings with the employee. To require the Commissioner or her designee to exercise a "judgmental function involving a determination whether extension of the probationary period is justified under all the circumstances" is an unwarranted intrusion into the supervisor's domain. I construe the "consent" requirement of Section 10.061 to provide for a review by the Commissioner or designee limited to ensuring procedural requirements of timely and proper notice are given.

James S. Gilson
James S. Gilson

ORDER

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

The Grievance of Karen Peplowski is DISMISSED.

Dated this 20th day of January, 1983, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney
Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.

James S. Gilson
James S. Gilson