VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 82-60
CAROLINE RUSSELL	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On October 14, 1982, Attorney Ronald Fox filed a grievance with the Vermont Labor Relations Board on behalf of Caroline Russell, Social Services District Director ("Grievant"), alleging that the 10-day suspension and placement in a six-month warning period of Grievant violated the July 1, 1982 - June 30, 1984, collective bargaining agreement between the State of Vermont and the Vermont State Employees' Association and the Personnel Rules and Regulations.

On May 16, 1983, Grievant, pursuant to an agreement among the State of Vermont, Grievant and the Chairman of the Vermont Labor Relations Board, filed an amended grievance with the Board to protect the confidentiality of individuals cited in documents relating to alleged child abuse and neglect.

On May 26, 1983, the State moved the Board to dismiss the amended grievance because it raised for the first time issues of discrimination by alleging other district directors have failed to initiate investigations following complaints of child abuse and/or neglect and that the discipline imposed because of this alleged breach of duty was not equal to that imposed on Grievant. The State also moved that Grievant's claim that her 5th and 14th Amendment rights had been violated is not properly raised before the Board and should be dismissed. On August 22, 1983, the Board

denied the State's Motion to Dismiss, concluding that the paragraphs of the amended complaint which add allegations relating to discrimination which the State find objectionable do not add any new substantive grounds for claims and offer evidentiary support for allegations of discrimination which have been part of this dispute before the amendment.

Hearings were held before the full Board on September 15, 1983, October 13, 1983, and December 1, 1983. Grievant was represented by Attorney Fox. Assistant Attorney General Marilyn Signe Skoglund represented the State.

Requested Findings of Fact and Memoranda of Law were filed by the State and Grievant on December 16, 1983. Also, on December 16, 1983, the State renewed its Motion to Dismiss relating to Grievant raising the discrimination issue first filed with the Board on May 26, 1983. On December 22, 1983, the State filed a Supplemental Request for Findings of Fact and Supplemental Conclusions. On December 23, 1983, Grievant filed a Reply Memorandum and a Memorandum Opposing the Motion to Dismiss.

FINDINGS OF FACT

1. At all times relevant herein, Grievant was Social Services District Director A for the Department of Social and Rehabilitation Services ("Department"), Agency of Human Services in the Department's Morrisville office, and was a managerial employee as defined in 3 VSA §902. Grievant has been employed by the Department continuously since 1961. As a managerial employee, Grievant was a member of a collective bargaining unit represented by VSEA prior to July 1, 1982, but since that time has not been a member of any such unit.

2. 13 VSA §1355, effective July 1, 1974 - April 24, 1982, provided: "The commissioner of social and rehabilitation services shall cause

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FINDINGS OF FACT

1. At all times relevant herein, Grievant was Social Services District Director A for the Department of Social and Rehabilitation Services ("Department"), Agency of Human Services in the Department's Morrisville office, and was a managerial employee as defined in 3 VSA §902. Grievant has been employed by the Department continuously since 1961. As a managerial employee, Grievant was a member of a collective bargaining unit represented by VSEA prior to July 1, 1982, but since that time has not been a member of any such unit.

2. 13 VSA §1355, effective July 1, 1974 - April 24, 1982, provided: "The commissioner of social and rehabilitation services shall cause

reports made (of child abuse or neglect) to be investigated within 72 hours". 33 VSA §685, which superceded 13 VSA §1355 effective April 25, 1982, provides: The commissioner of social and rehabilitation services shall cause an investigation to commence within seventy-two hours after receipt of a report made (of child abuse or neglect)".

3. At all times relevant, Vermont statutes required that if a report of child abuse or neglect involved the acts or omissions of an employee of the Department, the report shall be directed to the Secretary of the Agency of Human Services who shall cause the report to be investigated by staff other than staff of the Department. 13 VSA §1354, superceded by 33 VSA §684 effective April 25, 1982.

4. At all times relevant, there were regulations issued by the Department, governing investigations of child abuse and neglect, which provided in pertinent part:

> Section 3212: ..."Complaints of child abuse and neglect which are reported by public and private health, mental health, and social service agencies does not excuse the Department... from investigating the complaint within 72 hours...."
>
> Section 3212.2, Methods: Legal safeguards for individual rights affect methods of investigation and choice of sources of information. Confidentiality, privacy and respect for individual dignity shall be observed to the full extent possible.
>
> (State's Exhibit 16)

5. At all times relevant, Grievant was aware of the statutory provisions and Department regulations cited in Findings #2, 3 and 4.

6. On July 18, 1979, a Department Welfare Fraud Investigator called Grievant to report a complaint of possible neglect or abuse occurring in a family. The report concerned an abdominal injury to the family's youngest son which required hospitalization (hereinafter "Child #2") and a facial injury to the family's eldest son

(hereinafter "Child #1") allegedly resulting from a slap to the face. At the time of receiving the report, Grievant understood the Investigator had received the information from Child #1's and Child #2's paternal grandfather (hereinafter "the grandfather"), and thought that one child was involved, not two.

7. During the phone conversation between Grievant and the Investigator, Grievant asked the Investigator to have the grandfather call Grievant regarding the facial injury and told the Investigator she would check with the Copley Hospital regarding the abdominal injury.

8. It was not unusual for Grievant to make a similar request as she made here to the Investigator about having the grandfather call her in similar situations, and such a practice was not an unusual practice in the Department on July 18, 1979.

9. As a result of the phone call, Grievant, on July 18, 1979, prepared an intake form (State's Exhibits 10, 10a). On the intake form, Grievant marked a box indicating there was evidence of a need for protective services. She prepared an intake form because there was possible child abuse involved and she marked the box indicating a need for protective services because she thought there may have been a need for immediate protective services.

10. Grievant called Copley Hospital on or about July 18, 1979, and spoke with Dr. Robert Parker who was familiar with the child hospitalized with abdominal injuries. Dr. Parker told Grievant he believed the abdominal injury was the result of an accident involving Child #2 falling on a piece of a game and he had no suspicions of abuse.

11. Grievant did not question Dr. Parker about the alleged facial injury to Child #1.

12. On July 30, 1979, the grandfather called Grievant and asked her to call the father of Child #1 and Child #2 (hereinafter "the father").

13. On July 31, 1979, Grievant called the father. The father expressed concern that Child #1's and Child #2's mother (hereinafter "the mother") was abusing the children. The father cited primarily the face-slapping incident. He said he thought the mother had slapped Child #1. The focus of the conversation and the focus of the father's concern related to custody of the children. Grievant explained to the father the procedures involved in a court-ordered custody investigation as the father and mother were then involved in divorce proceedings. Grievant told the father to have his attorney call her and to send her a picture which the father claimed his attorney had of Child #1's face after the face-slapping incident. Grievant did not consider the call from the father to be a complaint of child abuse because the entire substance of the conversation regarded child custody and she thought the mentioning of the face-slapping incident was just supporting evidence for the father to have custody of the children.

14. On July 31, 1979, after speaking with Dr. Parker, the grandfather and the father, Grievant checked off a box marked "not opened" on the intake form she had filled in on July 18, 1979 (State's Exhibits 10, 10a).

15. On August 3, 1979, Grievant received a letter from the attorney representing the father in his divorce action which indicated that the attorneys for the father and mother "have for sometime been discussing the possibility of the SRS Department conducting an investigation of the facts and circumstances relating to the child custody issue". The letter further provided:

> Because my client reported to me he had reason to believe that the older of the two boys has at least on one occasion been physically battered by the mother,

> Attorney ------- and I are in agreement that an investigation by your office would be beneficial. Both our clients have agreed to the investigation. Therefore, I request that your office undertake the investigation as soon as possible. I have enclosed for you a picture given to me by my client which clearly shows the condition of the battered child as it existed after the incident".
>
> (State's Exhibit #3)

16. Grievant responded to the attorney by letter dated August 8, 1979. She stated, "I am somewhat aware of this couple's situation, having talked with (the father) on the phone last week. I explained to him at that time that this agency would be willing to conduct an investigation into the circumstances of the parties and make a recommendation as to custody of the minor children". Grievant further stated the request for a custody investigation had to come from the presiding judge and she enclosed appropriate forms. Grievant noted that the picture referred to in the earlier letter had been omitted (State's Exhibit 4).

17. The attorney replied to Grievant by letter dated August 22, 1979, and enclosed the previously-omitted picture. He also stated he was "in the process of obtaining the request from the presiding judge" (State's Exhibit 5). The picture enclosed with the letter was dated May, 1979 (State's Exhibit 12).

18. Upon receiving the picture (State's Exhibit 12), Grievant became concerned child abuse may be occurring. Grievant noted the time lapse which had occurred since the taking of the picture and Grievant determined it would be difficult to ascertain the alleged abuse incident. She decided to discuss the incident when conducting the divorce custody investigation upon receipt of the request from the judge. Grievant decided to do both investigations at once to reduce trauma to a family an investigation can cause.

19. Grievant understood the letter of August 3, 1979, to be a request for a child custody investigation and not a report of abuse. The State's witnesses assert the letter clearly requested an investigation into child abuse. On the basis of the letter itself, and all the other creditable evidence, we find the letter ambiguous and capable of being understood to request a child custody investigation but not also independently reporting abuse; or requesting both a child custody invesigation and an abuse investigation. We find the evidence on this issue equally balanced. We thus conclude the State has not proved by a preponderance of the evidence Grievant demonstrated a lack of professional judgment and failure to follow statutory requirements regarding commencing investigations involving child abuse by not viewing the letter as a report of child abuse.

20. Grievant never received a request for a custody investigation from the presiding judge and never heard again from the father's or mother's attorneys. She inadvertently misplaced the file on the case and never followed up on the matter.

21. In 1979, there was no uniform intake log system used by the Department. The intake system used in each office was left to the discretion of each office. There was no intake log used in the Morrisville District Office in 1979, nor was one required. Intake logs were not commonly used in District Offices at that time.

22. A uniform intake log system came into use in March, 1980, with the implementation of the Task-Based System for Case Management and Supervision ("TBS"). One purpose for an intake log is to safeguard against intakes being misplaced. Intake logs are used to record incoming

calls to a District Social and Rehabilitation Services office and are continually reviewed to ensure cases are properly handled from beginning to end. Under TBS, it is highly unlikely an intake will be misplaced.

23. The statutory 72-hour rule to investigate child abuse or neglect reports was not uniformly followed by Department Social and Rehabilitation Service District Offices in 1979. In the Brattleboro District Office, cases were assigned once a week. In June, 1979, when Linda Kapuscinski became District Director of the Springfield District Office, 45 intakes (some of which were child abuse or neglect cases) were given to her which had not been assigned to anyone.

24. In 1979, the Department did not place emphasis on the statutory requirement to investigate child abuse or neglect reports within 72 hours, although it is unclear whether Allen Ploof, the Director of Social Services at the time, condoned this. Some District offices exercised judgment in determining how quickly investigations would be commenced; the most important considerations in these offices were the immediacy of the danger to to the child and staff availability.

25. The mother of Child #1 and Child #2 began working in the Morrisville District Social and Rehabilitation Services office in October, 1980. She worked under the supervision of Grievant.

26. The paternal grandfather of Child #1 and Child #2 called the Morrisville District Office at some point to report that his grandson had been beaten in the face with a frozen fish, thus causing a broken tooth. He was unable to say with whom he spoke. His testimony was in conflict as to when he called and to whom he spoke.

27. Grievant did not recall speaking with the grandfather. There is no record of his having called in any intake log in the Morrisville

office. We find Grievant did not speak to the grandfather concerning the frozen fish incident and received no message that he had called.

28. Grievant was aware of the frozen fish incident because the mother brought Child #1 to work one day during the summer of 1981 before taking him to the dentist for treatment of a broken tooth. The mother told Grievant the tooth had been chipped as a result of Child #1 being accidentally hit with a frozen fish. Grievant found the mother's explanation plausible.

29. Grievant never received a complaint from anyone regarding the frozen fish incident. Her only knowledge of the occurrence was due to having seen the child in the office.

30. Grievant made no connection between the 1979 face-slapping incident and the frozen fish incident at the time of seeing Child #1 in the office with the broken tooth.

31. We find based on Grievant's description of the child and the mother's explanation of the injury, taking into account the unlikelihood a frozen fish would "accidentally" strike a child, the facts were sufficient to put a trained caseworker on notice further inquiry was needed.

32. Grievant did not notify the Secretary of the Agency of Human Services of the frozen fish incident as required by 13 VSA §1354.

33. During the summer of 1981, the father of Child #1 and Child #2 contacted Carol LaBrecque, the District Director of the Rutland Office of Social and Rehabilitation Services. He complained that the Morrisville office was not responding to his complaints of possible child abuse and that this was probably due in part to the fact that his ex-wife worked

in that office. The father did not report to LeBrecque any specific instance of child abuse or neglect, but spoke in general terms. LaBrecque advised the father to contact the Secretary of the Agency of Human Services and report his dissatisfaction.

34. LaBrecque then called Grievant and relayed the complaint made by the father and told her the father may be complaining to the Secretary of Human Services. LaBrecque did not tell Grievant she was reporting a case of child abuse. Rather, she told Grievant the father's complaint concerned the Morrisville office's lack of investigation of earlier incidents. His complaint was directed against State employees, not the mother, on this occasion.

35. After talking to LaBrecque, Grievant did not report to the central office or to the Secretary of the Agency that a case of possible child abuse existed involving a Department employee. Grievant assumed she would hear about the father's complaint if he took LaBrecque's advice and called the Secretary of the Agency of Human Services. We find this action and assumption reasonable under all the circumstances.

36. In January, 1982, Grievant received a performance evaluation covering the period December, 1980 to December, 1981. She was rated fully satisfactory. Subsequent to that, she did not receive a performance evaluation prior to being placed in the warning period she is grieving herein.

37. In March or April, 1982, Thomas Moore, Director of Social Services, gave Grievant a written reprimand for failing to complete a timely evaluation of an employee. Grievant has not been otherwise disciplined, except for this case.

38. The father of Child #1 and Child #2 called Raymond Kirk, Deputy Commissioner of the Department, on May 11, 1982. The father reported that his children were being neglected and abused, and charged that the State knew of the neglect and abuse and failed to take any action because his wife worked in the Morrisville District Office.

39. In response to that call, Kirk spoke to Moore. Moore and Kirk realized the complaint would have to be referred to the Secretary of the Agency of Human Services for investigation because the complaint involved an employee of the Department. Kirk reported the situation to John O'Donnell, Deputy Secretary for the Agency of Human Services and informed O'Donnell of the need for an investigation.

40. O'Donnell assigned Bert Smith, Director of the Agency's Welfare Fraud Unit to conduct the investigation. Smith and Richard Morrissey, Investigator with the Welfare Fraud Unit, conducted the investigation. The investigation commenced on May 13, 1982, and a written report was made to Deputy Secretary O'Donnell by Morrissey and Smith on June 18, 1982 (State's Exhibit 20).

41. The Morrissey-Smith report found that the grandfather made a telephone call to Grievant and spoke to her regarding the frozen fish incident in 1981. The report concluded a more exhaustive investigation should have been done by "SRS" regarding the 1979 face-slapping incident (State's Exhibit 20).

42. After reviewing the Morrissey-Smith report, Kirk and Moore believed the report raised questions whether reports of abuse and neglect were being properly investigated in the Morrisville District Office. They concluded there may have been a systems problem in the office

and decided to review the practices of the office. Moore and Kirk decided to engage Maureen Thompson, a Department employee, and Ruth Chaskel, an independent consultant, to investigate the situation. Their report was completed July 16, 1982, and submitted to Moore (State's Exhibit 13).

43. In their report, Chaskel and Thompson were critical of Grievant's handling of the 1979 face-slapping incident and the 1981 frozen fish incident. The report concluded the marking of the boxes "evidence of need for protective services" as well as "...case not opened" on the intake form in July, 1979 (State's Exhibit 10, 10a) constituted an "obvious cross purposes in judgment". The report also states Grievant knew she made a "mistake" in 1979 by not proceeding with an abuse investigation while waiting for the custody investigation request. The report accepted as a fact that the grandfather had called the Morrisville office regarding the frozen fish incident. The report concluded Grievant had clearly violated Department regulations relating to child abuse investigations in various respects regarding the frozen fish incident. Chaskel and Thompson recommended "a probationary period of not less than three months", and during this period, "she should be closely supervised by the Central Office Administrator, and specific attention should be paid to intake procedures" (State's Exhibit 13).

44. The State claims the Chaskel-Thompson report is substantially equivalent to a marginal or unsatisfactory performance rating. Section 13 of the Personnel Rules and Regulations deals with performance evaluations. Subsection 13.01 provides: "The immediate supervisor shall rate those employees under his supervision on a prescribed form

in accordance with procedures established by the Personnel Board; "and Subsection 3.015 provides ratings shall be based on the following standards: a) Outstanding... b) fully satisfactory... c) Adequate... d) Marginal... f) Unsatisfactory. We take official notice that the Chaskel-Thompson report was not done on a prescribed performance evaluation form and the report was not based on the above-mentioned standards. Accordingly, we conclude the Chaskel-Thompson report is not substantially equivalent to a marginal or unsatisfactory performance rating.

45. In conducting their investigation, Morrissey and Smith interviewed a number of people, including Grievant, the father, the mother, the grandfather and Child #1 and Child #2. Chaskel and Thompson interviewed Grievant. However, they did not interview anyone else and to the extent that their report cites "facts" such as telephone calls which others claimed to have made to Grievant, the "facts" were drawn from the Morrissey-Smith report.

46. Linda Kapuscinski met with Bonnie Vander Tuin, a Personnel Officer with the Department, on July 30, 1982. At that meeting, Vander Tuin informed Kapuscinski that there was a group of six district directors who were not in favor and who needed to watch out. Vander Tuin stated that Grievant was in that group.

47. Grievant, after receiving a copy of the Morrissey-Smith report, wrote a seven-page memorandum, dated August 3, 1982, to Moore expressing concern about the Morrissey-Smith report, much of which she thought was misleading and thought many things were taken out of context. She sent a copy of the memorandum to O'Donnell and offered to

meet with him to discuss the matter further (State's Exhibit #6). Neither Moore nor O'Donnell discussed this memorandum with her.

48. On August 11, 1982, Moore hand-delivered a letter to Grievant, signed by Moore, by which she was notified of a 10-day suspension without pay and placement in a six-month warning period. The letter provided:

> This action is being taken because of a serious lack of professional judgment and failure to follow statutory requirements to initiate investigations following complaints of child abuse and/or neglect which were brought to your attention. At least two incidents were reported alleging possible abuse by the same parent and in each case you failed to initiate required investigations...
>
> Failure to achieve and maintain expected performance levels during the warning period could result in further disciplinary action up to and including dismissal.
>
> (State's Exhibit 1)

49. The "two incidents... alleging possible abuse" referred to in the August 11, 1982, letter, were the 1979 face-slapping incident and the 1981 frozen fish incident.

50. Prior to being placed in the warning period, Grievant did not receive a marginal or unsatisfactory performance rating.

51. The decision to suspend Grievant and place her in a warning period was affirmed in a letter dated August 17, 1982, from Kirk to Grievant (Grievant's Exhibit F). This letter indicated that the suspension was based upon the Morrissey-Smith report and Chaskel-Thompson report.

52. At the meetings at which the discipline of Grievant was discussed, possible disciplinary actions discussed ranged from reprimand to dismissal. Moore, Kirk, Department Commissioner John Burchard, Nevia Campi, Chief of Operations, Social Services; and Agency of Human Services Personnel Chief John Peterson participated in these discussions.

53. Moore made the final decision on disciplinary action. Dismissal was not chosen because of Grievant's satisfactory work record over a long period of time. Reprimand was not chosen because Moore felt that was not severe enough to underline the importance of the severity of Grievant's misjudgment.

54. In determining discipline, Moore did not consider the father's call to LaBrecque to be a report of abuse or neglect.

55. In determining the appropriate discipline, Moore relied on the Morrissey-Smith report, the Chaskel-Thompson report and Grievant's response to the Morrissey-Smith report in evaluating appropriate discipline.

56. If Grievant did not act improperly in the frozen fish incident, Moore would reconsider appropriateness of the discipline imposed. In disciplining Grievant for the frozen fish incident, Moore relied on the grandfather making the phone call regarding the incident to the Morrisville office.

57. The 10-day suspension cost Grievant $1,100 in wages.

58. On September 21, 1982, Campi wrote a letter to Grievant to further describe the expected performance levels for the warning period ending on March 1, 1983. Expected performance levels listed included: following statutory requirements, following department procedures, investigating all complaints without prejudging the source and insuring that all intakes adhere to a specified procedure (Grievant's Exhibit J).

59. At the end of the warning period on March 1, 1983, Grievant received a letter from Campi informing her that she was being removed from the warning period.

60. Grievant was never explicitly warned of the disciplinary ramifications of failing to investigate a report of child abuse or neglect. The Department has never had an explicit policy regarding disciplinary action for failure to investigate a report of child abuse or neglect.

61. In 1966-67, Susan LaGasse supervised the protective services unit in the Burlington District Social and Rehabilitation Services Office. The protective services unit had responsibility for child abuse and neglect investigation. As supervisor of the unit, LaGasse's role in abuse and neglect cases was comparable to Grievant's role in that area in the Morrisville office.

62. During 1976-77, LaGasse was unable to comply with the rule mandating investigation of child abuse and neglect cases within 72 hours. At one point, there was a back-log of 50 cases in the office, some of which were child abuse cases.

63. Complaints from the community brought this situation to the forefront, and the situation came to the attention of the Department's central office. The Department responded by implementing a new specialized intake system to comply with the 72-hour rule. LaGasse was given an overall "2" (inconsistently meets job requirements/standards) on her annual performance evaluation form for that period for her failure to comply with the 72-hour rule. She was not suspended and received no letter of reprimand over the failure to comply with the 72-hour rule.

64. Marion Paris was the Burlington District Director in 1976-77. Paris also received an overall rating of "2" for this period. Included

among management objectives to be accomplished within 30 days or sooner were "all high risk cases of physical or sexual abuse be responded to within the 72-hour statutory time limit" and "establish a mechanism to assure specific concrete, immediate, and ongoing knowledge of all high risk cases of physical and sexual abuse" (Grievant's Exhibit 6).

65. Subsequent to the situation in Burlington in 1976-77, the Department administration became increasingly concerned that child abuse complaints were pursued. Moore became Department Director of Social Services in August, 1980, and in that role has historically considered investigation of child abuse to be one of the most important duties of the Department and has a history of correcting child abuse.

66. In the Step III grievance filed in this matter with the Department of Personnel, included among "Applicable Statutory and Contract Sections" cited by Grievant were "U.S. Constitution, 5th and 14th Amendments" and "VSEA Agreement... Article 15, Disciplinary Action" (State's Exhibit 11). Article 15 provides, in pertinent part, "the State will... apply discipline with a view toward uniformity and consistency".

67. By letter dated July 25, 1981, Jacquel-Anne Chouinard, Commissioner of the Department of Personnel, extended certain provisions of the collective bargaining agreement between the State and the Vermont State Employees' Association to managerial employees. Article 13 of the Agreement, entitled "Performance Evaluation", and Article 15, entitled "Disciplinary Action", were not extended to managerial employees. Article 8, entitled "No Discrimination and Harassment", was extended to managers (State's Exhibit 9). Article 8 provides in pertinent part:

> In order to achieve work relationships among employees, supervisors and managers at every level which are free of any form of discrimination, intimidation or harassment, neither party shall discriminate against nor harass any employee because of race, color, religion, creed, ancestry, sex, marital status, age, national origin, handicap, membership or non-membership in the Association, or any other factor for which discrimination is prohibited by law.

68. Grievant did not specifically allege a violation of Article 8(1) in her Step III grievance, but made such an allegation in the amended grievance filed with the Board.

69. The July 29, 1981, letter of Chouinard stated that although the discipline provisions of the Agreement were not extended to managers, managers can only be dismissed for cause, including poor performance (State's Exhibit 9).

70. While evidence was introduced for the prupose of demonstrating that Grievant was in disfavor with the Department administration, we cannot find based on a preponderance of the evidence there was any managerial intent to take adverse action against Grievant irrespective of any improper conduct or poor performance on her part.

71. At all times relevant, the Rules and Regulations for Personnel Administration provided, in pertinent part, as follows:

> 2.043: Warning Period means a specified period immediately following receipt of a marginal or unsatisfactory performance rating by a non-probationary employee, during which he is expected to achieve an adequate level of performance.
>
> 3.03 Discrimination: Discrimination against any person in connection with recruitment, examination, appointment, training, promotion, retention, or any other personnel action because of race, national origin, or any other non-merit factors, or political or religious opinions or affiliations is prohibited...
>
> 12.04 Suspension: a. The appointing authority or his authorized representative may suspend an employee without pay for disciplinary reasons for a period of up to 10 work days.

12.06 Like Penalties for Like Offenses: In dismissals and suspensions for cause like penalties shall be imposed for like offenses.

13.02 Use of Performance Evaluation Reports: Performance evaluation reports shall be used:

13.025 In determining when a warning period is to be imposed to improve employee performance and when failure to show such improvement will result in demotion, intra-departmental transfer or dismissal.

MAJORITY OPINION

I PRELIMINARY ISSUES

a. Motion to Dismiss

On May 16, 1983, subsequent to the hearing on this matter, the State moved the Board to dismiss claims made by Grievant that the Department subjected her to disparate discipline and discrimination because Grievant raised no claims in her Step II and III grievances that other employees of the Department failed to investigate allegations of child abuse or neglect or otherwise failed in their duty and had not been disciplined. The State maintains Grievant's allegations that the State discriminated against her in violation of Section 3.03 and 12.06 of the Rules and Regulations for Personnel Administration and Article 8(1) of the Contract were not timely brought.

We deny the State's Motion to Dismiss for the following reasons. First, the State filed a substantially similar Motion to Dismiss on May 26, 1983. On August 22, 1983, the Board denied the motion, holding paragraphs of the amended grievance filed with the Board adding allegations relating to discrimination did not add any new substantive grounds to claims already made. The Board stated, "The additional paragraphs offer evidentiary support for allegations of discrimination which the Board

believes have been a part of this dispute before the amendment". We would only add that in the Step III grievance filed by Grievant, "U.S. Constitution, 5th and 14th Amendments" and "VSEA Agreement... Article 15, Disciplinary Action" were cited under "Applicable Statutory and Contract Sections". The 5th and 14th Amendments to the United States Constitution raise issues of due process and equal protection, the denial of which is discriminatory. Article 15 of the Agreement imposes the responsibility upon the State to "apply discipline with a view toward uniformity and consistency". These cites raised the issue of discrimination at Step III and thus the State was on notice discrimination was an issue. While, as discussed in the following sections, Article 15 and the 5th and 14th Amendments to the Constitution are not applicable to this grievance, the citing of them still put the State on fair notice.

Second, at the hearing, the Board Chairman ruled certain evidence of disparate treatment would be excluded, and that the other evidence of disparate treatment would remain in the case and be considered by the Board. The Chairman made this ruling after a conference discussing the issue with counsel for the State and Grievant, and the State raised no objection to the Board ruling at the time.

b. Applicability of Article 13 and 15 of the Contract

In the grievance filed with the Board, Grievant maintains the State violated Article 13 of the Agreement between VSEA and the State by not calling to Grievant's attention, during the rating year, work deficiencies which may affect her performance evaluation rating, and violated Article 15 of the Agreement by failing to act promptly to impose discipline within a reasonable time of the offense, by failing to apply discipline

with a view toward uniformity and consistency and by failing to impose progressive discipline in increasing order of severity.

The State contends Grievant is not covered by these Contract provisions. We agree. Grievant is a manager pursuant to 3 VSA §902(18) and §906 and is, therefore, excluded from membership in a bargaining unit. As such, Grievant is not covered by the terms of the Agreement, except where certain terms of employment contained therein have been extended to her by action of the Secretary of Administration. Grievant has produced no evidence to show that either Article 13 or Article 15 of the Agreement have been extended to her, and a 1981 letter from the Personnel Commissioner in evidence indicates those provisions were not extended.

c. Applicability of 5th and 14th Amendments of U.S. Constitution

The grievance filed with the Board alleges the discipline imposed against Grievant violated Grievant's rights to due process and equal protection of the laws guaranteed by the United States Constitution in the 5th and 14th Amendments. The State contends Grievant's claim in this regard is not properly raised before the Board because jurisdiction of the Board in employee grievance proceedings is governed by the definition of the term "grievance" set forth at 3 VSA §902(14) and Constitutional claims are not encompassed within this definition. We agree.

It is appropriate for us to look to Constitutional law where language in an agreement imports a Constitutional standard to interpret that portion of the Agreement. Grievance of William Sypher and the Vermont State Colleges Faculty Federation, Local 3180, AFL-CIO, 5 VLRB 102, at 125 (1982). However, absent that circumstance, the term "grievance"

is not so infinitely expandable as to include every Constitutional right. Grievant's concerns about discriminatory penalties are, however, cognizable under the Colleran and Britt standards of review. 6 SLRB 235 (1983). See infra.

II. MERITS

a. Standards of Review

At issue on the merits is whether there was cause for the 10-day suspension and placement in a six-month warning period imposed on Grievant. Courts have found no substantive difference between a "cause" standard for discipline and a "just cause" standard. In re Grievance of Brooks, 135 Vt. 563, 568 (1977). Carter v. United States, 407 F.2d. 1238, 1244 (1968). Norris v. Commission of Human Relations, 325 N. E2d. 818 (Ill. App. Ct. (1979). Thus, the analysis we employ here is the same we apply when reviewing disciplinary actions against State employees covered by the contractual "just cause" standard, the analysis we adopted in Grievance of Colleran and Britt, supra.

There are two requisite elements which establish just cause for discipline: 1) it is reasonable to discipline an employee because of certain conduct, and 2) the employee had fair notice, express or fairly implied, that such conduct would be ground for discipline. Colleran and Britt, supra. The ultimate criterion of just cause is whether the employer acted reasonably in disciplining an employee for misconduct. Id. In reviewing disciplinary matters, it is our job to determine de novo and finally the facts of a particular dispute, and whether the penalty imposed on the basis of those facts is within the law and the contract. Id. The burden of proof on all issues of fact required to establish just cause is on the employer, and that burden must be met by a preponderance of the evidence. Id.

b. 1979 Face-Slapping Incident and 1981 Frozen Fish Incident

Grievant was disciplined because of a "serious lack of professional judgment and failure to follow statutory requirements to initiate investigations" following complaints of "two incidents... alleging possible child abuse by the same parent". The two incidents Grievant was disciplined for were the 1979 face-slapping incident and the 1981 frozen fish incident. The statutory requirements referenced were 13 VSA §1354-1355 which required investigations of suspected child abuse within 72 hours of receiving a report; and when a report of suspected child abuse concerns an employee of the Department, required the report to be sent to the Secretary of the Agency of Human Services who would cause an investigation to commence.

In our view, the State has not demonstrated by a preponderance of the evidence that Grievant's actions regarding the face-slapping incident indicate culpability on her part. The first notification to Grievant of the face-slapping incident was on July 18, 1979, when a Welfare Fraud Investigator informed her a child's grandfather was alleging the child, who resided in the area Grievant's office covered, had been slapped in the face resulting in a facial injury. Grievant's response to this was to tell the Welfare Fraud Investigator to have the grandfather call her. While this response would not be adequate today in the Department, in 1979 the response was a common practice employed in child abuse cases throughout the Department. Accordingly, we conclude Grievant's response was reasonable.

The grandfather subsequently called Grievant on July 30, 1979, and told her to contact the child's father. Grievant called the father the following day. The father spoke of the face-slapping incident and

stated a picture of the child's face after being slapped had been taken which was in his attorney's possession. Grievant requested the father have his attorney send her the picture, but did not immediately investigate the face-slapping incident.

A few days after speaking to the father, Grievant received a letter from the father's attorney (State's Exhibit 3), the substance of which is contained in Finding #15. The final notification to Grievant regarding the face-slapping incident was receipt of the picture, earlier-mentioned by the child's father, showing the condition of the child's face after the alleged face-slapping incident. This she received from the father's attorney shortly after August 22, 1979.

We must determine whether a reasonable person situated as Grievant was should have been on notice the August 3, 1979, letter from the father's attorney (State's Exhibit 3) requested an abuse investigation. The standard is an objective one, not a subjective evaluation of Grievant's mind. We conclude the State has not proven by a preponderance of the evidence Grievant's interpretation of the letter as a request for a divorce custody investigation rather than an additional request for an abuse investigation was improper. We find the evidence in a virtual balance on the issue. The failure of the attorney to include the picture with his first letter, the staleness of the evidence, and general lack of urgency displayed by the father and his attorney concerning the incident add color to Grievant's position that a custody investigation was all that was being requested. Thus, we cannot find by a preponderance of the evidence that Grievant was culpable in responding to the letter as a request for a child custody investigation. This is not to say

that another worker would not have concluded an abuse complaint was made, only that on these facts it is equally probable that the thrust of the letter was to request a custody review.

In sum, the first offense Grievant was charged with, "failure to follow statutory requirements to initiate investigations within 72 hours following reports of child abuse", was not proven. The State must prove a violation by a preponderance of the evidence and in our view it has failed in this burden.

However, we believe Grievant is culpable with regard to the 1981 "frozen fish" incident. While the evidence does not indicate Grievant received a specific complaint regarding the incident from the grandfather of the involved child or anyone else, she in essence received a report of possible abuse when the mother of the involved child brought the child into Grievant's office. The mother, who was employed in Grievant's office, brought the child to work before taking him to the dentist for treatment of a broken tooth. Grievant saw the child's broken tooth. The mother told Grievant the tooth had been hit with a frozen fish. Grievant found the mother's explanation plausible and took no further action.

Grievant's lack of action warranted disciplinary action for the following reasons. Grievant is a trained professional in detecting child abuse. It is her job to be suspicious of possible abuse and she has a statutory responsibility to investigate it and prevent it. She also has a mandate not to make a judgment herself when the possible abuse involves an employee under her supervision. Seeing the child with the broken tooth should have alerted her to possible abuse on the mother's

part; particularly given the mother's explanation of the incident as an "accident", an explanation which Grievant should have suspected as less than convincing.

At the very least, Grievant should have treated the incident as a report of child abuse. Her duty then was to make a report to the Secretary of the Agency of Human Services. The Secretary could then cause the report to be investigated. Where possible abuse involved the acts of an employee of the Department, Grievant had a statutory duty to make no determination at all. Thus her conclusion that the mother's story sounded "plausible" was itself a violation of law. Grievant was guilty of a "serious lack of professional judgment" because she made a judgment; namely that the mother's explanation of the broken tooth as an "accident" was plausible; and did not report the incident elsewhere. The facts before her were sufficient to put a trained caseworker on notice further inquiry was needed and she should have proceeded accordingly.

c. LaBrecque Phone Call

Evidence was presented of a phone call Grievant received in the summer of 1981 from Carol LaBrecque, the District Director of the Rutland Office of Social and Rehabilitation Services, in which LaBrecque informed Grievant the father of the child involved in the face-slapping incident and the frozen fish incident had called LaBrecque and complained that the Morrisville office was not responding to his complaints of earlier incidents of possible child abuse and this was probably due in part to the fact that his ex-wife worked in the office.

Given the stated reasons for which Grievant was disciplined, we conclude this report from LaBrecque and Grievant's response of taking no

action as a result of the call cannot support the disciplinary action imposed. The disciplinary letter referenced "two incidents" as the basis for the disciplinary action, the two incidents being the face-slapping incident and the "frozen fish" incident. When the father called LaBrecque, he did not tell her he was complaining about either of these two incidents, and did not mention any specific instance of child abuse or neglect, but spoke in general terms. There being no stated connection between the phone call and the two charged incidents, the LaBrecque phone call cannot provide basis for the disciplinary action.

Further, even assuming a stated connection between the phone call and either of the incidents, Grievant did not violate any statutory requirements when taking no action upon receiving the call. LaBrecque did not believe the father was presenting a report of child abuse and did not report it as such to Grievant. Thus, Grievant was not obligated to treat the call as a report of child abuse.

d. Appropriateness of Penalty

1. The Warning Period - Grievant also questions the legitimacy of the disciplinary action imposed on the grounds that the six-month warning period she was placed in was "illegal" because, according to Section 2.043 of the Personnel Rules and Regulations, an employee can only be placed in a warning period following the receipt of a marginal or unsatisfactory performance rating, and no such evaluation was made here.

Grievant is technically correct that placement of Grievant in the warning period was not consistent with the Personnel Rules. We reject the State's argument that the Chaskel-Thompson report was essentially a performance evaluation as contemplated by the Personnel Rules.

Placement of an employee in a warning period contemplated by the Personnel Rules presumes the employee has performance problems. Sections 2.043 and 13.025. Moreover, Section 13 of the Rules establishes specific procedures and criteria for performance evaluations. The Chaskel-Thompson report does not meet any of those standards. It is entirely hearsay. They were not Grievant's supervisor, and no "ratings" were given.

A "warning period" as such is inapplicable to misconduct cases. Obviously any penalty for misconduct carries the implication that further instances of misconduct will be treated more severely. It is unclear what management was attempting to do here. We presume what management intended to do, since this is clearly a misconduct case, was to provide the six-month period as the period of time within which the repetition of the misconduct could lead to more severe discipline, including dismissal, but after that period the misconduct would not be considered in enhancing the penalty in any future misconduct case. In this way, the warning period is similar to Article 12 of the Agreement between VSEA and the State that letters of discipline will be removed from an employee's file two years after being placed there and destroyed if the letters have not resulted in other discipline or adverse performance evaluation during that two-year period.

Thus, we conclude management's technical violation of the Personnel Rules was a de minimus violation. Grievant has now been removed from the warning period without further disciplinary action being taken against her. Moreover, as we construe the "warning" it was actually to Grievant's benefit because it limited the time within which the incident could be used to enhance penalties to six months.

2. The Penalty - We turn now to determine whether the penalty imposed on the basis of the proven facts is within the limits of law and the contract. Grievance of Colleran and Britt, supra. The Board will not require that the State prove by a preponderance of the evidence that the choice of discipline imposed by Department Director of Social Services Thomas Moore against Grievant was proper. Id. If the State establishes Moore responsibly balanced the relevant factors in a particular case and struck a balance within tolerable limits of reasonableness, his penalty decision will be upheld. The Board will only alter the penalty selected by the employer if we conclude either that the facts of the underlying incident are different than those relied on by management when it imposed the penalty and the proven facts do not justify the penalty, or we find the facts to be as relied on by management, but do not find the penalty meets the requisite standards of reasonableness. Id.

We look to the specific factors enunciated in Colleran and Britt to determine the legitimacy of the disciplinary action. The pertinent factors here are the seriousness of the offense, the employee's job level, the employee's past disciplinary and work record, and the notoriety of the offense. The other factors mentioned in Colleran and Britt are not helpful in our determination whether the disciplinary action is within legal standards of management discretion.

Grievant's proven offense of failure to pursue the frozen fish incident was serious because it was a violation of a statutory duty in the area of child abuse. The detection and prevention of such abuse is one of the primary missions of the Department. Her failure demonstrated a serious lack of professional judgment, particularly given her job level

of District Director of an office to investigate child abuse. Grievant was aware of the statutory requirement regarding turning over reports of abuse involving Department employees to the Secretary of the Agency of Human Services so she was on notice her offense could result in disciplinary action. Also, the offense obtained notoriety through the complaints of the father and had the potential for an adverse impact on the reputation of the Agency if knowledge of the offense became public.

On the other hand, we believe the offense was inadvertent, and was not malicious nor frequently repeated. Further, Grievant was charged with failure to follow statutory requirements to initiate investigations following complaints of child abuse in two instances. We have concluded that one of these charges was not proven; and that Grievant did not fail to respond to child abuse complaints in the frozen fish incident, but instead committed the less egregious action of showing a lack of judgment in failing to report it to the Secretary.

Grievant's past disciplinary and work records also weigh in her favor in considering the legitimacy of the disciplinary action imposed. Grievant's past disciplinary record, in over 20 years of service, indicates only one written reprimand for failure to ensure an employee was properly evaluated and no evidence indicates this reprimand was a factor in imposing the disciplinary action here grieved. Grievant's performance had always been rated satisfactory.

Grievant alleges the penalty imposed was inconsistent with those imposed upon other employees for the same or similar offenses and that she was punished in 1982 for 1979 and 1981 offenses by more severe standards than existed in 1979 and 1981. We find this argument unconvincing.

The evidence indicates two employees in the Department's Burlington District Office were given adverse performance evaluations in 1976-77 for failure to enforce the statutory 72-hour rule to investigate child abuse complaints. While an adverse performance evaluation is a different penalty than that imposed on Grievant, we do not believe the difference in sanctions indicates discrimination against Grievant. The context in which the situations arose differs. In 1976-77, it is apparent the Department was lax in requiring that child abuse complaints be investigated within the statutory timeframe. It was appropriate to handle a failure to enforce the 72-hour rule as a performance problem rather than a misconduct problem in such a context since expectations had not been clearly defined. However, the punishment imposed on Grievant in 1982 was imposed by a supervisor, Social Services Director Thomas Moore, who had a history of correcting laxity in investigating child abuse. One of his priorities and presumably one of the priorities of the current Department administration, was to make significant changes in laxity in the child abuse area. Moore had not been Social Services Director in 1976-77.

We recognize that one of the incidents Grievant was disciplined for, the 1979 face-slapping incident, occurred prior to the time Moore became Director of Social Services and prior to the time the Task Based System (TBS), a uniform intake log system designed to safeguard against intakes being misplaced, was implemented in March, 1980. The 72-hour rule was not consistently followed in other district offices in 1979, notably Brattleboro and Springfield. We can infer from this that the penalty imposed against Grievant was more severe than if the 1979 incident had come to light in 1979. However, we find Grievant innocent of the 1979 incident.

The remaining incident, the frozen fish incident, occurred at a time when Moore had been Social Services Director for approximately one year and TBS had been in effect for nearly a year and a half. To charge Grievant with misconduct for this incident rather than treat it as a performance problem was appropriate given the changed situation in the Department since 1976-77. Thus, we do not find disparity in comparing the Burlington situation and the disciplinary action taken against Grievant.

The ultimate issue is whether the penalty imposed in 1982 for the 1981 offense is reasonable under all the circumstances. An employee does not have a vested interest in lax discipline; but only has a right that any punishment imposed be reasonable.

In weighing the factors relevant for consideration in determining the legitimacy of the particular disciplinary action imposed, we consider of utmost importance the fact that Grievant was disciplined for two offenses and only one lesser offense was established. If managment had proven both offenses, we would have upheld the discipline imposed given the seriousness of the alleged offenses, taking into consideration all the factors previously mentioned. However, given the fact only one lesser offense was established, the penalty imposed exceeds the limits of reasonableness and amounts to an abuse of discretion. We conclude the facts of the underlying incident are different than those relied on by management when it imposed the penalty, and it is not reasonable to impose the same term of suspension for a less serious offense. Colleran and Britt, supra.

We turn now to determining the appropriate disciplinary action. Colleran and Britt, supra. The issue at stake concerning Grievant's

culpability in the 1981 frozen fish incident is the integrity of the reporting system for child abuse complaints. Grievant's failure jeopardized the credibility of the Department generally. We have considered imposition of a written reprimand, but reject that in view of the interests at stake. We think Grievant's failure is sufficiently grave to warrant loss of pay, and of sufficient concern to make punishment exemplary. Since management imposed a 10-day suspension for two offenses of a similar nature, we believe it is appropriate to reduce the suspension to five days given one lesser offense.* The six-month warning period imposed by management is upheld with the proviso that it not be considered placement in a warning period because of performance deficiencies but as a period of time within which further disciplinary action may be taken if repetition of the misconduct occurred.

Grievant requests as a further remedy she be "reimbursed for attorney's fees and all other expenses incurred due to discriminatory delay in taking disciplinary action". Grievant alleges "discriminatory delay" because the State became aware of the accusation against Grievant in May, 1982, and the Morrissey-Smith report, documenting the factual basis upon which discipline of Grievant was premised, was completed on June 18, 1982, yet Grievant was not disciplined until August 1, 1982. On June 18, 1982, Grievant was included within the bargaining unit represented by VSEA. She was removed from the bargaining unit effective July 1, 1982. Grievant maintains the delay in disciplining her until

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*As in Colleran and Britt, if management wishes to submit new evidence on the penalty issue, an appropriate motion should be filed.

after she no longer could be represented by VSEA constituted an additional punishment by imposing upon Grievant the added weight of funding her representation through private counsel.

We do not find management's actions constituted discriminatory delay. The Department requested that a Department employee and an independent consultant provide a report in addition to the Morrissey-Smith report, and the completion of that report caused the delay. The action of having the additional report done was reasonable in order to provide an intra-department review of Grievant's actions. The Morrissey-Smith report was prepared by investigators from outside the Department. The amount of time it took to do a complete investigation is understandable given the long lapse in time between when the alleged offenses occurred and when they came to light.

Grievant further requests she be paid compensatory and punitive damages based upon the harm suffered by her as a result of the employer's disciminatory actions taken against her. The Supreme Court has determined that generally, the proper remedy for improper dismissal is reinstatement with back pay and other emoluments from the date of the improper discharge less sums of money earned or that without excuse should have been earned since that date. In re Grievance of Brooks, 135 Vt. 563 (1979). In this suspension case, we find no basis in law or the Agreement by which we may grant compensatory and punitive damages in addition to a back pay order for the days improperly suspended.

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.

OPINION OF MEMBER GILSON

I concur with all aspects of the majority opinion except for the view that the Board may mitigate penalties imposed by management when the Board concludes the penalty imposed by management exceeds the limits of reasonableness and amounts to an abuse of discretion. As I stated in my opinion in Colleran and Britt, supra at 284-285:

> If the Board finds that the penalty imposed by management is unreasonable or otherwise outside legal limits, it may not then impose a lesser penalty of its own choosing. The Supreme Court has stated that we may not substitute our judgment for that of the employer, In re Goddard, supra, and by assuming management's authority to impose discipline we would be doing just that. The Board must remand so management may determine the proper penalty. I recognize this means litigation may very well be protracted as the penalty imposed by management on remand may then be appealed. This may not be a desirable method of resolving disputes, but it is what I believe the Legislature and the Supreme Court have told us we must do.

The lesser penalty imposed by the Board on Grievant is prejudicial to both parties. Grievant is prejudiced because the Board has determined there was no just cause for management's penalty yet Grievant finds herself being punished by the Board. Management is prejudiced since the current state of the law as established by our Supreme Court provides the Board may not substitute its judgment for management but the Board has done just that in setting the penalty here. Colleran and Britt, supra, at 285.

Accordingly, the majority should remand this case to management to determine the proper penalty, and not change the state of the law on its own initiative.

James S. Gilson

ORDER

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

1. The Grievance of Caroline Russell is GRANTED to the extent the 10-day suspension imposed against her on August 11, 1982, is reduced to a five-day suspension, and the six-month warning period she was placed in on August 11, 1982, is upheld with the proviso that it not be considered placement in a warning period because of performance deficiencies but as a period of time within which further disciplinary action may be taken against her if repetition of the misconduct occurred;

2. The State of Vermont shall pay Grievant the sum of $550, which sum represents the amount of money Grievant would have earned if she had not been improperly suspended for five days; plus payment of interest at the legal rate of interest for the period August 11, 1982, to the date Grievant is paid such sum;

3. The five-day suspension and six-month warning period imposed against Grievant shall not be considered in enhancing a penalty in any future disciplinary action taken against Grievant;

4. Any and all materials relating to the 10-day suspension and placement in a six-month warning period shall be removed from Grievant's personnel file and be replaced with a letter consistent with this decision.

Dated this 2nd day of March, 1984, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.