

VERMONT LABOR RELATIONS BOARD

GRIEVANCES OF:

DARWIN MERRILL

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DOCKET NOS. 84-45, 84-46

MEMORANDUM AND ORDER

By motion dated October 11, 1985, the State of Vermont requested that the Labor Relations Board reconsider its October 3, 1985, ruling in this matter. The State filed a memorandum in support of the Motion on October 18, 1985. Grievant filed a Memorandum in Opposition to the State's Motion on October 25, 1985. The State raises various issues in support of its motion, most of which were fully considered by the Board in its original deliberations and do not require discussion here. After review and consideration, the Board sees no reason to alter its judgment on those issues. However, there are two issues which the Board would like to more fully discuss.

First, the State contends the Board improperly substituted its own judgment for that of the Employer in its original decision by faulting management for making "no effort to counsel both persons as good labor relations practice requires", 8 VLRB 288, where there was no duty, statutory or otherwise, for management to have done so. Apparently, the State views this comment as reflective of the Board's rationale for finding a lack of cause for dismissal. While we reiterate our view that good labor relations practice required such an effort, this view did not form a basis for concluding cause for dismissal did not exist.

Second, the State contends the Board exceeded its authority in substituting its own judgment for that of management by limiting the Employer's exercise of discretion as it relates to any extension of Grievant's warning period in the following respects: 1) limitation to 90 days in

length; 2) limitation on the permissible bases for such extension; and
3) requiring the Employer to notify the Board as to its intention to extend the warning period. The State maintains that even if the Board were correct in its determination that just cause did not exist for Grievant's dismissal, the Vermont Supreme Court's decision in Grievance of Janes, 144 Vt. 648 (1984), permits the Board only to remand the matter to the Employer for appropriate action. In Janes, the Court concluded the Board exceeded its authority when, after concluding no just cause existed for a State employee's dismissal, it ordered the dismissal letter to be replaced with a letter of removal. The Court remanded to the Employer "for such further action as may be appropriate under the contract between the parties".

Upon reflection, we agree the Janes decision limits our authority in this matter to reinstatement and back pay and that we exceeded our authority in limiting management's discretion as it related to any extension of Grievant's warning period. While the State and the Vermont State Employees' Association have essentially negated the effect of Janes by subsequently negotiating a contractual provision in the 1984-86 Contract giving the Board explicit authority to impose a lesser form of discipline than dismissal [See Grievance of Sherman, 7 VLRB 380 (1984)], Grievant is not covered by that contractual provision. Thus, the Janes decision governs this matter and mandates that any decision as to extending Grievant's warning period be remanded to the employer for such further action as may be appropriate.

Now therefore, based on the foregoing reasons, it is hereby ORDERED:

1. The final paragraph of the Opinion in the October 3, 1985, Findings of Fact, Opinion and Order in this matter is amended to read as follows:

We turn now to determining what remedy to apply in this case. We have concluded cause did not exist for Grievant's dismissal. However, we have also concluded Grievant demonstrated some performance deficiencies during the warning period in areas for which he was placed in a warning period. At the time Grievant was dismissed, he had reached the end of his warning period. Instead of dismissing Grievant, Powell could have extended Grievant's warning period. Under such circumstances, we believe an appropriate remedy is to reinstate Grievant with full backpay, but remand to management for such further action as may be appropriate.

2. Paragraph 2(b) of the October 3, 1985, Order is RETRACTED and replaced with the following sentence:

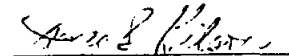
This matter is remanded to the Employer for such further action as may be appropriate.

3. The State's Motion for Reconsideration is GRANTED to the extent of the above amendments and is DENIED in all other respects.

Dated this 7th day of November, 1985, at Montpelier, Vermont.¹

VERMONT LABOR RELATIONS BOARD


William G. Kemsley, Sy.


James S. Gilson

¹. This Order is slightly revised from a Memorandum and Order issued October 31, 1985, on the State's Motion for Reconsideration and was issued subsequent to the State filing a Motion for Further Reconsideration.