

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:

THERESA HETZEL

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DOCKET NO. 84-56

FINDINGS OF FACT, OPINION AND ORDER

STATEMENT OF CASE

On November 26, 1984, Attorney David Gibson filed a grievance on behalf of Theresa Hetzel ("Grievant"), an employee of the Brandon Training School operated by the Department of Mental Health, State of Vermont ("State"). The grievance alleged the June 1984 reassignment of Grievant continued a pattern of harassment and discrimination against Grievant which had been undertaken the previous January and was disciplinary action applied in violation of Article 15, Section 1.B; Article 8, Section 1; and Article 49 of the collective bargaining agreement between the State and the Vermont State Employees' Association, effective for the period July 1, 1982 - June 30, 1984 ("Contract"). Grievant requested that the reassignment of her duties be rescinded and that the State be ordered to cease and desist from harassing, intimidating or otherwise disciplining Grievant without basis.

A hearing was held before Board Members James S. Gilson, Acting Chairman, and William G. Kemsley, Sr., on September 5, 1985. Chairman Kimberly B. Cheney was absent from the hearing and has not participated in the decision. Attorney Gibson represented Grievant. Assistant Attorney General Michael Seibert represented the State.

The State filed a Memorandum of Law on September 20, 1985. Grievant filed Proposed Findings of Fact on September 23, 1985, and a Reply Memorandum and Affidavit on September 30, 1985. The State filed no Reply brief. On October 22, 1985, Grievant filed portions of the transcript of the hearing with the Board.

FINDINGS OF FACT

1. Grievant has been employed at the Brandon Training School ("BTS"), an institution for mentally retarded persons operated by the State, since 1975. At all times relevant, she was a Mental Retardation Primary Care Nurse and her supervisor was Patricia Faivre, Nursing Services Program Manager. Faivre's supervisor was Linnea Taylor, Assistant Superintendent for Nursing Services. Taylor reported directly to BTS Superintendent, Dr. James Morrey.

2. Until March, 1984, Grievant, at all times during her employment, received evaluations from her supervisors rating her overall performance as "frequently exceeds job requirement standards" (Grievant Exhibits 4-4G). In the opinion of former supervisors and co-workers, Grievant is an excellent nurse. Faivre has been Grievant's supervisor since June 1981.

3. By memorandum of January 27, 1984, Faivre requested Grievant remove entries Grievant had made in the nurse's notes section in the record of a resident at BTS. The notes concerned Grievant's observations concerning what Grievant viewed as the detrimental effect the feeding program for the resident was having on the health of the resident and the improper conduct of Robert Turchin, Program Services Supervisor, in the matter. Faivre informed Grievant she was directing the entries be removed because they were "unprofessional, subjective and emotional" and "inappropriate" to be contained in a resident's record (Grievant Exhibit 17). Previously, Faivre had advised Grievant to document her concerns involving Turchin.

4. Subsequently, Grievant did not remove the entries as requested by Faivre. Faivre and Taylor ultimately removed the entries from the resident's record.

5. During the course of events discussed above concerning the feeding program of the resident, Grievant had instructed an aide, Mary Haynes, to feed the resident to ensure he received proper feeding so as to prevent weight loss. Haynes received a written reprimand for her actions. Haynes grieved the reprimand and Grievant testified on her behalf on February 9, 1984, at a grievance hearing concerning the reprimand.

6. On February 17, 1984, Faivre gave Grievant a letter of counseling. *Faivre was critical of Grievant for comments Grievant had made in the resident's record, the way she had supplied information to a physician concerning the resident, her failure to follow directives of her supervisor and questioned Grievant's judgment in preserving the confidentiality of residents' records. Faivre imposed various requirements on Grievant in these areas and informed her that "failure to improve in these areas will lead to further review of your performance."* (Grievant Exhibit 7).

7. In March, 1984, Faivre did a special evaluation of Grievant which rated her overall performance since August, 1983, as "inconsistently meets job requirements/standards." The decision to give Grievant a special evaluation was a joint decision of Superintendent Morrey and Faivre.

8. Grievant subsequently filed a grievance over the special evaluation and the evaluation was withdrawn.

9. During the period Fall 1983 - Spring 1984, Grievant and Turchin had various conflicts, including the conflict noted above concerning the resident's feeding program. During that period, both Grievant and Turchin worked in the Primary Development Unit ("PDU"). In Spring, 1984, Grievant requested she be transferred from PDU to the Living/Learning Center. Grievant requested the transfer because she viewed Turchin as a difficult person with which to work. (State's Exhibit 5).

10. At some point prior to May 15, 1984, Taylor and Dr. Peter Aines (Assistant Superintendent for Habilitation Services and Turchin's supervisor) recommended to Superintendent Morrey that both Grievant and Turchin be reassigned from the PDU Unit to another unit. Morrey concurred in the recommendation. The decision to reassign Grievant and Turchin was not a disciplinary action but a management solution to resolve a problem where employees were not working well together. Management decided to transfer both employees instead of just one so as to not indicate that one of the employees was the cause of the problem and so that the reassignments would not be viewed as disciplinary.

11. The decision as to where Grievant was to be reassigned was not made by Taylor or Morrey, but was left to Faivre.

12. Prior to May 24, 1984, Grievant became aware Turchin was being transferred out of PDU. By memorandum of May 24, Grievant requested that her transfer request be withdrawn and she be allowed to remain at PDU (State's Exhibit 6).

13. In June, 1984, Faivre implemented a reorganization of the Nursing Department. As part of the reorganization, Faivre reassigned Grievant from being primary case nurse at the PDU to that of being primary case nurse for the two cottages at BTS. Faivre informed Grievant of the reassignment by memorandum of June 22, 1984.

14. As a result of the reassignment, Grievant's caseload went from 25 residents to 39 residents. PDU has more seriously ill and medically needy residents than the Cottages, resulting in a greater demand for nursing services per patient in PDU. The increased caseload given Grievant reflects

this fact and the fact there was a nursing shortage at the time of the reassignment, and is not due to discrimination against Grievant or harassment of her.

15. *The nurse preceding Grievant in the Cottages had the assistance of another nurse for 24 hours a week. When Grievant was assigned to the Cottages, she had nursing assistance for 16 hours a week. The reduction in nursing assistance was caused by a nursing shortage at the time and not due to discrimination against Grievant or harassment of her.*

16. The contract provides in pertinent part as follows:

ARTICLE 8

NO DISCRIMINATION OR HARRASSMENT AND AFFIRMATIVE ACTION

1. No Discrimination, Intimidation or Harrassment: 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.

ARTICLE 15

DISCIPLINARY ACTION

1. The parties jointly recognize the deterrent value of disciplinary action. Accordingly, the State will:
....b. apply discipline with a view toward uniformity and consistency...

ARTICLE 49

WHISTLEBLOWER

A "Whistleblower" is defined as a person covered by this Agreement who makes public allegations of inefficiency or impropriety in government. No provision of this Agreement shall be deemed to interfere with such an employee in the exercise of his constitutional right of free speech, and such person shall not be discriminated against in his employment with regard thereto.

17. Grievant made no claims at Steps II or III that her assignment was discipline in violation of Article 15, Section 1b. Grievant also made no claims at Steps II or III that Article 49, the "Whistleblower" provision, was violated. Grievant made no specific claim at Steps II or III that Article 8, Section 1 was violated but she did claim her reassignment was the result of harassment and discrimination.

OPINION

The first issue before us is whether Grievant timely raised various claims she has made in this grievance. The State contends Grievant failed to raise the following issues she has raised before the Board at the earlier steps of the grievance procedure: 1) that Grievant's assignment was discipline in violation of Article 15, Section 1b of the Contract; 2) that the State violated Article 49, the "Whistleblowing" provision of the Contract; and 3) that the State violated Article 8, Section 1 of the Contract.

Article 16 of the Contract, Grievance Procedure, states that a grievance shall contain "a statement of facts concerning the grievance..." and "specific references to the pertinent section(s) of the Contract or of the rules and regulations alleged to have been violated". It further provides that if a grievance is not raised in a timely manner at Steps II and III of the grievance procedure, "the matter shall be considered closed". This language mandates specific raising of issues when the grievance is first submitted or the right to raise the issue is waived. Grievance of Colleran and Britt, 6 VLRB 235, 259 (1983).

A review of the grievances filed at the earlier steps indicates the whistleblowing issue was not raised and no claim was made that Grievant's assignment was a form of improper disciplinary action in violation of Article 15 of the Contract. Accordingly, the State was not on sufficient notice of these issues at the earlier steps, and therefore denied an "adequate opportunity to reconcile their differences as quickly as possible at the lowest possible organizational level".

Grievant also did not specifically cite Article 8, Section 1 of the Contract at earlier steps, but we do not believe this failure precludes our review of a harassment and discrimination claim. Allegations of harassment and discrimination have been a part of this grievance since it was first filed and thus the State was on fair notice these were issues.

Although claims of harassment and discrimination are properly before us, we find them substantively without merit. The evidence does not indicate discrimination or harassment based on any of the prohibited reasons cited in Article 8, Section 1 played any part in the decision to reassign Grievant.

The evidence also does not indicate Grievant was treated unequally "to individuals in the same circumstances under the applicable rule", which also would be a prohibited form of discrimination. Nzomo v. Vermont State Colleges, 136 Vt. 97 (1978). Rather, the evidence indicates the reassignment of Grievant was a non-discriminatory, non-disciplinary management solution to a problem where two employees, Grievant and Robert Turchin, were having problems working together. If Grievant had been reassigned and Turchin had not, Grievant's claim of

discrimination would have more force. However, management transferred both employees. Grievant has not been singled out for special treatment.

Grievant alleges her increased caseload and lack of nursing assistance upon reassignment indicates she was being discriminated against and harassed. However, it is evident the increased caseload resulted from a then-existing nursing shortage and less demand for nursing services per resident than her previous assignment, and was not due to discrimination against Grievant or harassment of her. Likewise, the reduction in nursing assistance was caused by a nursing shortage at the time and not due to discrimination against Grievant or harassment of her.

The action contested herein is simply the assignment of a different group of patients to Grievant's care, an action which is generally not contractually restricted and is within management's prerogative. Absent a showing of discrimination or harassment, we conclude Grievant's reassignment did not violate the Contract. Thus, we conclude the grievance should be dismissed.

ORDER

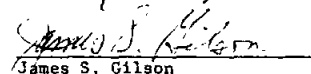
Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED:

The Grievance of Theresa Hetzel is DISMISSED.

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

VERMONT LABOR RELATIONS BOARD


William G. Kemsley, Sr.


James S. Gilson