

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 86-2
VERMONT STATE EMPLOYEES')	
ASSOCIATION AND MICHAEL DUSTIN)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

At issue is whether Grievants' Motion for Summary Relief shall be granted. On January 3, 1986, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of itself and Michael Dustin. The grievance alleged the State of Vermont, Agency of Transportation ("Employer") violated Articles 6, 14 and 17 of the collective bargaining agreement between the State and VSEA for the Non-Management Unit, effective for the period July 1, 1984 to June 30, 1986 ("Contract"), in that: 1) Dustin was not advised of his right to request the presence of a VSEA representative when he was interrogated by a management representative concerning alleged misconduct; 2) the Employer refused to provide VSEA with a copy of the tape recording of that interrogation; 3) there was no just cause for the discipline; 4) progressive discipline was bypassed inappropriately; and 5) the suspension was inconsistent with discipline imposed on other employees for similar offenses.

Hearings were held on December 4 and 11, 1986, before Board Members Charles H. McHugh, Acting Chairman; William G. Kemsley, Sr. and Catherine Frank. Grievants were represented by Michael Zimmerman, VSEA Staff Attorney. Michael Seibert, Assistant Attorney General, represented the Employer. On the first day of hearing, prior to the introduction of any evidence, Grievant made a motion for summary

relief requesting a Board order granting relief on the sole basis that the Employer violated the Contract in failing to warn Dustin, during an investigation, of his right to the presence of a VSEA representative and that the fruits of that interrogation constituted the sole basis for the discipline imposed. The Board reserved judgment on the motion and took the testimony of Langdon Cummings, Agency of Transportation Personnel Officer, who participated in the decision to discipline Dustin; and Gerald McNamara, Supervisory Investigator in the Department of Motor Vehicles, who conducted the investigatory interview of Grievant. Subsequent to that testimony, the Board continued the hearing pending a ruling on Grievant's motion for summary relief. The parties filed briefs on the motion for summary relief on December 11, 1986.

FINDINGS OF FACT

1. At all times relevant, Michael Dustin was a bridge maintenance mechanic for the Employer. His job duties involved the maintenance and repair of bridge structures.
2. On February 12, 1985, one of Dustin's co-workers met with the Secretary of Transportation, Patrick Garahan, and made allegations of wrongdoing and impropriety against a number of people, including Dustin, at the District 7 Highway Garage in St. Johnsbury. The general nature of the allegations concerned favoritism, misuse of State property, and theft of State materials. With respect to Dustin, in particular, the co-worker alleged he had taken some plywood for use in his kitchen, and that he was the beneficiary of favoritism.

3. Due to the possibility of criminal charges arising from the allegations, Garahan, in consultation with Agency of Transportation Personnel Officer Langdon Cummings, decided to use a Motor Vehicle Inspector, Gerald McNamara, to conduct an investigation into all the allegations made by Dustin's co-worker.

4. McNamara, who is a supervisor, was not in the direct chain of command between Garahan and Dustin, although both were ultimately accountable to Garahan. McNamara reported to the Chief Inspector, the Chief Inspector reported to the Commissioner of Motor Vehicles and the Commissioner of Motor Vehicles reported to Garahan.

5. McNamara met with Garahan on February 13, 1985. Garahan gave McNamara a copy of the specific allegations made, and asked him to investigate and determine if there was any truth to the allegations, and, if so, to take appropriate legal action through the courts. Garahan asked McNamara to report his findings to him. Garahan told McNamara any administrative action based on McNamara's findings would be taken by Garahan. Garahan did not give McNamara authority to determine whether discipline should be imposed and did not ask him to recommend whether discipline should be imposed.

6. As part of his investigation, McNamara conducted 23 interviews of employees of District 7, including two interviews of Dustin. At the outset of the first interview with Dustin, McNamara informed Dustin he had been asked by Garahan to investigate the allegations made and that he would report back to Garahan. McNamara did not advise Dustin he had a right to have a VSEA representative present at the interview. During the first interview, Dustin told McNamara he had taken a few scraps of State-owned plywood and 8-10

pieces of State-owned firewood for his personal use. Dustin further told McNamara he had used a State vehicle to transport persons who were not State employees.

7. McNamara reported to Garahan the admissions made by Dustin. McNamara made no recommendation concerning taking disciplinary action against Dustin.

8. As a result of McNamara's report to Garahan, Dustin was suspended for two days. Garahan, Cummings and Donald Ramick, Director of Maintenance for the Agency of Transportation, were involved in the decision to suspend Dustin. The letter of suspension, signed by Ramick, provided the following reasons for suspension:

You have admitted taking plywood and a small amount of firewood for your personal use.

You have admitted taking non-state employees in a State vehicle during night patrol.

(State's Exhibit B)

9. The only evidence of the cited offenses came from Dustin's admissions to McNamara during McNamara's interview of him.

10. If he was to testify, Dustin would agree the cited reasons for suspension are true.

OPINION

The issue before us is whether we should grant Grievant's motion to rescind Dustin's two-day suspension because of the Employer's alleged failure to advise Dustin of his contractually-guaranteed right to a VSEA representative at an interview which ultimately formed the basis for the suspension.

The applicable Contract language provides as follows:

Whenever an employee is called to a meeting with management...where the purpose of the meeting is to

determine whether discipline shall be imposed, the employee shall be notified of his/her right to request the presence of a VSEA representative and, upon such request, the VSEA shall have the right to accompany the employee to any such meeting...
(Article 17(a)(6))

This places an affirmative duty on management to inform employees of their right to VSEA representation at such a meeting. Grievance of Boucher, 9 VLRB 50, 58 (1986). Grievance of Carosella, 8 VLRB 137, 155 (1985).

The Employer contends McNamara's interviewing of Grievant constituted no Contract violation since the interview was not a "meeting with management" and the "purpose of the meeting" was not to "determine whether discipline shall be imposed".

We disagree. While McNamara was not within Dustin's chain of command, he was a designated representative of the Secretary of Transportation, Grievant's ultimate superior. In such capacity, he was "management" within the meaning of the Contract.

With respect to the purpose of the meeting, McNamara was charged with investigating allegations against Dustin. While part of the focus of the meeting was to determine whether criminal acts had occurred, it is no less clear an implied purpose of the meeting was to determine whether discipline should be imposed. This is evident since a criminal act involving theft of State property, which was an allegation against Dustin, would presumably result in the imposition of disciplinary action and Dustin was, in fact, disciplined as a direct result of admissions he made at the interview concerning taking State property. While McNamara did not have authority to impose discipline himself, the purpose of his interview of Dustin was,

at least partially, to contribute to management's determination whether discipline would be imposed. Thus, the Employer violated the Contract.

In determining what remedy follows from the Employer's violation, we turn to decisions of the Vermont Supreme Court for guidance. The Court has determined that defined procedures for dismissal of employees are binding and must be scrupulously observed. Nzomo v. Vermont State Colleges, 136 Vt. 97, 100 (1978). Where procedural shortcomings do not affect the ultimate decision to dismiss, reversal of the decision is not warranted. Nzomo v. Vermont State Colleges, 138 Vt. 73, 75-76. However, if procedural shortcomings do affect the ultimate decision or if an employee suffers consequential damages as a result of a procedural violation, the Board may choose to make an award commensurate with the proven injury. VSCFF and Peck v. Vermont State Colleges, 139 Vt. 329, 333-334 (1981). We see no reason why this guidance should not apply to suspensions of employees, as well as dismissals. Analogously, if a suspended employee, and/or the employee's representative, demonstrates prejudicial harm as a result of a procedural violation, the Board has authority to make an award commensurate with the proven injury.

McNamara's failure to inform Grievant of his right to a VSEA representative at the interview affected the decision to suspend since statements made by Dustin during the interview were the sole basis for disciplining him. Dustin was obviously harmed since the incriminating statements made in an interview carried out in violation of the Contract resulted in his suspension. The Contract violation subverted the central institutional purpose of VSEA to represent employees and,

thus, VSEA was obviously harmed. It was denied its negotiated right to represent employees at such meetings. Due to the Employer's abrogation of this fundamental right of union representation, we believe it appropriate to exclude the admissability of statements made by Dustin in his interview with McNamara. Boucher, supra, at 59. The Employer should not benefit, and Dustin and VSEA conversely should not be harmed, by the fruits of a contractually-prohibited interview. Since those statements form the sole basis for Grievant's dismissal, the Employer has no admissible evidence with which to sustain the charges against Grievant. Thus, the Employer has not established just cause for the suspension.

ORDER

Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED the Grievance of the Vermont State Employees' Association and Michael Dustin is SUSTAINED; and

1. The two-day suspension of Dustin on July 11 and July 12, 1985, is rescinded; the Employer shall pay Dustin two day's wages at his pay rate effective July 11 and July 12, 1985, plus 12 percent interest per annum; and
2. The Employer shall remove all references to the suspension from Dustin's personnel file and other official records.

Dated this 19th day of December, 1986, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh
Charles H. McHugh, Acting Chairman

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

Catherine L. Frank
Catherine L. Frank