VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 85-10
JOHN GORRUSO	)	

MEMORANDUM AND ORDER

On January 23, 1986, the Labor Relations Board issued its Findings of Fact, Opinion and Order in this case. 9 VLRB 14. The Board issued its final order, concerning back pay and other benefits due Grievant, on March 6, 1986. The State filed a Motion for Reconsideration, and supporting memorandum, on February 13, 1986. Grievant filed a memorandum in opposition to the State's motion on February 27, 1986.

The State raised various issues in its memorandum, each of which will be discussed in turn.

Finding #11 - The State requests the Board remove from Finding #11 the last two sentences. Upon reconsideration, we are inclined to remove the last sentence, which in referring to Grievant and Correctional Officer Terri Forte, provides: "There were occasions during this period where they kissed each other briefly and held hands". However, we decline to remove the second to last sentence concerning Grievant and Forte engaging in friendly conversations.

Finding #16 - The State requests the Board change that portion of this finding concerning Grievant allegedly stating he was going to "open up on the crowd (in the bar owned by Forte's husband) with an M-16 machine gun" to add that Forte, believing Grievant made this statement, reasonably feared for her safety in Grievant's presence that night. We decline to so amend Finding #16.

Finding #17 - The State requests the Board make various revisions in Finding #17, which concerns the encounter between Grievant and Forte in the correctional facility front office on November 14. Upon reconsideration, we revise Finding #17 only to the extent that the following sentence concerning Forte reviewing an inmate's file be removed: "It was improper for Forte to be reviewing this file". The evidence presented is insufficient for us to draw such a conclusion.

Finding #20 - The State requests the Board reconsider this finding concerning Grievant's comments to Correctional Officer Lisa Casey subsequent to Casey finding a marked Bible in her mailbox and claiming it was sexual harassment. The State contends Grievant called Casey a "slut", or, at the very least, said "(y)ou are all alike" to her. We decline to revise this finding.

Finding #21 - The State objects to the absence of matters in this finding concerning Grievant's off-duty sexual advances towards Casey. Particularly, the State requests we add references to the negative effects Grievant's actions had on Casey. We decline to revise this finding.

Finding #23 - The State takes exception to the following sentence in this finding concerning Superintendent O'Malley's investigation of alleged sexual harassment against Grievant: "We think it must have been apparent to the women that O'Malley was seeking derogatory information concerning Grievant". Upon reconsideration, we remove this sentence from Finding #23. There is no support in the record for the proposition that O'Malley told any of the women either the nature of Forte's complaint or that it concerned allegations against Grievant.

Finding #32 - The State questions the relevance of Finding #32, which concerns Forte's reassignment to a desirable front office position subsequent to making sexual harassment allegations against Grievant and wherein the Board stated: "We conclude O'Malley had a special interest in Forte's career". The State contends that, through this finding, the Board has created speculation about whether there was something inappropriate about the relationship between Forte and O'Malley.

We decline to change this finding. In so deciding, we stress that we did not intend to imply there was anything inappropriate in the relationship between Forte and O'Malley. It was a normal relationship of a supervisor appreciating the work of a subordinate. The State should not consider the finding as being derogatory toward either individual.

However, consistent with these views, we will strike the sentence on the eighth page of the Opinion (numbered Page 37), beginning on the sixth line of the page, which provides "We also think his views were colored by the fact his protege, Forte, was involved".

Forte's Failure to Immediately Report Harassment

In reference to the Board noting Forte failed to report Grievant's harassment when it first began, the State contends:

> The Board apparently concluded that the State's training and the absence of an additional complaint system were to blame for such tardiness. The Board apparently concluded that this combination of events to some extent excused Grievant's behavior.

This does not at all represent the conclusions of the Board, as clearly stated in the opinion. We pointed out management's failure to establish an effective preventive and remedial system concerning sexual harassment because such failure made our factfinding task more difficult, not to excuse Grievant's behavior. In this case, we had to weigh much conflicting evidence. A system encouraging early complaints, when the controversy is at a low level and consequences not severe, usually results in more accurate fact determinations at the time. By the time positions have hardened and the stakes are high, factfinding is less reliable. We stated Grievant was on fair notice sexually motivated approaches which place another in fear was prohibited conduct and that management's failure to establish an effective preventive and remedial system concerning sexual harassment did not excuse Grievant's behavior (See pages 35-37 of Opinion).

We note Forte's testimony that making a sexual harassment complaint against Grievant could adversely affect her successful completion of probation. We decline to so conclude because to do so would find the State in violation of its contractual duty under Article 5 to prevent sexual discrimination or harassment of employees. We do not believe the evidence warrants such a finding.

Complaint Systems Requirement

The State contends Grievant never took the position the discipline was invalid because the State did not have a "prompt and efficient" system to dispose of sexual harassment complaints and that "this is the Board's issue alone". That is not at all our issue, nor is the opinion based on that except to the extent that management's failure in this regard contributed to the difficulty of fact finding in sexual harassment cases where acts and effects may be hard to establish.

The State contends the Board, in effect, has retroactively imposed an extra-contractual requirement of training and systems creation on the State in the area of sexual harassment. The Board has imposed nothing on the State. We simply have noted the failure to have such a system contributed to the difficulty of our fact finding task in this case.

Mitigation of Discipline

The State contends the Board's mitigation of Grievant's discipline to a 60-day suspension exceeded the Board's authority because the Board does not have the authority to substitute its judgment for that of the Employer.

Upon reconsideration, we agree the Board has exceeded its authority in imposing a 60-day suspension, but for reasons different than advanced by the State. As we thoroughly discussed in Grievance of Sherman, 7 VLRB 380, at 398-404, the Contract gives us authority to substitute our judgment for that of the Employer. However, we do not believe we have the authority to impose a sanction the Employer could not impose.

The maximum sanction short of dismissal which can be imposed by the Employer is a 30-day suspension. Article 16, Section 8, of Contract. We think it appropriate for the Board to draw the same contractual lines as the Employer. Like the Employer, the Board is to choose between dismissal and a suspension of no more than 30 days. If the Board decides the misconduct of a discharged employee was not sufficiently serious to warrant dismissal, the employee is entitled to be placed in no worse a position than he or she would have been if not dismissed; namely, an effective 30-day suspension.

The State contends that even though the Board has rejected part of the State's case, the Board has nonetheless sustained extremely serious charges against Grievant. Accordingly, the State questions whether Grievant should receive any back pay at all. For us to deny back pay to Grievant would be inconsistent with our above-stated views that the maximum penalty we can impose on an employee, short of dismissal, is a 30-day suspension. To deny back pay to Grievant would be the same as sustaining a suspension from the date of discharge to the date of the Board decision; in this case 11 months. Even if we thought such a lengthy suspension was warranted in this case, which we do not, we are without authority to impose it.

Given this revised view of our authority, we must decide on the proper penalty for Grievant's offense. It was Superintendent O'Malley's fervently-held view Grievant could not be rehabilitated because of his misconduct. We sharply disagree because there were no attempts at rehabilitation or any preventive and remedial programs on sexual harassment. Therefore, we cannot conclude the basis for dismissal is sustainable.

We continue to adhere to the view that the contractual norm is progressive discipline and that bypassing these requirements is the exception. Taking these factors together, we conclude a reasonable penalty to enforce the seriousness of Grievant's offense is a 30-day suspension.

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

1. The Findings of Fact, Opinion and Order of January 23, 1986, in the Grievance of John Gorruso are recalled and are amended as follows:

A. Finding of Fact #11, #17 and #23 are revised as discussed herein and as indicated on the attached numbered pages, and such numbered pages shall be substituted in place of their numbered counterparts in the January 23 decision;

B. The third full sentence on the eighth page of the Majority Opinion (numbered page 37), is deleted as indicated on the attached numbered page 37, and such numbered page 37 shall be substituted in place of its numbered counterpart in the January 23 decision;

C. The second to the last sentence of the Majority Opinion is amended so that "60-day suspension" is deleted and "30-day suspension" is substituted in its place, as indicated on the attached numbered page 41, and such numbered page 41 shall be substituted in place of its numbered counterpart in the January 23, 1986, Opinion;

D. Numbered paragraphs 2 and 3 of the Order are amended so that "60 working days" and "60 regularly scheduled workdays" are deleted and "30 working days" and "30 regularly scheduled workdays" are substituted in their place, as indicated on the attached numbered page 48, and such numbered page 48 shall be substituted in place of its numbered counterpart in the January 23 decision; and

2. The March 6, 1986, Order on back pay and other benefits due Grievant is amended so that the equivalent of 30 days pay shall be added to the back pay award.

Dated this 24th day of June, 1986, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.