VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	DOCKET NO. 85-11
	)	
CLAUDETTE BOUCHER	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On March 1, 1985, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Claudette Boucher ("Grievant"). The grievance alleged the dismissal of Grievant from her position as District Clerk B with the State Department of Social Welfare violated Article 17 of the collective bargaining contract between VSEA and the State in that there was no just cause for discipline, the State bypassed progressive discipline and there was no appropriate reason for bypass.

On September 10, 1985, Grievant filed a Motion to Amend Grievance to allege that the State failed to conduct a thorough and unbiased investigation into the charges against her, the State failed to give Grievant a pre-termination hearing, and the investigator conducting the investigation failed to inform Grievant of her right to the presence of a VSEA representative during questioning. The Board permitted the amendment of grievance to the extent of failure to inform Grievant of her right to the presence of a VSEA representative during questioning but declined to allow amendment on the other two grounds.

Hearings were held before the Board on November 7 and 21, 1985; December 12 and 19, 1985; and January 16, 1986. Member James Gilson missed three days of hearing and has not participated in the decision. Assistant Attorney General Michael Seibert represented the State. VSEA Staff Attorney Michael Zimmerman represented Grievant.

The parties filed Memoranda of Law on the last day of hearing, January 16, 1986.

FINDINGS OF FACT

1. Grievant began employment with the State in 1976 when she was hired by the Health Department as a Typist B. She worked continuously in that position until July, 1984, when she began working for the Department of Social Welfare as a District Office Clerk B in the Burlington District Office. She remained in that position until her dismissal on January 31, 1985.

2. During her employment with the State, Grievant received annual performance evaluations which all rated her overall performance at least "3" (consistently meets job requirements/standards"). On the last annual evaluation she received from the Health Department, covering the period November 7, 1982, to November 7, 1983, Grievant received an overall rating of "4" ("frequently exceeds job requirements/standards"). (Grievant's Exhibit 8).

3. Prior to her dismissal, Grievant was never disciplined during the course of her employment with the State.

4. In her District Clerk B position with the Department of Social Welfare, Grievant provided secretarial support services for the workers who handled food stamp and Medicaid claims for the Department. Among Grievant's duties were answering the telephone, typing and using the computer to gather information on welfare clients.

5. On August 14, 1984, Myra Gauthier, Grievant's supervisor, gave Grievant a memorandum dated April 9, 1984, from Commissioner James O'Rourke to all Department of Social Welfare employees. Grievant

read the memorandum and signed the document, indicating that she read and understood the policy. The memorandum provided in pertinent part as follows:

> Employees throughout the Department have the occasion to work with highly confidential information every day. This is a major responsibility and must be treated with the highest degree of respect and integrity. It is both the policy and the practice of the Department of Social Welfare that all client information be kept strictly confidential. The Department is mandated by both Federal and State laws to limit disclosure of information about either clients of or applicants for programs that we administer. Therefore, I want to impress upon all staff that any employee who
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> - discloses any part of a client's confidential record outside of the office, or
> - divulges the identity of applicants or recipients for reasons other than proper program administration, as prescribed by Vermont Statutes (33 VSA §2551) and federal and state regulations, or to an individual who lacks a legal or professional right to know, or
> - uses confidential material in any fashion unbecoming a professional employee
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> shall be subject to disciplinary action up to and including immediate dismissal from Vermont State service. I cannot overemphasize the importance of maintaining the trust that the public, the clients, and I have placed in you. (Grievant's Exhibit 5).

6. Grievant understood this memorandum to prohibit her from disclosing confidential information on clients to persons outside the Burlington District Office and she understood violation of confidentiality could subject her to disciplinary action up to and including immediate dismissal.

7. 33 VSA §2551, relating to the Department of Social Welfare, provides in its entirety as follows:

> (a) The names of or information pertaining to applicants for or recipients of assistance or benefits, including information obtained under section 2552 of this title, shall not be disclosed to anyone, except for the purposes directly connected with the administration of the department or when required by law.

(b) A person shall not:

(1) Publish, use, disclose or divulge any of those records for purposes not directly connected with the administration of programs of the department, or contrary to regulations issued by the commissioner; or

(2) Use any records of the department of any kind or description for political or commercial purposes, or purposes not authorized by law.

8. Section 3.016 of the State Personnel Rules and Regulations provides:

3.016 An employee shall not disclose confidential information gained by him by reason of his official position except as authorized or required by law, nor shall he otherwise use such information for his personal gain or benefit. (Grievant Exhibit 4).

9. On January 31, 1985, Paul Ohlson, Acting Commissioner of the Department of Social Welfare, informed Grievant by letter of her dismissal from employment. The dismissal letter provided in pertinent part as follows:

This is to inform you of your dismissal from your position of District Clerk B, Department of Social Welfare, at the close of business January 31, 1985.

This action is being taken under the provisions of Article 17, Section 3b of the Non-Management Unit Contract, effective July 1, 1984, for the following reasons:

During the period October 1, 1984 to December 1, 1984, you released confidential case information which you obtained in the conduct of your employment. Specifically, you disclosed information regarding six different recipients of public assistance, to individuals who had no legal right to such material. Your actions were an abuse of the Public trust placed in your position as well as a violation of State law, 33 V.S.A., Section 2551. The release of such information on your part violates Vermont State Personnel Rules and Regulations, Section 3.016.

At the time of your hiring, you were informed orally by your supervisor of the Department's confidentiality regulations as contained in a 8/11/82 PP & D Interpretive Memo, Welfare Assistance Manual §2000. In addition, on 8/14/84 you signed a written statement given to all Department employees, which not only defined the rules of confidentiality, but also placed you on notice that violation of such rules might result in disciplinary action up to and

> including dismissal. Violation of any one, some, or all of these six aforementioned violations of confidentiality are sufficient cause to warrant your immediate dismissal.
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> Because you are being dismissed immediately for gross misconduct, you will not be given two weeks notice or pay in lieu of notice... If you and your representative wish to meet with me to informally discuss the circumstances of your dismissal, you may request a meeting within three days of receipt of this letter.
> (State Exhibit A)

10. Grievant is specifically charged with giving "stat panels," which are confidential Department of Social Welfare documents containing a summary of the status of benefits provided to individual welfare recipients, to Larry Johnson on six welfare recipients (i.e., Catherine Hatterick, Marie Gray, James Prim, George Prim, Nancy Hatterick and Elias Metevier); showing Johnson a "stat panel" on his ex-wife Karen Johnson, and giving Johnson a ANFC and Food Stamp Notice and a beneficiary report on Metevier, which also were confidential materials (State Exhibits B, C).

11. We find, based on a preponderance of the evidence, that Grievant did provide Johnson with the above materials during the period October 1, 1984, to December 1, 1984, with the exception of the ANFC-Food Stamp Notice to Metevier which we find Johnson took from the Metevier home. Johnson had no right to see or receive any of these documents and Grievant knowingly breached the confidentiality of the individual welfare recipients.

12. Bert Smith, Fraud Unit Director in the Department of Social Welfare, performed the Department investigation of the allegations prior to Grievant's dismissal. On January 30, Smith interviewed Grievant concerning the allegations. Prior to the interview, Smith did not inform Grievant she had the right to have a VSEA representative present at the interview. Smith told Grievant he wanted to ask her some questions. He told Grievant she did not have to discuss the matter with him if she

chose not to; that she could answer his questions or not answer them, either way it did not make any difference. Grievant told Smith that Johnson had requested information on welfare recipients from her but she had not given him any information.

13. In deciding to dismiss Grievant, Ohlson concluded Grievant's behavior was totally unacceptable; that she had violated a public trust and relationship with clients which the Department had a very difficult time establishing. Ohlson believed the breach of confidentiality was so severe that any lesser disciplinary action would not have been an adequate response. Ohlson concluded Grievant engaged in gross misconduct because her actions completely compromised the integrity of the Department of Social Welfare.

14. Article 17 of the Contract provides in pertinent part as follows:

> A.
> 1. No permanent or limited status employee covered by this agreement shall be disciplined without just cause. The parties jointly recognize the deterrent value of disciplinary action. Accordingly, the State will:
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> .... b. apply discipline or corrective action with a view toward uniformity and consistency;
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> c. impose a procedure of progressive discipline or progressive corrective action in increasing order of severity;
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> d. in misconduct cases, the order of progressive discipline shall be:
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> i. oral reprimand;
> ii. letter of supervisory counseling (applicable *to those agencies/departments which utilize this* letter);
> iii. written reprimand;
> iv. suspension without pay;
> v. dismissal.
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> .... f. The parties agree that there are appropriate cases that may warrant the State:
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> i. bypassing progressive discipline .... as long as it is imposing discipline .... for just cause.

...3. ... an employee may be dismissed immediately without prior notice or pay in lieu of notice for any of the following reasons:

....b. gross misconduct;

...6. ... Whenever an employee is called to a meeting with management where discipline is being imposed or 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...

...9. In any case involving a suspension or dismissal, should the Vermont Labor Relations Board find just cause for discipline, but determine that the penalty was inappropriate or excessive, the Vermont Labor Relations Board shall have the authority to impose a lesser form of discipline.

OPINION

We first discuss two preliminary matters raised by Grievant.

Post-Dismissal Evidence

Grievant, citing arbitral authority [Koven & Smith, Just Cause: The Seven Tests (1985)], contends the Board should refuse to base its decision on the charges against Grievant on evidence which the State did not have, although it could have been obtained, at the time the decision to dismiss was made. Since the essence of just cause is whether or not the employer acted reasonably in imposing discipline for the alleged misconduct, In re Grievance of Brooks, 135 Vt. 563, 568 (1977), Grievant maintains the inquiry in any disciplinary grievance is whether the State, based upon what it knew at the time discipline was imposed, was reasonable in believing that an offense had occurred. Accordingly, the argument goes, no evidence developed after the decision would be admissable. Grievant contends, for example, the State may not use the "stat panel" on Karen Johnson (which the State was aware of but did not have a copy of prior to the dismissal), the testimony of various State witnesses which was not known to the State at the time of dismissal, and the handwriting analysis report done during

the course of Board hearings and the testimony of the State's handwriting expert.

In deciding this issue, we draw a distinction between evidence gathered after discharge which supports the reason given for discharge, such as is involved here, and evidence gathered after a discharge to add an entirely new offense. The latter is clearly inappropriate. The Contract requires the Employer to state the reasons for dismissal in the dismissal letter, Article 17(A)(2), and our review does not go beyond the reasons given by the employer for its action in the dismissal letter. Grievance of Regan, 8 VLRB 340, 365 (1985).

However, with regard to post-dismissal evidence supporting the stated reasons for disciplinary action, we believe the relevant consideration is really one of fairness and surprise. As a general rule, we believe an employer may investigate further to substantiate facts known to exist at the time of dismissal to support action already taken, as long as an entirely new charge is not added and the discharged employee is given an adequate opportunity to contest it. To the extent arbitral authority is pertinent, the weight of arbitrators' decisions supports this approach. See Issacson Structural Co., 72 LA 1075, 1078 (Arb., Cornelius Peck, 1975). New York Telephone Co., 66 LA 1037, 1041-1042 (Arb., Irving Markowitz, 1976). Pacific Telephone and Telegraph Co., 45 LA 655, 658-659 (Arb., Harold Somers, 1965). San Gano Electric Co., 44 LA 593, 600 (Arb., Harold Sembower, 1965).

In applying the general rule to this case, consideration of fairness and surprise have been satisfied. The evidence Acting Commissioner Ohlson had at the time of dismissal was sufficient for a reasonable person to conclude Grievant committed the charged offenses. The State's

subsequent attempts to gather evidence did not serve to enlarge the charge against Grievant but simply support it. Given the length of the proceedings before us, Grievant had ample opportunity to contest any new evidence. This is particularly so with regard to the handwriting analysis, given the nearly one-month hiatus between the handwriting report done by the state expert and the final day of hearing, and given the Board-imposed requirement the State was required to bear the reasonable cost of a second handwriting analysis done by a person of Grievant's choice.

Grievant's Right to VSEA Representation

The second preliminary issue raised by Grievant concerns the State's alleged violation of Article 17 of the Contract through the failure of Bert Smith to advise Grievant of her right to the presence of a VSEA representative during Smith's questioning of her on the allegations at issue. Grievant contends that had she been informed of her right to a VSEA representative she may have brought evidence to light which would have cast doubt on the reliability of Smith's investigation. As relief, Grievant submits that her reinstatement would serve to bring home to the State the consequence of its failure to afford its employees their rights.

Article 17, Section 6 provides an employee "shall be notified" of the right to request the presence of a VSEA representative whenever an employee is "called to a meeting with management where the purpose of the meeting is to determine whether discipline shall be imposed". This places an affirmative duty on a supervisor to inform the employee of their right to VSEA representation at such a meeting. Grievance of

Carosella, 8 VLRB 137, 155 (1985). It is clear this contractual provision was violated here. While Smith did not have authority to impose discipline himself, his interview of Grievant was held for the express purpose of contributing to management's determination whether discipline would be imposed.

While the State was in clear violation of the Contract in this regard, we do not believe the circumstances of this case warrant the granting of the remedy requested by Grievant. Defined procedures for dismissal of employees are binding and must be scrupulously observed. Nzomo v. Vermont State Colleges, 136 Vt. 97, 100 (1978). However, 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 (1980).

Here, we do not find Smith's failure to inform Grievant of her right to a VSEA representative affected the decision to dismiss. Grievant said nothing during the interview to incriminate herself. If Grievant had made any harmful statements during this interview, we would not hesitate to exclude the admissibility of such statements due to the abrogation of her right to a VSEA representative. Further, we doubt very much presence of a VSEA representative would have brought evidence to light which would have cast doubt on the reliability of Smith's investigation. Smith interviewed Grievant one day before she was dismissed. We do not see how in such a short time evidence favorable to Grievant could have been lost, or how she could otherwise be disadvantaged.

However, we are not limited to granting a remedy only where the decision to dismiss is affected. If an employee suffers consequential

damages as a result of a procedural violation, we may choose to make an award commensurate with the proven injury. Vermont State Colleges Faculty Federation and Peck v. Vermont State Colleges, 139 Vt. 329, 333-334 (1981). In the past, we have awarded employees monetary damages where such negative consequences exist. Grievance of Sypher, 5 VLRB 102, 123-124 (1982) (non-reappointed faculty member entitled to travel expenses to Board hearing as a result of employer denial of his fundamental right to rebut evaluations of his performance). Grievance of Peck, 4 VLRB 334, 341-342 (1981) (non-reappointed faculty member entitled to recompense for period he was looking for work where failure of Colleges to do written performance evaluation may have adversely affected employee in securing employment elsewhere).

In this case, Grievant has not demonstrated any prejudicial harm due to the State's violation. However, this is the second case before us where the State has violated a fundamental right of an employee to union representation at a meeting held for the express purpose of contributing to management's determination whether discipine shall be imposed. See Grievance of Carosella, supra. We believe it is appropriate to discourage such disregard of negotiated procedures. If the State can violate these procedures knowing only a token penalty or no penalty is imposed, it is invited to continue ignoring procedural rights of employees. Peck, supra, at 342. 3 VSA §982(g) authorizes the Board "to enforce compliance with all provisions of a collective bargaining agreement upon complaint of either party." We note Grievant was not given 2 weeks pay in lieu of notice here. To compensate her for the contractual violation we will award her 2 weeks severance pay.

Specific Charges Against Grievant

Grievant contends there was no just cause for her dismissal. Specifically, Grievant 1) contends the notice aspect of just cause was not satisfied, and 2) denies she committed the offense charged.

Our scope of review in this case is guided by Section 9, Article 17 of the Contract, and our decision in Grievance of Sherman, 7 VLRB 380 (1984).

Grievant is charged with divulging confidential information regarding recipients of public assistance to a person who had no legal right to such material. We find by a preponderance of the evidence that the Employer has substantially established the charges against Grievant.[1]

A discharge may be upheld only if it meets two criteria of reasonableness: one, that the conduct constitutes a substantial shortcoming detrimental to the State's interests, and the other, that the employee had fair notice, express or fairly implied, that such conduct would be grounds for dismissal. In re Grievance of Brooks, 135 Vt. 563, 568 (1977).

We look to the factors enumerated in Grievance of Colleran and Britt, 6 VLRB 235, at 268-269 (1983), for guidance in determining the legitimacy of the disciplinary action. However, in this case no extensive analysis of these factors is necessary because Grievant has violated a statutory provision on confidentiality which the Legislature has established to be at the heart of the mission of the Department of Social Welfare, namely

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[1] We note that we find the State has not established that Grievant gave one piece of confidential information to Johnson (i.e., the Metevier ANFC-Food Stamp Notice) as charged. However, this was only one of nine documents Grievant is alleged to have given to Johnson and the State's failure to establish Grievant's guilt on this one piece of information does not affect our decision the charge has been substantially established.

protecting the identity of recipients of welfare assistance or benefits. When the Legislature expressly establishes a rule for the workplace, it is entitled to complete respect. When an employee is on notice of such rule and violates it, he or she has committed an extremely serious offense.

Grievant was on clear notice divulging of any confidential information on welfare clients would subject her to disciplinary action up to and including dismissal. Her breach of confidentiality, in violation of a statute, constitued gross misconduct, warranting her immediate dismissal. We recognize her past employment record was unblemished. However, in this instance, we conclude bypass of progressive discipline is appropriate. Dismissal of employees without recourse to progressive discipline is appropriate when egregious conduct is involved. See In re Grievance of Brooks, supra (several severe arguments with co-workers, one of which involved the use of physical force against a female co-worker); In re Grievance of Carlson, 140 Vt. 555 (1982) (employee defrauded State of substantial amounts); In re Grievance of Goddard, 142 Vt. 437 (1983) (employee repeatedly struck inmate). We believe the Legislature has established that breach of confidentiality is an offense meeting that level of conduct.

ORDER

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

The Grievance of Claudette Boucher is DISMISSED. However, Grievant is awarded a sum equal to two weeks pay as compensation for the contractual violation.

Dated the 23rd day of January, 1986, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.