

## VERMONT LABOR RELATIONS BOARD

GREIVANCE OF RODRIGO GELIO       )  
      (SICK PAY)                        )  
  )

Docket No. 22-31

### FINDINGS OF FACT, OPINION, AND ORDER

#### Introduction

Vermont State Employees' Association ("VSEA") on behalf of Rodrigo Gelio ("Grievant"), filed a Grievance seeking reimbursement for pay from his employer the Vermont Department of Health, ("VDH" "State") which determined he was absent without authorization and off payroll. The VSEA and VDH have filed the following stipulations of fact and request that the Vermont Labor Relations Board determine whether the VDH violated Article 14 (9) of the Collective Bargaining Agreement ("CBA"), by placing Grievant on unauthorized leave for September 21, 22, 23, and 24, 2021, and not paying him on those days.

#### FINDINGS OF FACT

1. The employer is the State of Vermont and its Department of Health (VDH), located at 108 Cherry Street, Burlington, Vermont, 05402.
2. At all times relevant to this grievance, the State of Vermont and the Vermont State Employees' Association (VSEA) and have been parties to a Non-Management Bargaining Unit Collective Bargaining Agreements, which was in effect from July 1, 2020, to June 30, 2022. (Joint Exhibit 1)
3. At all times relevant to this grievance, Rodrigo Gelio (Grievant) was employed as a Program Tech II at the Division of Alcohol and Drug Abuse Programs (ADAP), which is one of several divisions within the VDH. ADAP has since been renamed the Division of Substance Use Programs, but was known as ADAP during Grievant's tenure.

4. On September 7, 2021, Grievant was placed on paid Temporary Relief from Duty (TRD). (Joint Exhibit 2).
5. On September 13, 2021, Grievant sent an e-mail to Cynthia Seivwright, ADAP Division Director, that stated, "\*\*\*\* my grandma is 97 years old, and she is in need of immediate care due to an accident she had recently. Wondering if I could use some of my annual leave to go there and help her out from September 21 to September 30?" (Joint Exhibit 3, pg. 1-2).
6. Ms. Seivwright responded, "This appears to be an FMLA qualifying event. You are instructed to get in contact with the DHR Leave Management Unit (LMU) and work with them on providing the required documentation." (Joint Exhibit 3, pg. 1).
7. On September 14, 2021, Grievant contacted the LMU and stated that he needed to care for a grandparent out of the country. (Joint Exhibit 4).
8. On September 16, 2021, the LMU sent FMLA paperwork to Grievant indicating the certification was due on September 23, 2021. (Joint Exhibits 4, 5).
9. Grievant contacted his uncle in Brazil to obtain documentation that could be used to support his FMLA request but was not able to get it.
10. Grievant did not go to Brazil to care for his grandmother. He did not send in FMLA paperwork.
11. Grievant did not inform the LMU, Cindy Seivwright, or anyone else at VDH that he did not go to Brazil.
12. Grievant ultimately decided to not go to Brazil, and therefore, did not complete the process of applying for FMLA leave. He did not inform anyone at the State of his change in plans. No one from the State contacted Grievant to ask him why he had not completed

the FMLA paperwork.

13. On September 29, 2021, the LMU sent Grievant an e-mail that stated, "On September 14, 2021, we were informed that you may have a need for a leave of absence due to a serious health condition affecting an immediate family member that makes you, at times, unable to perform your job. On September 16, 2021, we requested medical documentation from an appropriate health care provider setting forth the information concerning your absences from work. To date, we have not received the appropriate medical documentation to support a leave of absence. Consequently, we do not have enough information to designate your absences as FMLA qualifying." (Joint Exhibit 6).
14. The September 29, 2021, email attached a letter further explaining the reasons for not designating the absences as FMLA qualifying. (Joint Exhibit 6).
15. On October 7, 2021, Kate Minall, Human Resources Manager, contacted VSEA union representative, Rachel Fields, requesting confirmation that Grievant had been on leave and unavailable from September 21, 2021, through September 30, 2021. (Joint Exhibit 7, pg. 1-2).
16. Grievant responded, "I emailed Cindy on September 13 asking if I could use some of my accrued leave time to visit / help my 97 years old grandma in Rio de Janeiro, Brazil. She recently had an accident and my mom lives three hours away (pls see attached email). Cindy instructed me to contact LMU, which I did. My uncle said recently that her situation has improved though. Additionally, I thought it would be too expensive and rushed to go there for one week or so only. In other words, I did not ask for permission after contacting LMU, since my plans have changed, and I decided not to go after all." (Joint Exhibit 7, pg. 1).

17. From September 21, 2021, through September 30, 2021, Grievant was coded as unauthorized off payroll.
18. From September 21, 2021, through September 30, 2021, Grievant was never called to report to duty. Grievant states he was at home and could have come into work if he was called.
19. On October 13, 2021, Grievant sent an e-mail to Kate Minall requesting his timesheet be corrected to indicate he was on TRD from September 21, 2021, to September 30, 2021. (Joint Exhibit 8, pg. 2-3).
20. Ms. Minall responded, "You indicated you needed to absent to care for a family member which we believed to be an FMLA qualifying event. You failed to respond to the LMU and failed to supply the required documentation to support your absence. You also failed to tell your supervisor, Division Director or even myself that you were not taking FMLA. Since you did not contact anyone to tell them otherwise, we reasonably believed that you were on FMLA and unavailable. You did not make any other requests for leave and were not approved to take any leave. Your absence was unauthorized and was correctly coded as Unauthorized Off Payroll." (Joint Exhibit 8, pg. 1-2).
21. Grievant replied, "I respectfully disagree. By using this code you are saying that I went on leave without asking for permission, which is not true. Cindy only said that it looks like a qualifying LMU event. She did not give any further instructions. She did not say I should contact her once I hear from LMU or anything like that." (Joint Exhibit 8, pg. 1).
22. On October 19, 2021, Kate Minall sent Grievant a letter summarizing the events. (Joint Exhibit 9).
23. On June 13, 2022, the VSEA filed the underlying grievance at Step IV with the VLRB.

24. On June 27, 2022, the State filed its Answer with the VLRB.
25. The parties have agreed to these stipulations in lieu of a hearing.
26. The parties stipulate that the issue for the Board to decide is whether the State violated article 14 (9) of the CBA by placing Grievant on unauthorized leave for September 21, 22, 23, and 24, 2021, and not paying him on those days.

### OPINION

The Grievant has the burden of proving the State violated the applicable provisions of the Collective Bargaining Agreement (“CBA”) when it docked the Grievant’s pay, by changing his entry on his time sheet from “temporary relief from duty” to” unpaid unauthorized leave.” See e.g., Grievance of Sharp, 1 VLRB 412, 414 (1978). Article 14, of the CBA provides in pertinent part:

9. An appointing authority may relieve employees from duty temporarily with pay for a period of up to thirty (30) workdays:
  - (a) to permit the appointing authority to investigate or make inquiries into charges and allegations made by or concerning the employee;

The CBA provision governing when an employee is absent without leave is contained in Article 34 and is premised on the employee being absent from duty.

- (2) A classified employee who does not report for work or who is absent from duty during any portion of a workday and who does not have authorization for such absence shall be considered “absent without leave.” Any such absence shall be without pay, and, in addition, may be grounds for disciplinary action.

The contract language is clear, the predicate event for being absent without leave is being absent from duty. The facts as stipulated and agreed to by the parties are that Grievant did not travel to Brazil. Grievant never said he was going to take leave to travel to Brazil. Rather, he inquired about the process for taking leave to travel to Brazil to assist his ailing grandmother.

Rather than approve the use of his sick time, the supervisor advised that the event mentioned in the email qualified for FMLA and that Grievant needed to complete the requisite FMLA forms before he could travel. Grievant did not complete the requisite forms, nor did he travel. Grievant filled out his time sheet indicating he was still on TRD status. The State, however, changed the entry to unapproved leave.

The thrust of the State's argument is that Grievant was not available for duty because he was absent. Grievant, however, was not absent. The parties stipulated that Grievant did not go to Brazil. The State mistakenly argues that Grievant was absent from work because he told his supervisor he was leaving the country to go to Brazil to care for his grandmother. Grievant's email does not say he was going to Brazil. It inquired about the process for taking leave to go to Brazil. Grievant's query did not generate an immediate approval or denial. Instead, he was told that his request qualifies as an FMLA event. That he qualifies for an event does not require him to apply for FMLA nor to take leave. Indeed, when notifying Grievant that it had insufficient information to designate the leave as FMLA qualifying, the LMU acknowledged "we were informed that you may have a need for a leave of absence due to a serious health condition affecting an immediate family member . . . ." Finding 13.

After Grievant emailed his query to his supervisor, the State imposed additional hurdles before he could take leave. When the hurdles proved too cumbersome, Grievant withheld his request for FMLA and did not travel. The State acknowledges he did not leave. The State, however, docked his pay because he failed to complete the requisite FMLA forms for the FMLA leave the State concedes he never took.

The Board finds unpersuasive the VDH's argument that Grievant was required to affirmatively state that he was not taking FMLA leave. As an initial matter there is nothing in the CBA that imposes this requirement. Second, the State mistakenly asserts that Grievant affirmatively stated he was taking leave for FMLA reasons. As outlined above, Grievant inquired about the process for taking leave, he never "affirmatively" stated he was taking leave. Third, the VDH was aware that Grievant had not completed the process or filing necessary to take leave. The State's conclusion that Grievant was "on FMLA and unavailable" was incorrect and conflicts with the information provided to the VDH.

Finally, the federal cases applying the Americans with Disabilities Act ("ADA") upon which the VDH relies are inapposite and not persuasive. See, e.g., Shiflett v. GE Fanuc Automation Corp., 151 F.3d 1030 (4th Cir. 1998 )(affirming the district court's grant of summary judgment in favor of employer because " Defendants should not bear ADA liability because plaintiff was too reticent in communicating his problems."); Weigel v. Target Stores, 122 F.3d 461, 467–68 (7th Cir. 1997) (holding representations by employee that they are totally disabled or unable to work may be used as evidence by employer to help establish employee is not qualified individual with a disability under ADA).

The VDH's argument hinges on the incorrect recitation of facts. Grievant did not state nor represent that he was out of the country for FMLA purposes. Because he made no such representation, the VDH's conclusion that he was not available is also faulty. Grievant did not create uncertainty. He asked if he could take leave. He was never provided with an answer. He was presented with uncertainty and in the face of that uncertainty did not take leave. The VDH's October 7, 2021, email asking the Union to confirm that Grievant had been on leave and

unavailable from September 21, 2021, through September 30, 2021, further demonstrates that the VDH did not consider the request for leave as equivalent to Grievant actually taking leave.

The VSEA has proven that Grievant was not absent without authorization, and the State violated the CBA when it docked his pay from September 21, 2021- September 30, 2021.

### ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered:

1. The Grievance of Rodrigo Gelio is sustained:
2. The State shall pay the Grievant his pay from September 21, 22, 23, and 24, 2021, plus interest.
3. The interest due Grievant shall be computed on gross pay and shall be at the legal rate of twelve (12) percent per annum.

Dated this 24<sup>th</sup> day of July, 2023, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Robert Greemore

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Robert Greemore, Chair

/s/ Alan Willard

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Alan Willard

/s/ David Boulanger

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David R. Boulanger