

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 22-07
STEPHEN DUCEY)	

FINDINGS OF FACT, OPINION, AND ORDER

Stephen Ducey (“Mr. Ducey” “Grievant”), a Tax Compliance Officer working for the Vermont Department of Taxes (“Department” “State”), grieves his termination for engaging in gross misconduct for falsifying COVID-19 test results, failing to follow directives, and engaging in dishonesty. Grievant alleges the State terminated him without just cause; improperly bypassed progressive discipline and progressive corrective action; and retaliating against him for his questions and comments about the COVID-19 vaccination and mitigation policy.

The Vermont Labor Relations Board held hearings on the grievance on September 22, 2022, before Board members, Richard Park, Chair, Karen Saudek, and David Boulanger. Grievant appeared pro se. The Department was represented by Assistant Attorney General Allison L.T. Powers, Esq. The hearing was held on the Microsoft Teams Platform. The Department filed a post-hearing brief on October 27, 2022.

FINDINGS OF FACT

1. Grievant (“Mr. Ducey” “Grievant”) began working at the Department of Taxes (“Department” “State”) in June 2019 as a Tax Compliance Specialist, Level II. He was later promoted to a Tax Compliance Specialist, Level III. Grievant’s job duties as a Tax Compliance Officer included collection of delinquent taxes and establishing payment plans for taxpayers. Grievant specialized in wage garnishment, working on garnishing delinquent taxpayers’ paychecks. He worked independently performing his duties.
2. On March 13, 2020, in response to the COVID-19 pandemic, Governor Phil Scott declared a State of Emergency for the State of Vermont and thereafter issued directives limiting in-person contact, requiring telecommuting and work from home.
3. In response to the Governor’s State of Emergency, most members of the State’s workforce, whose positions allowed them to do some or all of their duties from a remote location, began working remotely.
4. Members of the State’s workforce who did not work remotely were required to follow the COVID-19 mitigation measures recommended by the U.S. Centers for Disease Control and the Vermont Department of Health, such as wearing proper facial coverings.
5. The State of Emergency expired June 15, 2021. The State began to develop plans for state employees to return to their assigned work/duty stations.
6. On September 10, 2021, Agency of Administration Secretary Susanne Young emailed all Executive Branch employees notifying them of the State’s COVID 19 Vaccination Attestation/Testing (“VAT”) policy.
7. Effective September 15, 2021, the State, and the Vermont State Employees’ Association (“VSEA”) collectively bargained a side letter modifying the terms of the 2020-2022 Non-

Management Unit Collective Bargaining Agreement that addressed COVID-19 mitigation measures in the State's workforce.

8. Effective September 20, 2021, all State employees were required to either attest to their being fully vaccinated against COVID-19 or comply with identified mitigation measures. The mitigation measures required weekly testing for COVID -19, and the donning of face coverings.
9. Grievant received the email from Secretary Young announcing the COVID-19 VAT policy.
10. Effective September 20, 2021, State employees who did not attest to being vaccinated against COVID-19 were required to self-administer a polymerase chain reaction ("PCR") COVID-19 test weekly in the workplace.
11. DHR generated an Asked Questions document addressing the State's COVID-19 mitigation measures. The document was published online and a link to access this document on the internet was sent to all State employees via email.
12. The State contracted with a vender, Binx, to process the employee COVID-19 testing services. To register and access the testing service, unattested employees created an online account with Binx. These employees were required to consent to terms and conditions imposed by Binx to complete the Binx registration process and provide their informed consent for the testing process. Each week when an employee submitted their COVID-19 test, they linked the specific test kit to their Binx account
13. Grievant did not sign the attestation form, and therefore was required to properly wear a mask in the workplace and comply with weekly workplace COVID-19 testing beginning September 20, 2021.

14. Grievant understood this requirement but had questions about the process for testing through the Binx lab. Grievant did not feel comfortable consenting to the Binx informed consent form.
15. Grievant was informed by his supervisor Valerie Rickert that if he did not sign the Binx consent form, the refusal would be equivalent to a refusal to test for which he would be placed on off-payroll status for up to five days.
16. A number of State employees, including Grievant, raised concerns about the terms and conditions of the Binx informed consent. Employees who failed to provide their informed consent were unable to complete the registration and their weekly tests were not registered or attributed to them. After negotiations with the State, Binx agreed to amend the informed consent language. On October 28, 2021, Binx's informed consent language was updated to address the valid concerns that were raised.
17. After the Binx consent form was modified to address some of the concerns raised by Grievant and other State employees, Grievant signed the testing consent form on November 2, 2021.
18. On November 3, 2021, Grievant sent an email to co-worker Hildy Jones, in relation to Grievant's signing of Binx's updated consent terms. Grievant indicated he intended to submit "blank swabs" to his employer for the required workplace COVID-19 testing.
19. COVID-19 testing sites for State of Vermont employees were located throughout the state. Each testing site had a designated test site administrator. Test site administrators were responsible for organizing the distribution and collection of COVID-19 tests, collecting, and sending the completed tests to the testing laboratory in a timely manner, and assisting employees to understand the instructions that were included in each test kit regarding how to properly self-administer the PCR test.

20. The State did not receive COVID-19 test results from employees submitting weekly tests. Instead, the State received a report from Binx with information including the names of employees who completed a COVID-19 test for a given week and whether the sample submitted by each employee on the list was testable.
21. Grievant questioned whether he could take his required COVID-19 test at the public testing sites sponsored by the Department of Health. Although State employees could use those testing sites in their capacity as members of the public generally, State employees that did not attest to being vaccinated, had to access the testing sites at their work sites and self-administer the PCR tests to comply with VAT policy.
22. Karen Pallas, Administrative Assistant was designated as the COVID-19 test site administrator for the Department. Prior to working at the Department, Ms. Pallas worked in several nursing homes and attended college for nursing. Ms. Pallas worked in the reception office located off the main lobby at 133 State Street, Montpelier.
23. Jessica Martin, a Tax Program Training Specialist with the Department, was the back-up COVID-19 test site administrator when Karen Pallas was not available. Ms. Martin's workspace was located behind the reception office and shared a hallway with Ms. Pallas's office.
24. The test kits for the Department employees required to take weekly COVID-19 tests were located at the Department reception kiosk or desk on the first floor of 133 State Street.
25. Ms. Pallas was responsible for distributing COVID-19 test kits every Monday to Department employees required to test. The employees were afforded an opportunity to take the test away from her office or use the desk outside her office.
26. After the employees completed the test, they returned the test kit to Ms. Pallas in a gray bag.

27. Ms. Pallas collected the completed test kits in their gray bags and gathered them in a box to be retrieved by the UPS driver. The UPS pick-up for the box of completed test kits was between 2 and 4 p.m.
28. As tests were taken and returned, Ms. Pallas kept track of the number of tests completed and compared it with the number of staff members required to take weekly testing.
29. The completed test kits had to be at the Binx testing location within twenty-four hours.
30. If the UPS driver arrived before all the tests were collected, Ms. Pallas asked the security guard to call the UPS driver requesting another pickup that day.
31. Sometimes Ms. Pallas called Department employees that had yet to take a test kit to remind them of the testing and asked if they were going to retrieve a test kit.
32. On November 8, and 15, 2021, Grievant received COVID-19 test kits at his workplace and submitted his test samples for processing at his work site.
33. Grievant's test results for November 8, and November 15, 2021, came back as invalid.
34. At the time, Grievant and his wife were new parents caring for a six-month old. Grievant's baby was experiencing seizures and Grievant was not sleeping in the evenings.
35. On November 22, 2021, Ms. Pallas called Grievant asking if he was going to take the COVID 19 test, as she did not see him come down for a test.
36. Grievant came to the reception desk, Ms. Pallas retrieved a test kit from the locked cabinet. She provided Grievant with the test kit. Ms. Pallas initially went back into her office then returned to the area where Grievant was taking the test. She observed him opening the kit and placing the test materials on the table.
37. Ms. Pallas observed Grievant open the test vial, uncap it, put it down, take out the nasal swab, put the nasal swab into the vial, then recap the vial. She observed that Grievant did

not place the nasal swab in his nose. Grievant submitted the test kit and Ms. Pallas placed Grievant's test kit in the box with the other tests.

38. On that day, Ms. Martin heard Grievant and Ms. Pallas in the hallway outside her office.

She heard Grievant comment that the testing would be quick and easy because he takes the swab from one location and puts it in another. Based on what she heard, Ms. Martin did not believe Grievant had completed the test. She came out of her office and asked Grievant if he had swabbed his nose and he said he did not. She heard Ms. Pallas and Grievant continue to talk, but Ms. Martin did not hear the details of the conversation.

39. Ms. Pallas heard Ms. Martin ask Grievant if he swabbed his nose and heard Grievant reply that he did not swab his nose, and he had not swabbed his nose for past workplace COVID-19 tests.

40. Grievant had conducted the testing in Ms. Martin's office prior to November 22, 2021.

On those occasions, Ms. Martin turned away from Grievant to work on her computer and give him some privacy. She did not hear him coughing, sneezing, or using a tissue, which she usually heard when people insert the nasal swab during COVID-19 testing.

41. Grievant admits that on November 22, 2021, he did not swab his nasal cavity because he thought he had missed the deadline for sending out the test and thought his test would not be mailed out or tested.

42. On November 23, 2021, Ms. Pallas emailed Chris McConnell, her testing coordinator, advising that Grievant did not place the swab in his nasal cavity and placed the unused swab in the vial for testing. She emailed Mr. McConnell because she was concerned that this was a violation of the COVID-19 VAT policy.

43. In the email, Ms. Pallas wrote that Jessica Martin asked Grievant if he took the test and Grievant responded that he did not take the test and that “he has been doing the test this way for a bit.”

Investigation

44. Grievant was interviewed by Investigator Margaret Loftus of the Vermont Department of Human Resources. During the interview he admitted he did not swab his nasal cavity on November 15, 2021. He explained he was late with his testing and had missed the first pick up of vials and thought his test would not be mailed out.

45. Grievant explained that he was under a lot of stress and went through the motions of testing but did not swab his nasal cavity.

46. During the interview, Grievant asserted on prior occasions when he tested, he adhered to the testing procedure and complied with the instructions and swabbed his nasal cavity.

47. Grievant’s weekly workplace COVID-19 tests submitted for the weeks of November 8, 15, and 22, 2021, were all untestable samples.

48. The Department terminated Grievant’s employment on January 7, 2022, for falsifying workplace COVID-19 test results, failing to follow the directive to submit valid workplace COVID-19 tests, and dishonesty during the employment investigation.

OPINION

Grievant alleges the Employer dismissed him without just cause, improperly bypassed progressive discipline, and retaliated him for questioning the COVID-19 VAT policy. Just cause for dismissal is some substantial shortcoming detrimental to the employer’s interests which the law and sound public opinion recognize as a good cause for dismissal. In re Grievance of Brooks, 135 Vt. 563, 568 (1977). The ultimate criterion of just cause is whether an employer

acted reasonably in discharging an employee for misconduct. Id. There are two requisite elements which establish just cause for dismissal: 1) it is reasonable to discharge an employee because of certain conduct, and 2) the employee had fair notice, express or fairly implied, that such conduct would be grounds for discharge. Id.

In carrying out our function to hear and make a final determination on whether just cause exists, the Labor Relations Board determines *de novo* and finally the facts of a particular dispute, and whether the penalty imposed on the basis of those facts is within the law and the contract. Grievance of Colleran and Britt, 6 VLRB 235, 265 (1983). The burden of proof on all issues of fact required to establish just cause is on the employer, and that burden must be met by a preponderance of the evidence. Id. Once the underlying facts have been proven, we must determine whether the discipline imposed by the employer is reasonable given the proven facts. Id. at 266.

The Employer terminated Grievant because of the misconduct described in the Loudermill letter of December 6, 2021. The State alleged Grievant engaged in the following misconduct which warrants just cause for termination: (1) refusing to follow a lawful and reasonable work order relating to COVID-19 VAT policy; (2) falsifying test results; and (3) being dishonest during the human resources investigation.

Grievant admits he did not complete the nasal test kit as directed on November 22, 2021. Rather than complete the necessary steps of inserting the swab in his nasal cavity and providing a sample, he inserted a clean swab into the testing vial. The test came back invalid. For those employees that chose not to attest that they had been vaccinated, VSEA and the State agreed upon mitigation measures, weekly testing, and use of face coverings. Grievant did not undergo testing, because he did not provide his own biological material to be tested. The State has proven that Grievant did not follow work orders and directives related to COVID-19.

The State, however, has not proven that Grievant falsified a test result. Grievant did not falsify a test result, rather he failed to complete the test and failed to comply with the COVID-19 VAT policy.

The State alleges Grievant violated Personnel Policy 5.6 and 17.0. Personnel Policy 5.6, requires employees to pursue the common good in their official activities, uphold the public interest, and conduct themselves in a manner that will not bring discredit or embarrassment to the State of Vermont. State employees refusing to follow directives to help minimize the health and safety risk to the Vermont workforce and public could bring discredit and embarrassment to the State of Vermont. The testing procedure was part of a compromise reached between management and labor to balance the interests of employees who chose not to attest to being vaccinated with the State's interest in protecting the health of State of Vermont employees and the public. Grievant's defiant charade of following all but the most important step of the testing process could discredit the State. Grievant did not act in the public good in submitting an incomplete test for processing.

The State alleges Grievant violated Personnel Policy 17.0 when he was untruthful or lied during the investigation when he stated that he completed the testing on November 8, and November 15, 2021. During the investigation interview Grievant claimed that he had previously adhered to the testing instructions and swabbed his nasal cavity as instructed. The State alleges Grievant was not truthful. When confronted with not swabbing his nose and placing a clean or unused swab in the test medium vial, Grievant admitted that he had been doing this for a bit. Jessica Martin testified that Grievant had performed the testing in her office on other occasions and that during the testing, it did not sound as if he swabbed his nose. She did not hear any coughing or nose blowing which often accompanied the administering of the nasal swab test.

Grievant maintained throughout the investigation and before the Board that November 22, 2021, was the only time he placed a blank or clean swab in the test vial. All three of the tests were returned as invalid or untestable. The similar result for all three supports the conclusion that it is more likely than not that Grievant implemented a similar practice of not swabbing for all three tests. Indeed, Grievant joked with a colleague about submitting blank swabs. In an email to a colleague about the testing policy, Grievant wrote, the State “can have blank swabs now . . . lol!” The Board finds the testimony of Ms. Pallas to be credible and finds the State has proven it is more likely than not that Grievant did not swab his nasal cavity on November 8 and 15, and that he was untruthful when he said he swabbed on those dates.

Reasonableness of Termination Decision

In determining whether the proven charges justify the termination decision, the Board applies the factors announced in Grievance of Colleran and Britt, 6 VLRB 235, 268-69 (1983). The factors include: 1) the nature and seriousness of the proven offenses, 2) the Grievant’s job level, 3) the Grievant’s past work record including length of service, performance on the job, and past disciplinary record, 4) the effect of the offenses upon Grievant’s ability to perform at a satisfactory level and their effect on supervisors’ confidence in Grievant’s ability to perform assigned duties, 5) the consistency of the penalty, 6) the clarity of notice, 7) the notoriety of the offense or its impact upon the Employer’s reputation, 8) the potential for Grievant’s rehabilitation, 9) mitigating factors, 10) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future, and 11) mitigating factors. See Id. at 268-69 (1983).

The Colleran factors provide a means of assessing the reasonableness of the employer’s decision. The employer is not required to prove each factor to support the reasonableness of its decision, “only that ‘on balance the relevant factors support management’s judgment.’” In re Jewett, 2009 VT 67, ¶ 23, 186 Vt. 160, 170 (quoting In re Colleran, 6 VLRB at 269).

We first consider the nature and seriousness of Grievant's offenses and their relation to Grievant's duties, position, and responsibilities. The just cause analysis centers upon the nature of the employee's misconduct. Grievance of Merrill, 151 Vt. 270, 273 (1989); In re Morrissey, 149 Vt. 1, 13 (1987). In deciding whether there is just cause for dismissal, the Board determines the substantiality of the detriment to the employer's interests. Merrill, 151 Vt. at 273-74.

The Colleran and Britt factors focus on the seriousness of the misconduct as it relates to the Grievant's "duties, position and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated." Grievance of Colleran and Britt, 6 VLRB at 268. Grievant failed to adhere to the Vaccine Attestation and Mitigation requirements that were developed to ensure the safety and protection of State of Vermont workers and the public. At the time of his termination, the State was still dealing with the impact of the COVID-19 pandemic. After the introduction of COVID-19 vaccines, the State implemented the VAT policy that required those employees that did not attest to being vaccinated, to wear masks in the workplace and to undergo weekly testing for COVID-19. Grievant compromised the success of that policy by defying the directions and deliberately not testing himself and submitting a blank swab for testing. Grievant's disregard for the health and safety of the public and the State workforce supports the reasonableness of the termination decision.

Grievant held a position of trust within the Department and has frequent contact with the public. Deliberately refusing to complete the required COVID-19 testing undermines his ability to faithfully execute his position of trust.

Prior to the events leading to his termination, Grievant had no disciplinary record. Throughout his tenure with the Department, Grievant received positive evaluations, including an Excellent evaluation in 2020. The Board does not consider the emails questioning the COVID-

19 policy as evidence of unprofessionalism. The comments of Grievant and others about the Binx informed consent form were reasonable and led to changes to the form.

Grievant's supervisors have lost confidence in his ability to perform his job. Grievant's deliberate choice to flout the testing requirements and intentionally submit an unused or blank swab as his sample demonstrates a lack of judgment and trustworthiness. The supervisors' loss of trust and faith in Grievant's ability to garnish worker wages and other fiduciary responsibilities is reasonable.

Grievant's conduct is not quite analogous to either of the two cases offered by the employer in support of its consistency of the penalty factor. Both of those offenses involved falsifying records. In one case where a supervisor entered eight hours of work on a subordinate's timesheet on days the employee did not work, the supervisor received only a reprimand. In the second case provided by the State, an employee was terminated for falsifying a tax return and creating fraudulent direct deposits. Although Grievant's conduct was deliberate and intentional, contrary to the State's assertion, Grievant did not intend to falsify the test result. He intended and elected to refrain from submitting a nasal sample. He went through the motions without actually swabbing his nose. This action did not result in a falsification of a test result. It would, and did, result in an invalid test result. The State has, however, employed a range of discipline for misconduct. The decision to terminate Grievant for not being truthful or forthcoming during the investigation and failing to adhere to the VAT policy is within the range of penalties imposed by the Employer.

There has been no notoriety from the offense.

The clarity of notice supports the reasonableness of the termination decision. On September 23, 2021, Commissioner Fastiggi issued a memorandum outlining the mitigation measures imposed on non-attesting employees. The memorandum was forwarded to Grievant

and advised that employees that did not comply with the weekly testing would be subject to disciplinary action up to and including termination. The testing process required Grievant to swab his nose, which Grievant willfully did not do. Grievant was on notice that this conduct could lead to discipline including termination.

Grievant was also on notice of his obligation to be truthful and forthcoming during the investigation and that failure to adhere to this policy could lead to termination. Grievant was not forthcoming during the investigation and the Board has found that he was not truthful regarding his claim that he complied with the testing procedure on November 8, and 15, 2021.

Although Grievant recognizes failing to swab his nose and complete the COVID-19 testing as required was a bad decision, he has yet to recognize the consequences of his actions. Blithely disregarding the instruction to complete the test and merely going through the motions jeopardized the utility and effectiveness of the COVID-10 testing and VAT policy. Grievant has not demonstrated he appreciates the consequences of his actions. The employer's conclusion that Grievant cannot be rehabilitated is reasonable.

The nature of Grievant's misconduct also undermines the adequacy of alternative punishment to deter Grievant or others from engaging in the same or similar conduct.

ORDER

Based on the foregoing findings of fact and reasoning of the Board, it is hereby
ORDERED that the Grievance of Stephen Ducey is DISMISSED.

Dated this 9th day of February 2024, at Montpelier Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

Richard W. Park, Chairperson

/s/ Karen D. Saudek

Karen D. Saudek

/s David Boulanger

David Boulanger