

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	
VERMONT STATE EMPLOYEES')	DOCKET NO. 86-3
ASSOCIATION AND STANLEY TATRO)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On January 10, 1986, the Vermont State Employees' Association (VSEA") filed a grievance on its own behalf and on behalf of Stanley Tatro, Transportation Maintenance Worker for the State of Vermont, Agency of Transportation ("Employer"). The grievance alleged the five-day suspension of Tatro and related actions violated Articles 5, 6, 14, 17 and 74 of the Contract between the State and VSEA for the Non-Management Unit, effective for the period July 1, 1984, to June 30, 1986 ("Contract").

A hearing was held before Board Members Charles H. McHugh, Chairman; William G. Kemsley, Sr., and Catherine L. Frank on January 29, 1987. Frances C. Lindemann, Special Assistant Attorney General, represented the Employer. Michael R. Zimmerman, VSEA staff attorney, represented Grievants. The Employer and Grievants filed Requested Findings of Fact and Memoranda of Law on February 5, 1987. The parties also filed a Stipulation for Admission of Additional Evidence on February 5.

During the course of these proceedings, Grievants dropped their claims that the Employer violated Articles 5, 6, 14 and 74 of the Contract because such claims had not been raised at the earlier steps of the grievance procedure.

FINDINGS OF FACT

1. At all times relevant, Tatro was employed as a Transportation Maintenance Worker B (Pay Scale 6) at the District 7 Highway Garage, in St. Johnsbury, Vermont.

2. At all times relevant, Tatro was a VSEA Steward.

3. During 23 years of employment with the State, Tatro had never been disciplined prior to the suspension at issue herein.

4. In February, 1985, Tatro, in a meeting with then-Secretary of Transportation Patrick Garahan, made a number of allegations against other Agency of Transportation employees. His allegations included 1) misuse of State property (e.g., using a State grader to plow a private driveway; 2) conducting personal business during working hours (e.g., building a fishing shanty on State time; 3) "favoritism"; 4) taking State property for private use; and 5) intimidation by superiors (e.g., an employee was pressured into withdrawing a grievance).

5. After having heard Grievant's allegations, Secretary Garahan designated Motor Vehicle Inspector Gerald McNamara to conduct an investigation into the allegations.

6. On February 14, 1985, McNamara interviewed Tatro. At the time of the interview, no allegations against Tatro had been made. The purpose of the interview was to review each of the allegations Tatro had made against others. McNamara did not advise Tatro he had the right to request the presence of a VSEA representative at the interview. The purpose of the interview with Tatro was neither to impose discipline nor to determine whether discipline should be imposed against Tatro.

7. During the course of the interview, Tatro told McNamara that while Tatro was discussing the employee morale problem with Tatro's supervisor, Alton Bugbee, Bugbee told Tatro he could have him fired for drinking on the job. Tatro informed McNamara this was in reference to Tatro drinking beer with members of his work crew while on duty on Christmas Eve day in 1984. Tatro's comments to McNamara about drinking on the job were unsolicited.

8. At all times relevant, one of the duties performed by Tatro has been to go out on the road with a crew to cut brush and perform other road maintenance jobs. Tatro acts as the lead crew member during these times.

9. After interviewing Tatro on February 14, 1985, McNamara interviewed co-workers of Tatro. On March 8, 1985, McNamara interviewed co-workers Keith Brown, Robert Heywood, Michael Dustin and John Cosgrove. All four employees spoke of the "horseplay" engaged in by Tatro and his crew. Brown told McNamara that there was a lot of "screwing around" that went on with Tatro and the brush crew, such as filling Coke bottles with gasoline and throwing them into the fire to blow up. Heywood told McNamara that he did not like working on Tatro's crew because they would knock people down, push them around and, in his opinion, they were dangerous to be around. Heywood said Tatro was dangerous with a chainsaw. Heywood indicated he was afraid of Tatro and his crew when they were together. Heywood described an incident when a member of Tatro's crew threw a co-worker to the ground where he narrowly missed hitting his head on a chunk of wood and another incident where icy snowballs were thrown and broke a truck mirror of a co-worker. Heywood told McNamara that Tatro encouraged this type of activity when he should be seeing to it that

it was stopped. Dustin told McNamara that the horseplay that went on with Tatro's crew was going to result in someone getting hurt. Cosgrove told McNamara that several workers did not like to work with Tatro and his crew due to the amount of horseplay that goes on. Cosgrove described one incident when he was working with the crew, where he was struck so hard in the head by a snowball thrown by one of the crew that he left the work site and drove back to the garage.

10. During the March 8 interview, Dustin told McNamara that during work hours on December 24, 1984, he observed Tatro and two other members of his crew return to the garage obviously drunk. Dustin stated he saw Tatro walk over to a picnic table in the garage and open a beer. Dustin also related that one of the crew members told Dustin that they had consumed a case of beer and a bottle of blackberry brandy while out cutting brush. This referred to the same drinking incident mentioned by Tatro in his February 14 interview with McNamara.

11. On March 12, 1985, Tatro, who was on leave at the time, drove his privately-owned truck past his supervisor, Richard Slicer, and his work crew and honked the horn. Tatro headed in the direction of a State-owned salt shed which contained pea stone. Tatro loaded some pea stone into the back of his truck, then drove back to where Slicer and his crew were working. Tatro stopped the truck and told the workers he had picked up the stone to repair his driveway where his wife got stuck in her car. Slicer saw the pea stone in the truck but did nothing to stop Tatro from leaving and did not ask him about the stone. Tatro took the pea stone home and used it in his driveway.

12. After Tatro left, Slicer went to the salt shed and saw tire tracks that could have been from Tatro's truck. Slicer then reported

the incident to his supervisor, Bugbee, who reported it to his supervisor, Hugh Elder. Within a few days, Bugbee called McNamara and told him of the incident. Elder called Langdon Cummings, Agency of Transportation Personnel Director, and told him of the incident. Cummings had the authority to discipline employees. Cummings decided to wait until the conclusion of the investigation into other allegations at the garage to take action on the theft of the pea stone.

13. On March 27, 1985, McNamara interviewed Tatro for a second time. That interview was the first opportunity McNamara had to question Tatro about allegations against Tatro which had been made during the course of McNamara's investigation. McNamara did not advise Tatro of his right to request the presence of a VSEA representative. McNamara asked Tatro about the allegation that he had taken State-owned pea stone. Tatro's response as, "yep, I did it". When McNamara asked Tatro why, he responded that he "wanted to see if my supervisor had the balls to stop me, and he didn't". McNamara asked Tatro about the allegation, which Tatro had originally admitted during his first interview with McNamara, that he and two co-workers had consumed alcoholic beverages during working hours on Christmas Eve day of 1984. Tatro did not deny it. In addition, McNamara, for the first time, asked Tatro about the allegations that horseplay took place among his brush-cutting crew. Tatro conceded that it did take place, but insisted that it was no worse than on other crews.

14. By letter dated July 16, 1985, Donald Remick, Agency of Transportation Director of Maintenance, informed Tatro by letter of disciplinary action taken against him. That letter provided in

pertinent part as follows:

(T)his letter is the official notification of your suspension from duty without pay for five workdays, effective July 22, 1985, thru July 26, 1985, inclusive for the following reasons:

You have admitted taking a load of pea stone (State-owned) from a State facility for your personal driveway.

You have admitted allowing members of your work crew to engage in rough or boisterous activities (horseplay) during working hours.

You have admitted drinking on the job during working hours.

All of these admissions constitute violation of Section 3.01, Employee Conduct of the Rules and Regulations for Personnel Administration. The State of Vermont and this Agency cannot and will not tolerate such inexcusable conduct. I consider your actions in this matter to be sufficient cause to warrant the bypassing of lesser disciplinary measures. Any further incidents of a similar nature will result in more severe disciplinary action up to and including your immediate dismissal.

(Employer Exhibit B)

15. Section 3.01 of the Rules and Regulations for Personnel Administration, cited in the letter of suspension given to Tatro, provides, in pertinent part, as follows:

3.01 Employee Conduct: Every employee shall fulfill to the best of his ability the duties and responsibilities of his position. In his official activities, the classified employee shall pursue the common good and shall uphold the public interest, as opposed to personal or group interests.

3.013 An employee shall not use State property or equipment for his private use or for any use other than that which serves the public interest.

Tatro had never seen this provision prior to being suspended.

16. Before the investigation by McNamara, there was not a written rule in the District 7 Highway Garage about taking or using State property. Employees, besides Tatro, had taken State property or used it for their personal use prior to the investigation and had not

been disciplined. Prior to taking the State-owned pea stone, Tatro was aware that he could be disciplined for taking State property.

17. Before the investigation by McNamara, there was not a written rule in the garage about horseplay.

18. Until Christmas, 1984, it had been the practice at the District 7 Highway Garage to have a Christmas party which included alcoholic beverages. Prior to December 24, 1984, Tatro was aware that he could be disciplined for drinking alcohol on the job. He was aware that a co-worker had been disciplined for drinking on the job.

19. As a result of McNamara's investigation, about six employees (including Tatro) were disciplined or given letters of counseling.

20. Cummings was involved in the discipline imposed on Tatro. He recommended that Tatro be suspended and he wrote the letter of suspension. His recommendation and the disciplinary letter he wrote was based both on statements made by co-workers and admissions made by Tatro and was not based solely on Tatro admitting the incidents occurred. Tatro understood that he was being disciplined for the incidents themselves and not solely because of admissions he made.

OPINION

Grievants raise various issues in seeking to reverse the five-day suspension of Stanley Tatro. We discuss each of those issues in turn.

The first issue is whether the Employer violated the Contract by failing to advise Tatro of right to the presence of a VSEA representative during questioning and, if so, what the consequences of that failure should be.

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 VSEA and Dustin, 9 VLRB 297(1986).

We conclude this contractual provision was violated when McNamara interviewed Tatro on March 27, 1985. McNamara constituted "management" within the meaning of the Contract since he was a designated representative of the Secretary of Transportation, Tatro's ultimate supervisor. Further, it is clear part of the purpose of the interview was to determine whether discipline should be imposed against Tatro since allegations made against Tatro which ultimately formed the basis of his suspension were brought up by McNamara during the interview. Thus, the failure of McNamara to notify Dustin of his right to request the presence of a VSEA representative at the interview violated the Contract.

Due to the Employer's abrogation of this fundamental right of union representation, we believe it is appropriate to exclude the admissibility of statements made by Tatro in his interview with McNamara. Dustin, supra, at 301-302. Grievance of Boucher, 9 VLRB 50, 59(1986). The Employer should not benefit, and Tatro and VSEA conversely should not be harmed, by the fruits of a contractually-prohibited interview. Dustin, at 302.

Grievants contend that the exclusion of the admissibility of admissions made by Tatro during the interview necessarily results in

two of the three charges against Tatro (i.e. the pea stone charge and the horseplay charge) not being proven since the admissions formed the sole basis for the charges against him.

We disagree that the admissions by Tatro during the interview formed the sole basis for those charges. The evidence indicates that, for each of the three charges made against Tatro in his letter of suspension, evidence gathered outside of and independent from admissions made by Tatro during the contractually-prohibited interview was considered by the Employer in imposing discipline.

First, with respect to theft of the pea stone, management had an eyewitness account of the incident from Grievant's supervisor prior to Tatro admitting to McNamara during the interview that he had taken the pea stone. Second, with respect to the horseplay charge, four co-workers of Tatro had told McNamara of horseplay engaged in by Tatro's work crew prior to Tatro discussing it with McNamara during the interview. Finally, with respect to drinking alcohol on the job, Tatro had admitted this offense unsolicited at a prior interview with McNamara, which interview was contractually proper, and a co-worker had separately affirmed Tatro had been drinking on the job.

We recognize the suspension letter given Tatro indicated he was suspended because he "admitted" the charges and the Board has consistently stated that it will not look beyond the reasons given for the action by the Employer in the disciplinary letter. Grievance of Earley and Ibey, 6 VLRB 72, 80 (1983). Grievance of Erlanson, 5 VLRB 28, 39 (1982). However, we are wary of turning disciplinary letters into dialectic exercises. Erlanson, at 39. While the suspension

letter may have been inartfully drafted, the letter adequately put Tatro on notice that he was being disciplined for theft of pea stone, drinking and horseplay. To limit the basis for the suspension to admissions made by Tatro relating to these charges would be an overly strict interpretation of the meaning of the letter. It is evident the Employer considered evidence in addition to Tatro's admission when deciding to suspend him and such evidence is relevant.

In sum, we conclude evidence existing outside of and independent from admissions made by Tatro is properly before us in determining the validity of Tatro's suspension. Further, we find the evidence is sufficient to establish the charges of theft of pea stone, drinking on the job during working hours and allowing work crew members to engage in horseplay.

Nonetheless, Grievants contend just cause did not exist for suspension. There are two requisite elements which establish just cause for suspension: 1) it is reasonable to discipline an employee because of certain conduct, and 2) the employee had fair notice, express or fairly implied, that such conduct would be grounds for discipline. In re Grievance of Brooks, 135 Vt. 563 (1977).

Grievants contend Tatro did not have fair notice the conduct he engaged in would be grounds for discipline and that this was an inappropriate case to bypass progressive discipline.

We conclude Tatro was on fair notice his conduct would be grounds for discipline, particularly with respect to the two more serious charges of theft and drinking.

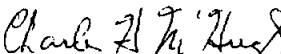
While the evidence indicates that taking state property and personal use of state property was condoned to some extent at the highway garage where Tatro worked, this does not excuse the theft engaged in by Tatro. Honesty is an implicit duty of every employee and, at a minimum, Tatro should have known that dishonest conduct was prohibited. In re Grievance of Carlson, 140 Vt. 555, 560 (1982). Tatro admitted he knew he could be disciplined for taking state property and, in fact, gave as a basis for the theft that he was challenging his supervisor to stop him from the theft.

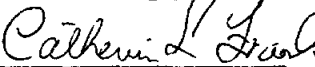
Similarly, while on the job drinking has been condoned to some extent at the garage, Tatro should not be excused from his drinking. First, remaining sober at work is an implied responsibility of which every employee should be aware. Moreover, Tatro was aware at the time of his offense that a co-worker had been disciplined for drinking on the job.

The presence of fair notice is less clear with respect to Tatro allowing crew members to engage in horseplay. Prior to his suspension, no warnings were provided to Tatro that he should not engage in horseplay. However, Tatro had at least implied notice that some of the "horseplay" in evidence herein - e.g. careless use of chainsaw, an employee being struck on the side of the head with an icy snowball - was inappropriate. Knowledge of common safety standards is an implied responsibility of every employee. We conclude that Tatro had fair notice he could be disciplined for the conduct with which he was charged.

We similarly conclude the Employer acted reasonably in bypassing progressive discipline and suspending Tatro for five days. Defrauding

the State is a very serious offense and has been found to constitute just cause for dismissal. c.f. Carlson, supra. Grievance of Graves, ___ Vt. ___ (December 12, 1986). Tatro's theft, taken together with the lesser offenses of on the job drinking and allowance of horseplay, certainly justified the lesser penalty of suspension.


Charles H. McHugh, Chairman


Catherine L. Frank

DISSENTING OPINION

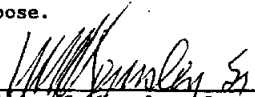
I dissent from the conclusion of the Board majority that the five-day suspension of Tatro should be sustained. Unlike my colleagues, I agree with Grievants that admissions made by Tatro formed the sole basis for disciplining him, the bulk of which admissions were made during a contractually-prohibited interview and are inadmissible evidence.

While evidence gathered outside of and independent from admissions made by Tatro during the contractually-prohibited interview was available to management when it disciplined Tatro, it is evident management chose not to use such evidence as a basis for discipline. This is indicated by the suspension letter which states as reasons for suspension that Tatro "admitted" the three charges made against him. It is well-established precedent that the Board will not look beyond the reasons given for the disciplinary action by the Employer in the disciplinary letter. Grievance of Earley and Ibey, 6 VLRB 72, 80 (1980). Grievance of Erlanson, 5 VLRB 28, 39 (1982). Thus, admissions by Tatro formed the sole basis for the discipline against him.

The only admissions made by Tatro with respect to the allegations against him of theft of state-owned pea stone and allowing crew members to engage in horseplay were made during the March 27, 1985, interview with McNamara. Due to the Employer's abrogation of the fundamental right of Tatro to union representation at the interview, it is appropriate to exclude the admissibility of statements made by Tatro in this interview. Grievance of Dustin, 9 VLRB 297, 301-302. Thus, the Employer has no admissible evidence to sustain these charges against Tatro.

With respect to drinking alcohol on the job, Tatro had admitted the offense at a prior interview with McNamara, which interview was properly conducted under the Contract. This admission is sufficient to sustain the charge relating to drinking on the job.

Thus, I would conclude the Employer has proven one of the three charges against Tatro. In my view, the proper remedy to apply here would be to reduce the five-day suspension to a lighter penalty consistent with the proven charge. I take into consideration that the drinking on the job charge fell in the middle range of charges against Tatro, being less serious than the theft charge and more serious than the horseplay charge. I also consider that while Tatro was on notice that he could be disciplined for drinking on the job, the clarity of the notice, and thus the severity of the offense, was somewhat weakened by on the job drinking being condoned to some extent at the garage. Given these considerations, I conclude a one-day suspension would be an appropriate penalty to impose.


William G. Kemsley, Sr.

ORDER

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

The Grievance of Vermont State Employees' Association and Stanley Tatro is DISMISSED.

Dated the 26th day of March, 1987, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh

Charles H. McHugh, Chairman

Catherine L. Frank

Catherine L. Frank