

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	
ANDREW GIBBS AND VERMONT)	DOCKET NO. 86-14
STATE EMPLOYEES' ASSOCIATION)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On February 21, 1986, the Vermont State Employees' Association ("VSEA") filed a grievance on its own behalf and on behalf of Andrew Gibbs, alleging the State of Vermont, Department of Mental Health ("Employer") violated the collective bargaining contract between VSEA and the State of Vermont for the Non-Management Unit effective for the period July 1, 1984 to June 30, 1986 ("Contract"), and Gibbs' due process rights, in dismissing Gibbs. The grievance further alleged the Employer violated Articles 6 and 14 of the Contract by refusing to provide VSEA with copies of statements and other evidence upon which the decision to dismiss Gibbs was based.

Hearings were held before Board Members Charles H. McHugh, Acting Chairman; William G. Kemsley, Sr. and Catherine L. Frank on September 12 and 26, 1986, and October 2 and 9, 1986. VSEA Staff Attorney Michael Zimmerman represented Grievants. Assistant Attorney General Michael Seibert represented the Employer.

The Employer filed Proposed Findings of Fact and Conclusions of Law on October 30, 1986, and a Memorandum of Law on October 31, 1986. Grievants filed a Memorandum of Law on October 30, 1986.

FINDINGS OF FACT

1. On January 23, 1986, Claudia Stone, Vermont State Hospital Operations Director, informed Grievant by letter of his immediate dismissal from employment, without two weeks notice or pay in lieu of notice, for gross misconduct. In the letter, Stone listed the following reasons for dismissal:

1. On or about October 19, 1985, you engaged in inappropriate sexual contact with female patient, M.L. This occurred in the shower room on Weeks 1. This is in direct violation of the Vermont State Hospital Client-Employee Relationship Policy, the Conditions of Employment and Section V(1) of the Employee Handbook.

2. On or about October 21, 1985, while the same patient, M.L. was in seclusion, you fondled her genital area. This is in direct violation of the Vermont State Hospital Client-Employee Relationship Policy, the Conditions of Employment, and Section V(1) of the Employee Handbook.

3. Between the dates of September 16 and October 17, 1985, you engaged in inappropriate sexual contact with former patient, C.B., on at least one, and perhaps as many as five occasions. This is in direct violation of the Vermont State Hospital Client-Employee Relationship Policy, the Conditions of Employment, and Section V(1) of the Employee Handbook.

4. You falsified your application form for State employment (completed and signed March 26, 1977) by answering "no" to the question: "In the past five years, have you been imprisoned, on probation, or fined for any violation of any law (except parking violations)?" Court records indicate that:

a) On or about 2/26/73, you entered a plea of nolo contendere to a charge of possession of malt beverages. You received a suspended sentence of 10 days, and were placed on probation.

b) On or about 7/9/73, you entered a plea of guilty to unlawful mischief. You received a suspended sentence of 60 days, and were placed on probation.

c) On or about 11/19/73, you entered a plea of guilty to possession of a deer during closed season. You were fined \$125.00.

You have, in the course of meetings with me, admitted that these convictions did take place as indicated in the records. Misrepresentation or falsification of your application form was

contradictory to the statement on the form which you also signed, which stated, "I hereby certify that my application form and all statements to it contain no false information and are complete to the best of my knowledge. I am aware that if an investigation discloses misrepresentation or falsification, my application may be rejected, my name may be removed from the register, and if already employed, I may be dismissed from State service, and I may be disqualified from applying in the future for any position covered by the Rules and Regulations of the State of Vermont".

5. On or about October 24, 1985, you were seen by a co-worker, Betsy Dolloff, coming out of the shower room on Weeks 1, at a time when a female patient, M.R., had been sent in to shower. Yet, at meetings on November 21, 1985 and January 13, 1986, in response to direct questions about whether you had ever been in the shower room with any female patient, you maintained that you "never went in the shower room when a female patient was in there". This is in direct violation of the Vermont State Hospital Client-Employee Relationship Policy, the Conditions of Employment, and Section V(1) of the Employee Handbook. Your denial that you have ever been in a shower room with female patients is contrary to the observation of a co-worker who witnessed you leaving the shower room at a time that a female patient was in it, and therefore suggests you have given a false statement.

We consider any one of these independent charges to be sufficient reason to warrant bypassing progressive discipline and imposing this dismissal.

(Grievants' Exhibit 11)

2. On February 26, 1973, Gibbs entered a plea of nolo contendere to the charge of possession of malt beverages, received a 10-day suspended sentence, and was placed on probation (State's Exhibit D, page 3).

3. On July 9, 1973, Gibbs entered a plea of guilty to the charge of unlawful mischief, received a 60-day suspended sentence, and was placed on probation (State's Exhibit D, pages 1 and 2).

4. On November 19, 1973, Gibbs entered a plea of guilty to the charge of possession of deer during closed season, and was fined \$125, with 30 days incarceration as the alternate sentence (State's Exhibit D, page 5).

5. On March 26, 1977, Gibbs completed and signed an application for employment with the State of Vermont. Contained on that application was the following question:

In the past five years have you been imprisoned, on probation, or fined for any violation of any law or ordinance (except parking violations)?

Gibbs answered "no" to that question. Gibbs read the following statement contained just above the space for the signature of the applicant on the application:

I hereby certify that my application form and all attachments to it contain no false information and are complete to the best of my knowledge. I am aware that if an investigation discloses misrepresentation or falsification,...if already employed, I may be dismissed from State service...

(State's Exhibit E)

6. While Gibbs did not fully understand the above statement concerning the possible consequences of falsifying his application, he understood he could be dismissed from employment if his application contained falsification. Gibbs answered "no" to the question concerning prior law violations because he thought the violations indicated above in Findings of Fact 2 through 4 had occurred more than five years previously.

7. Gibbs was hired on or about June 4, 1977 as a Vermont State Hospital Ward Aide. He was continuously employed in that position until he was dismissed on January 23, 1986. A Ward Aide performs housekeeping and patient care duties at a non-professional level involving the maintenance of the ward area and patients' quarters, plus assisting in the feeding and personal hygiene of patients (Grievants' Exhibit 1).

8. At all times pertinent herein, the Vermont State Hospital had a Patient Abuse Policy which provided in pertinent part as follows:

I. PURPOSE

...sexual...abuse...will not be tolerated and such staff behavior will result in a serious disciplinary response up to and including dismissal.

II. DEFINITIONS

B. SEXUAL ABUSE includes but is not limited to such acts of a sexual nature as kissing, fondling, intercourse, fellatio and indecent exposure. Further, employees shall not abuse the dignity of a patient, through inappropriate sexually-oriented conversation or through insulting or degrading sexual remarks or conduct.

(State's Exhibit H)

9. Gibbs was aware he could be dismissed for sexual abuse of patients.

10. September 6, 1985, C.B. was admitted as a patient to the Weeks 1 ward at the Vermont State Hospital. She remained on Weeks 1 until she was transferred to another ward at the Hospital on October 5, 1985. She was discharged from the Hospital on October 16, 1985. Upon her admission to the Hospital, C.B. was suffering from delusions and hallucinations. C.B. had delusions and hallucinations during her stay at the Hospital, although her condition improved during approximately the last four weeks she was at the Hospital.

11. We find the Employer has failed to establish by a preponderance of the evidence that Gibbs had sexual intercourse with C.B. on any occasion during her stay at the Hospital or that he otherwise engaged in inappropriate sexual contact with her.

12. On October 5, 1985, M.L. was admitted as a patient to Vermont State Hospital and on October 17, 1985, was transferred to

the Weeks 1 ward at the Hospital. She remained on Weeks 1 until November 21, 1985, at which time she was transferred to another ward. M.L. was hospitalized because she was manic-depressive. M.L. suffered from delusions and hallucinations when she was admitted to the Hospital and had delusions while she was at the Hospital.

13. We find the Employer has failed to establish by a preponderance of the evidence that Gibbs had sexual intercourse or other inappropriate sexual contact with M.L. on October 19, 1985, or any other date, in the shower room on Weeks 1. We further find the Employer has failed to establish by a preponderance of the evidence that Gibbs fondled M.L.'s genital area on October 21, 1985, or any other date, while M.L. was in seclusion.

14. On or about October 24, 1985, Betsy Dolloff and another employee brought Patient M.R. out of the seclusion room and escorted her to the shower room so the patient could take a shower. Prior to M.R. actually entering the shower room, Gibbs asked the employees to delay putting M.R. in the shower room until he got a mop, which was just inside the shower room door, to clean the seclusion room. Gibbs got the mop and only then was M.R. escorted into the shower room. When he completed his task, Gibbs returned to the shower room but, because M.R. was still inside, deposited the mop in the outside hallway. The evidence does not indicate Gibbs was in the shower room at the same time as the female patient in this instance or in the shower room with a patient in any other instance.

15. On November 15, 1985, Stone informed Gibbs by letter she was contemplating dismissal because of the alleged incidents involving

M.L. and C.B. and gave Gibbs the opportunity to respond to the allegations in writing or orally to give him a "chance to present points of disagreement with what the employer believes the facts to be; to identify witnesses to support your defense; to draw our attention to mitigating circumstances which should be considered; and to offer any other argument which may be appropriate" (Grievant's Exhibit 8). At Gibbs' request, a meeting on these allegations was held on November 21, 1985. At the meeting, Jerry Fishbein, VSEA representative, requested Stone to conduct further investigation. In the course of that investigation, Stone became aware of Gibbs' failure to disclose the 1973 convictions on his application form. By letter of December 11, 1985 Stone informed Gibbs he had a similar right to respond to this issue as he had to the allegations involving M.L. and C.B. (Grievant's Exhibit 9). A meeting was held December 19 on this issue. Subsequently, by letter of January 6, 1986, Stone informed Gibbs the allegations concerning Gibbs being observed coming out of a shower room while patient M.R. was in there had surfaced in the investigation. Stone informed Grievant he had a similar right to respond to this issue as he had to the earlier allegations (Grievant's Exhibit 10). A meeting on that issue was held on January 13, 1986. At the meetings of November 21 and January 13, Gibbs indicated he never went into a shower room when a female patient was in there.

MAJORITY OPINION

The issues in this matter are as follows: 1) whether the Employer abused the pre-termination hearings and thus violated Gibbs' due process rights; 2) whether the Employer established the charges against Gibbs in the dismissal letter; 3) whether the Employer

violated the Contract by imposing inconsistent discipline in dismissing Gibbs for sexual abuse; and 4) whether the Employer violated its statutory duty to collectively bargain and Articles 6 and 14 of the Contract by refusing to provide information so that VSEA could make an informed decision as to whether to appeal Gibbs' dismissal to the Board.

Grievants allege the Employer abused Gibbs' due process right to a pre-termination hearing under the US Supreme Court decision, Cleveland Board of Education v. Loudermill, 105 S.Ct. 1487 (1985), given the fact there were three such hearings, none of which served the purpose for which they were designed - as a "check against mistaken decisions" - but, rather were used as substitutes for an investigative process which should have been completed before any decision to dismiss had been made.

We disagree abuse of the Loudermill hearings occurred here. Loudermill provides that employees must have specific notice of the charges against them and an opportunity to present their side of the story prior to being dismissed. The circumstances herein of an investigation uncovering additional alleged wrongdoing against Gibbs in two instances subsequent to the first Loudermill meeting, while unusual and not ideal, does not indicate subversion of the purpose of Loudermill rights. The evidence indicates the purpose of each meeting was to provide Gibbs with an opportunity to present his side of the story on the various allegations, as Loudermill provided. We find no basis in Loudermill for ruling that additional charges may not be brought against an employee subsequent to a Loudermill hearing but prior to dismissal, as Grievants essentially request.

We turn to examining whether the Employer established by a preponderance of the evidence the charges against Grievant. Clearly, the most serious charges concerned the allegations of sexual intercourse and other inappropriate sexual contact with patients C.B. and M.L. The truth of these allegations would indicate a most serious offense since sexual abuse is in direct violation of Vermont State Hospital's responsibility to provide as safe and as therapeutic an environment as possible. However, as indicated in the Findings of Fact, the Employer has failed to establish these charges by a preponderance of the evidence.

Essentially, our decision came down to a determination whether the testimony of the two patients was sufficiently credible. We have concluded that neither the testimony of C.B. nor M.L. was sufficiently credible.

We found C.B.'s testimony not to be sufficiently credible due to her inconsistent recollection of events over time, the fact she suffered from delusions and hallucinations during the period of her stay at the Hospital and because no corroborating evidence exists indicating the alleged incidents occurred. In statements made soon after the alleged occurrence of events herein, she alleged Gibbs had intercourse with her on five occasions or "about" six occasions. During that same period, she indicated four such occasions to her psychiatrist. At the hearing, she had recollection of only three such occasions. With respect to lack of corroborating evidence, we note that a State investigator who interviewed other employees was able to turn up no additional evidence linking Gibbs to the alleged offenses. C.B.'s differing accounts, together with the lack of corroborating

evidence and the fact delusions and hallucinations contributed to her stay at Vermont State Hospital, causes us to be unable to conclude by a preponderance of the evidence any instances of sexual intercourse with Gibbs occurred. M.L.'s propensity to similarly suffer from delusions and hallucinations during the period of the alleged incidents, coupled with a similar absence of corroborating evidence concerning the alleged incidents involving her, leads us to the same conclusion with respect to her allegations. An additional factor we take into consideration is that it is not unusual for patients at the Hospital to make unfounded allegations of sexual abuse. We also take into consideration Gibbs' firm denial these allegations occurred.

The Employer presented testimony of two psychiatrists to support the credibility of the patients' version of events. We note that while we find such testimony helpful in judging the patients' competency, and we conclude they were competent witnesses, the doctors' testimony was not particularly helpful in determining the reliability of the patients' versions of events.

We also conclude the Employer did not establish the remaining two charges against Gibbs. Gibbs is charged with making a false statement by denying he had ever been in a shower room with female patients, since he allegedly was observed by a co-worker leaving the shower room at a time when a female patient was in the shower room. However, we have found as a fact that Gibbs was not observed leaving a shower room when a female patient was in there. Thus, the evidence does not establish he spoke falsely when he denied ever being in a shower room at the same time as a female patient.

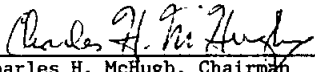
The final charge concerns Gibbs allegedly falsifying his employment application. Falsification of an employment application can constitute just cause for dismissal since an employer has a right to expect employees to be honest in their dealings with an employer. Grievance of Hurlburt, 9 VLRB 174, 190-191 (1986). Grievance of Bishop, 5 VLRB 349, 371-372 (1982). However, we have concluded Gibbs was not being dishonest when he answered "no" to a question concerning any law violations in the past few years although he had three such violations approximately three to four years previous. We believe Gibbs' testimony that he thought the violations had occurred more than five years previously when he submitted his application. While Gibbs was careless in completing the application, he was not dishonestly concealing the truth. Under the circumstances, the charge for falsification cannot be sustained and his inconsistent response does not constitute an independent basis justifying disciplinary action against him.

We further comment on what seems to be a disturbing trend in recent dismissal cases of the State "tacking on" application falsification charges to dismissal letters as a secondary basis for dismissal. This appears to be more of an effort to justify a dismissal for any reason than a legitimate concern about falsification.

In sum, we conclude none of the charges against Gibbs have been sustained by a preponderance of the evidence. Thus, he should be reinstated with full back pay.

Given our conclusion, we need not address whether the Employer imposed inconsistent discipline on Gibbs. It is also unnecessary to

address whether the Employer violated the Contract and the law by refusing to provide information to VSEA to assist it in deciding whether to appeal Gibbs' dismissal to the Board. We fail to see what further remedy we could grant at this time if we found such violation since during the course of the proceedings before the Board, the information VSEA requested was provided by the Employer pursuant to order of the Board or agreement of the Employer. If VSEA sought the information prior to appealing Gibbs' dismissal to the Board, the appropriate time to request Board action on that issue was prior to appealing the dismissal.


Charles H. McHugh, Chairman


William G. Kemsley, Sr.

DISSENTING OPINION

I strongly dissent from the majority opinion that the Employer has failed to establish by a preponderance of the evidence the sexual abuse allegations against Gibbs.

Unlike my colleagues, I find the testimony of C.B. and M.L. convincing. While C.B. may have given differing accounts over time as to the number of occasions Gibbs had sexual intercourse with her, it was evident that when testifying before the Board she was careful to speak only of the three occasions she clearly remembered. Given the passage of approximately a year between the incidents and her testimony before the Board, her failure to remember the exact number of incidents was understandable. Indeed, C.B.'s and M.L.'s version of

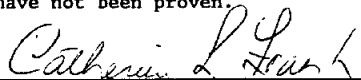
the substance of the incidents was, on the whole, consistent over time.

The fact C.B. and M.L. suffered from delusions and hallucinations due to their mental illness does not mean their testimony on sexual incidents with Gibbs should not be believed. First, the evidence indicates that during the probable period C.B. and Gibbs had intercourse, C.B.'s condition was much improved and she was in remission of episodes of delusion or hallucinations. Similarly, on the dates of the incidents between M.L. and Gibbs, no evidence exists of M.L. suffering from delusions. Second, the testimony of the two psychiatrists that their discussions with M.L. and C.B. on the incidents had led them to the conclusion the allegations were not the product of delusions and hallucinations constitutes persuasive expert testimony. They testified that both C.B. and M.L. were in a stable mental state when they made their allegations against Gibbs and when they testified before this Board. Further, Dr. Modell testified that delusions, if not based in reality, do not tend to persist after a person regains a state of mental stability. I find it hard to believe, therefore, that the sexual encounters described by M.L. and C.B. were the product of delusion. Third, the substantial consistency of M.L.'s and C.B.'s version of the substance of events over time and their demeanor on the witness stand convincingly contributes to the conclusion the incidents actually occurred. Finally, the fact two female patients, who did not know each other and were not initially aware of each other's allegations, made similar sexual abuse allegations against the same employee lends credence to the conclusion the incidents did happen. Not only did the described

sexual encounters of C.B. and M.L. occur in the same general time frame, but with the same employee, Gibbs, and in the same place, the shower room.

The majority's reliance on there being no corroborating evidence outside of the testimony of two patients is not only not persuasive, it is unreasonable. The incidents which occurred here are of the type which typically would have no witnesses or corroborating evidence. To require the Employer to present corroborating evidence to support a sexual abuse dismissal places an unfair burden on the Employer and makes it unjustifiably difficult to protect Vermont State Hospital patients from sexual abuse.

In sum, I conclude the sexual abuse charges against Gibbs concerning patients M.L. and C.B., have been established and constitute gross misconduct warranting dismissal. I agree with the majority the remaining two charges have not been proven.


Catherine L. Frank

ORDER

Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED the Grievance of Andrew Gibbs and the Vermont State Employees' Association is SUSTAINED; and

1. Gibbs shall be reinstated to his position as Ward Aide at the Vermont State Hospital; and

2. Gibbs shall be awarded back pay and benefits from the effective date of his discharge until his reinstatement for all hours of his regularly-assigned shift, minus any income (including unemployment compensation received and not paid back) received by Gibbs in the interim; and

3. The interest due Gibbs on back pay shall be at the legal rate of interest per annum and shall run from the date

each paycheck was due during the period commencing with Gibbs' dismissal, and ending on the date of his reinstatement; such interest for each paycheck date shall be computed from the amount of each paycheck minus unemployment compensation received by Gibbs during the payroll period; and

4. The parties shall submit to the Board by February 2, 1987, a proposed order indicating the specific amount of back pay and other benefits due Gibbs; and if they are unable to agree on such proposed order, shall notify the Board in writing that date of specific facts agreed to by the parties, specific areas of factual disagreement and a statement of issues which need to be decided by the Board. A hearing on those issues shall be held on February 5, 1987, at 9:00 a.m. in the Labor Relations Board hearing room.

Dated this 21st day of January, 1987, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD



Charles H. McHugh, Acting Chairman



William G. Kemsley, Sr.