

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)
) DOCKET NO. 87-19
TINA GRAHAM)

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On March 6, 1987, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Tina Graham ("Grievant"). The grievance alleged that the State of Vermont, Department of Motor Vehicles ("Employer") violated the sick leave and performance evaluation articles of the collective bargaining contracts between the State and VSEA for the Non-Management Unit, effective for the period July 1, 1984 to June 30, 1986, and July 1, 1986 to June 30, 1988 (hereinafter collectively referred to as "Contracts") by giving Grievant an adverse annual performance evaluation in that adverse ratings and comments on the evaluation were attributed to Grievant's authorized use of sick leave.

A hearing was held on December 17, 1987, before Board Members Louis A. Toepfer, Acting Chairman; William G. Kemsley, Sr. and Catherine L. Frank. Michael Zimmerman, VSEA Staff Attorney, represented Grievant. Michael Seibert, Assistant Attorney General, represented the Employer. Grievant filed Requested Findings of Fact and a Memorandum of Law on January 4, 1988. The Employer filed a Memorandum of Law on January 6, 1988.

FINDINGS OF FACT

1. Grievant has been a State employee since April of 1977. For the relevant period herein, Grievant was employed as a classified employee in the position of Motor Vehicle Rater B, Pay Grade 11, in the Department of Motor Vehicles (Grievant's Exhibit 1).

2. As a Motor Vehicle Rater B, Grievant processes vehicle registrations, license renewals, license plate requests and the like. Grievant works the night shift. In Grievant's unit, four employees (including Grievant) work the night shift, while nine employees work the day shift. The small size of the night staff and the nature of Grievant's work means that, if an employee is absent, an added work burden is placed on members of the night unit and the employees on the following day shift. The overall productivity of the unit is adversely affected by frequent absences.

3. At all times relevant, the Contracts provided in pertinent part as follows:

PERFORMANCE EVALUATION

1. Annual performance evaluations shall normally take place near the anniversary date of completion of original probation...

2. The determination of performance evaluation standards and criteria is understood to be the exclusive prerogative of management...

... 4. ...During the rating year, the immediate supervisor shall call the employee's attention to work deficiencies which may adversely affect a rating, and, where appropriate, to possible areas of improvement.

... 6. A "3", "4" or "5" overall performance evaluation ("consistently meets job requirements/standards", "frequently exceeds job requirements/standards", "consistently and substantially exceeds job requirements/standards") shall be grievable up to, but not beyond, Step III of the grievance procedure, provided, however, that adverse comments and any subfactor ratings of less than "3" on any evaluation are

fully grievable. The Vermont Labor Relations Board shall not have the authority to change any numerical rating, but may remand the rating to the employer for reconsideration consistent with the VLRB ruling on the merits.

DISCIPLINARY ACTION

A.

1. No permanent... status employee covered by this agreement shall be disciplined without just cause... Accordingly, the State will:

... c. impose a procedure of... progressive corrective action in increasing order of severity;

... e. In performance cases, the order of progressive corrective action shall be as follows:

i. oral notice of performance deficiency;

ii. written performance evaluation, special or annual, with a prescriptive period for remediation specified therein, normally three to six months.

iii. warning period of thirty (30) days to six (6) months, extendable for a period of up to six months. Placement on warning status may take place during the prescriptive period if performance has not improved since the evaluation;

iv. dismissal.

SICK LEAVE

1. Purpose

To establish the State's policies and practices which provide for a classified employee to be absent from duty with pay in the event of illness or injury.

2. Policy

It is the policy of the State to help protect the income of a classified employee when he cannot work due to illness or injury or for emergency periods when he must be absent from duty due to death or illness in his immediate family. Sick leave shall be administered in accordance with the following provisions.

a. Accrual

i. A classified employee shall receive sick leave benefits as follows:

... dd. An employee with five or more but fewer than 10 years of service shall accrue sick leave at the rate of one and one-quarter workdays per month.

... viii. Sick leave benefits may not be used by an employee prior to being credited to his account.

... b. Use of Sick Leave

i. The use of earned sick leave credits shall be authorized by an appointing authority or his delegated representative for an employee who is absent from work and unable to perform his duties because of illness, injury or quarantine for contagious disease...

... v. Unless physically unable to do so, an employee shall notify his/her supervisor... no later than one hour prior to the beginning of the scheduled work day, of his/her inability to report to work and the nature of the illness.

vi. An appointing authority... may require, when there is sufficient reason, the submission of a certificate from a physician or other evidence to... justify the approval of sick leave...

... vii. An employee who misrepresents his claim for sick leave may be subject to disciplinary action up to and including dismissal.

4. Responsibilities

a. The employee shall:

i. Give his supervisor advance notice of absence due to illness if he has advance knowledge of required treatment.

ii. In other instances, notify his supervisor no less than the first hour of the beginning of the scheduled workday, if possible, of his inability to report to work, and the nature of his illness.

... iv. Obtain a doctor's certificate if requested by the supervisor.

b. The appointing authority, or his delegated representative, shall:

... iii. Ensure that sick leave is not misused, and if necessary require submission of evidence as to necessity for sick leave.

(Grievant's Exhibits 2 and 3)

4. By virtue of her years of service, Grievant, during the relevant period herein, accrued one and one-quarter days of sick leave each month.

5. The performance evaluation at issue herein covered the rating period October 23, 1985 to October 23, 1986.

6. During the rating period, Grievant's supervisor imposed the following requirements on Grievant: 1) Grievant was required to produce a doctor's statement to support each absence due to claimed illness; 2) Grievant was not allowed to substitute accrued annual leave or compensatory time for sick leave; 3) Grievant was not allowed to use leave before it was accrued; 4) Grievant was not permitted to go off-payroll due to absences; and 5) Grievant was required to give two week's notice when requesting annual leave.

7. Between October 23, 1985 and January 12, 1986, Grievant was in an extended warning period, which had previously been imposed by reason of her absenteeism. Grievant successfully completed the warning period on January 12, 1986, and her performance was rated satisfactory.

8. For the rating period, Grievant was absent from work on authorized sick leave as follows:

November, 1985	3 hours
December, 1985	1 day
January, 1986	3 days
February, 1986	1 day
March, 1986	2 days
April, 1986	1 day, 3 1/2 hours
May, 1986	2 days
June, 1986	1 day, 2 hours
July, 1986	1 day
August, 1986	1 day, 2 1/4 hours
September, 1986	1 day, 2 hours
October 1-23, 1986	1 day

(Grievant's Exhibit 5, page 3)

9. All of the above absences charged to sick leave were supported by doctor's statements and Grievant's supervisor approved the charging of the absences to Grievant's bank of sick leave.

10. During the rating period, Grievant had an unauthorized absence on February 7, 1986. On that day, Grievant called her supervisor to report that she was ill. Her supervisor informed Grievant that she lacked sufficient accrued sick leave to cover the absence for the entire shift, and, therefore, ordered Grievant to come to work. Grievant did not work that day, and, as a result, was placed in an off-payroll (i.e., unpaid) status for six and three-fourths hours (apparently because she had one and one-fourth hours of sick leave to cover part of her absence), and was suspended without pay for three days (i.e., February 10 through 12) due to her absence on February 7 (Grievant's Exhibit 4).

11. On May 22, 1986, Christine Hall, Night Operations Supervisor, sent a memorandum to Grievant which cited her absences since the beginning of the year and contained the following comments:

You have received many memos in the past reiterating your seemingly excessive use of leave and its effect on your job performance and on the overall productivity of the unit.

I realize that you are working two jobs and I feel that this has an effect on your attendance. With summer vacations coming up and the workloads continuing to be as heavy as they are, I would hope that you would sincerely put more effort towards being here.

You have put in numerous requests for annual leave during the next few months which have not been approved yet. Whether or not they are approved will depend mainly on the workload, but the fact that you continually use leave almost

as fast as it's accrued certainly will have some bearing on my decision.

Also, as you have been informed, you will not be authorized to go off-payroll nor are you allowed to substitute annual leave for sick, so if you do get yourself in a situation where you need more sick leave than you have on the books, your job may be in jeopardy.

Please bear all of this in mind the next time you request time off.

(Grievant's Exhibit 4, pages 4-5)

12. On June 19, 1986, Hall sent Grievant a memorandum which provided:

My last memo reiterated your use of leave since January 1, 1986, and mentioned that as of that date you had only .03 sick leave.

Since then you accrued 10 hours of sick leave and have used up the 10 hours in the last two nights because of a problem you are having with your back.

I am writing you this memo to remind you that I will not authorize you to go off-payroll nor will you be allowed to substitute annual leave for sick. I realize that this may put you in a difficult situation, but I feel that it is mainly one of your own making.

During this end of fiscal year, it is very important that we can depend on our employees to be here doing their jobs. You are a viable and productive member of the night operations unit and without you, our overall productivity is reduced.

(Grievant's Exhibit 4, page 6)

13. On September 23, 1986, Hall sent Grievant a memorandum which cited her absences since June 19 and contained the following comments:

You are continuing to use your sick leave as fast as you accrue it. In fact, your use of two hours sick leave on 9/16 left you with none. You did accrue one and one-quarter days on the paycheck issued you on 9/18 so at present you have that amount to your credit.

I feel that I must warn you that you are walking a tightrope and sooner or later you're going to fall off. For your own sake and for the sake of the Department, you cannot continue to use your sick leave up as you have been doing.

I must remind you again that you will not be allowed to use leave before it shows on your paycheck. You will not be allowed to substitute annual leave or compensatory time for sick leave. I will not authorize you to go off-payroll. You must give at least two week's notice when applying for annual leave or compensatory time unless its an emergency situation which is agreed to by both parties. You must provide a doctor's certificate each and every time you are absent using sick leave.

If your use of leave doesn't improve, it may be necessary to again place you in a warning period.

As I have told you before, you are a viable and productive member of this unit and your absence negatively affects the overall effectiveness of the mail rating unit.

(Grievant's Exhibit 4, pages 9-10)

14. Grievant's absences while on authorized sick leave during the rating period adversely affected the productivity of her work unit and caused delay in the processing of documents produced by the unit.

15. On October 29, 1986, Grievant was given a performance evaluation covering the period October 23, 1985 to October 23, 1986. On the evaluation, Grievant was given an overall rating of "2" ("inconsistently meets job requirements/standards"). Grievant received a "2" rating in the individual factors of "Quantity of Work", "Attitude, Interest and Initiative", and "Personal Relationships". She was given a "1" rating ("unsatisfactory") in the subfactor "Absenteeism & Tardiness". In all other factors, Grievant received a rating of "3" ("Consistently meets job requirements/standards"). The evaluation contained the following pertinent comments:

A. Under the heading "Strengths", Hall made the following comment:

Tina is very helpful to others, especially temporary employees. With her job knowledge and ability, she could be a definite asset to the Department if she could only overcome her absenteeism.

B. Under the heading "Areas for Improvement", Hall made the following comment:

Tina must work on overcoming her absenteeism problem.

C. In the comments section supporting the numerical rating for the factor "Quantity of Work", Grievant's supervisor wrote:

When present, Tina's productivity is acceptable. However, workload to be accomplished is greatly affected by her absenteeism".

D. In the comments supporting the numerical rating for the factor "Absenteeism and Tardiness", Hall summarized the number of days during the rating period for which Grievant had been absent, both on authorized leave (i.e., sick and annual leave) and the February 1986 off-payroll and suspension periods.

E. In support of the numerical rating in "Attitude, Interest and Initiative", Hall made the following comment:

In my opinion, the only time Tina has demonstrated any effort toward self-improvement was during her warning period.

F. In support of the numerical rating in "Personal Relationships", Hall made the following comment:

I cannot consider Tina a good team member when her continued absences negatively affect the productivity of the team.

G. Finally, under the heading "Summary Comments", Hall wrote the following:

Tina continues to have a very serious problem with her absenteeism. This continues to have a definite negative effect on her overall job performance. In addition, the productivity of the unit suffers as well. Although she successfully passed her warning period earlier this year, she continues to use her leave as soon as she acquires it.

An example of her behavior in this area is demonstrated in the memo of February 10 where she was given a three-day suspension effective that day for failure to report to work on February 7, 1986. Other memos in her personnel file also reiterate her use of leave and its effect on her and the unit's productivity.

(Grievant's Exhibit 5)

16. The individual rating factors on performance evaluations for clerical employees such as Grievant contain standards to consider in assessing performance. The individual factors at issue herein provided as follows:

QUANTITY OF WORK - Consider workload to be accomplished, time lost in non-productive activity, consistency of output, amount of satisfactory work completed within given time period.

WORK HABITS

a) Absenteeism & Tardiness - is dependable. Shows up for work regularly. Shows up for work on time. Does not leave work early. Does not abuse leave benefits. Absences are legitimate and infrequent.

b) Diligence - Keeps busy. Assists others when own work is done. Does not distract or interrupt co-workers unnecessarily.

c) Care and Use of Supplies and Equipment - Keeps equipment clean and in good operating order, maintains neat and well-organized area.

ATTITUDE, INTEREST AND INITIATIVE - Consider efforts toward self-improvement, resourcefulness in seeking out improved methods or procedures, effect of statements and actions upon public and other employees.

PERSONAL RELATIONSHIPS - Consider ability to work as a member of a group or team, to cooperate, to maintain harmonious work relationships, to deal tactfully with the public.

17. Simultaneously with receipt of the performance evaluation, Grievant received a memorandum from Hall which provided in pertinent part as follows:

Due to your overall rating of "2" on your yearly performance evaluation, I am placing you in a warning period from November 3, 1986, through May 3, 1987.

During this period, you will receive bi-weekly reports on your progress. As you are aware, your excessive use of leave has a detrimental affect upon your performance and upon the effectiveness of the unit as a whole. You have had many opportunities to improve your attendance record to no avail. Further abuses of your leave privileges or failure to submit the required doctor's certificate will result in disciplinary action up to and including dismissal.

(Grievant's Exhibit 6)

18. Grievant grieved the evaluation and the warning period. At Step II of the grievance procedure, the hearing officer granted Grievant partial relief: the "1" rating in the subfactor "Absenteeism & Tardiness" was raised to a "2"; and the warning period was changed to a period of remediation (Grievant's Exhibit 9).

MAJORITY OPINION

At issue herein is whether Grievant's authorized use of sick leave during the performance rating period can provide a legitimate basis for an adverse performance evaluation and an accompanying period of remediation.

We conclude that Grievant's authorized use of sick leave cannot provide a legitimate basis for such adverse actions. Employees have a contractual right to use accrued sick leave if they are ill. It is inappropriate for management to penalize an employee in any way for exercising a contractually protected right. An adverse performance evaluation based on authorized use of sick leave certainly penalizes an employee since, under the disciplinary article of the Contract, it is a step in progressive corrective action which may lead to an employee's dismissal. Such action would have the result of at least chilling employees' exercise of these contractual rights. We conclude that Grievant's authorized use of sick leave cannot provide a legitimate basis for such adverse actions.

We recognize that some employees may take sick leave when they

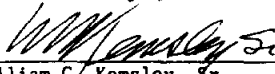
are not genuinely ill. However, management has the responsibility under the Contracts to ensure that sick leave is not misused and allows management to require the employee to submit a doctor's certificate or other evidence by which management can confirm the claimed illness. Here, management required Grievant to submit doctor's certificates and all of Grievant's authorized sick leave during the rating period were supported by the required doctor's certificates. Once having obtained the required doctor's statements supporting Grievant's claims of illness and having approved Grievant's use of sick leave, management acted inappropriately in using these approved absences as a basis for an adverse rating or the accompanying period of remediation. We cannot agree with the dissenting opinion that abiding by the letter of the Contracts should result in a penalty which will become a detrimental part of Grievant's work record.

In justifying the adverse performance evaluation, the Employer places much emphasis on the fact that Grievant's absences adversely affect the productivity of Grievant's work unit. Obviously, productivity is a legitimate management concern. Yet, management has negotiated an employee right to a certain monthly sick leave accrual based on years of service. If management believes the rate of accrual is high enough to adversely affect certain work groups' productivity, then that should be addressed in contract negotiations. In the meantime, management must live with its bargain. We see no logical alternative.

Pursuant to the Performance Evaluation article of the Contracts, we remand the adverse performance evaluation and accompanying period of remediation to the Employer for reconsideration absent reliance on

authorized use of sick leave as a basis for any adverse action.


Louis A. Toepfer, Acting Chairman


William G. Kemsley, Jr.

DISSENTING OPINION

I agree with my colleagues' view that authorized use of sick leave cannot normally provide a legitimate basis for an adverse performance evaluation. However, I believe that there are circumstances where extensive and continual use of sick leave can be a legitimate basis for an adverse performance evaluation notwithstanding the terms of the current contract.

In this case, the pattern and frequency of Grievant's absences over a period of a year adversely affected Grievant's productivity and that of her unit, causing delays in the processing of documents by the unit. This fact is true regardless of the reasons for Grievant's absences, and it is a legitimate concern of management for which there should be an avenue of redress.

While the Contract allows each employee who has worked five or more, but fewer than ten, years to accrue sick leave of one and one-quarter days per month, it does not logically follow that management should be content with employees who use maximum sick leave each year. It would be unreasonable for management to set job performance standards based on the maximum possible absentee rate by each employee. While it is assumed that each employee will take the maximum vacation leave allowed each year, this is not the case with sick leave. There is an implied understanding that from time to time each employee will need to use the maximum amount of sick leave, but that this is not the normal pattern from year to year. If an employee

has developed a recurring medical problem or physical handicap that prevents him/her from working one and one-quarter days each month for an extended period of time and there has been no discussion with management as to the nature of this problem, its duration or possible solutions, then management needs to take this into account when evaluating the employee's ability to continue to do the job he/she was hired to do. It is appropriate that management have an avenue to address such a problem. The performance evaluation process provides such an avenue.

In accurately attempting to assess an employee's performance, supervisors are directed by the performance evaluation form to consider standards such as: "is dependable", "amount of satisfactory work completed during a given time period", "shows up for work regularly", "absences are... infrequent", and "ability to work as a member of a group or team". In considering these standards in relation to an employee's performance during the rating period and his/her effect on productivity, the Employer appropriately may look to prolonged maximum use of sick leave as well as other absences as a basis for concluding that an employee "inconsistently meets job requirements/standards" in various individual rating factors and on an overall basis.

Certainly, each individual case is different and a reasonable period of time must be allowed to accomodate each employee's problem before corrective measures can be undertaken. Due to the length and pattern of use of sick leave in this case, and Grievant's failure to communicate with management as to the cause or possible resolution of the problem, I feel the comments on her performance evaluation are appropriate.

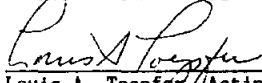
ORDER

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


The Grievance of Tina Graham is GRANTED and the performance evaluation provided Grievant covering the period October 23, 1985, to October 23, 1986, and accompanying placement in a period of remediation, is remanded to the Employer for reconsideration absent reliance on authorized use of sick leave as a basis for any adverse action.

Dated this 5th day of February, 1988, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD



Louis A. Toepfer, Acting Chairman



William G. Kemsley, Sr.