

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:

JOHN GORRUSO

)
)
)

DOCKET NO. 88-31

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On July 1, 1988, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of John Gorruso ("Grievant"), a correctional officer at Rutland Community Correctional Center. Grievant was dismissed in 1985, reinstated in 1986 pending appeal of a Vermont Labor Relations Board decision concluding that there was no just cause for Grievant's 1985 dismissal, and then dismissed on June 2, 1988, following a Vermont Supreme Court decision reinstating Grievant's 1985 dismissal. The grievance alleges that his June 2, 1988, dismissal violated Article 16 of the collective bargaining agreement between the State of Vermont and VSEA for the Corrections Unit, effective for the period July 1, 1986, to June 30, 1988 ("Contract") in that there was no just cause arising during his reinstatement for the dismissal, and that the Employer had waived the right to reinstate the 1985 dismissal.

A hearing was held on September 1, 1988, before Board Members Charles McHugh, Chairman; William Kemsley, Sr. and Louis Toepfer. Michael Seibert, Assistant Attorney General, represented the Employer. Michael Zimmerman, VSEA Staff Attorney, represented Grievant. Grievant filed Requested Findings of Fact and Memorandum of Law on September 8, 1988. The Employer filed a Memorandum of Law on September 8, 1988. Grievant died on November 29, 1988.

FINDINGS OF FACT

1. Under the State Employees Labor Relations Act ("SELRA"), the term "State employee" is defined as "any individual employed on a permanent or limited status basis..." SELRA also excludes a number of categories of individuals from the definition of "State employee", including those "(e)xempt or excluded from the state classified service under" 3 VSA §311. Only employees who are State employees within the meaning of SELRA are eligible to collectively bargain. 3 VSA §902 (Grievant's Exhibit 1, pages 3, 4).

2. Under 3 VSA §311, "all positions and categories of employment by the State" are included in the classified service, except those excluded by statute. Among those excluded by that section are "(p)ersons employed in a temporary capacity with the approval of the governor for a period not to exceed 190 workdays in any one calendar year". (Grievant's Exhibit 1, pages 1, 2).

3. 3 VSA §312 provides, in pertinent part, as follows:

a) The term "merit system" means the system developed to maintain an efficient career service in state government under public rules, which, among other provisions, includes... tenure, contingent on successful performance...

b) Retaining employees on the basis of the adequacy of their performance... and separating employees whose inadequate performance cannot be corrected...

4. Agency of Administration Bulletin 4.10, whose subject is "(c)ategories of (e)mployment", has as its purpose to "define the various categories of employment in the Executive Branch of state government, and to establish the employment policies and procedures applicable to each". It makes the following pertinent policy statements:

It is the policy of the State that each person hired by the State of Vermont shall be engaged in the appropriate category as defined herein and his/her employment shall be in accordance with the policies relating to that particular category.

All employment with the executive branch of state government is either classified or exempt; further broken down by statute or regulation into specific categories of employment. All positions are classified unless exempted by statute. The classified category includes permanent and limited service positions (Grievant's Exhibit 4).

5. At all times relevant, the 1984-86 Contract and the 1986-88 Contract for the Corrections Unit contained the following pertinent provisions:

DEFINITIONS

EMPLOYEE - Any individual employed by the State on a permanent or limited status basis...

LIMITED STATUS - That condition which applies to an employee who has completed an original probationary period and is occupying a limited service classified position. An employee with limited status is entitled to all the rights and privileges of a permanent status employee except reduction in force and reemployment.

LIMITED SERVICE POSITION - A time-limited position which is authorized for a period of three or fewer years.

PERMANENT STATUS - That condition which applies to an employee who has completed an original probationary period and is occupying a permanent classified position. Rights and privileges of permanent status include, but are not limited to, reduction in force, reemployment, appeal and consideration for promotion, transfer and restoration.

PROVISIONAL STATUS - That condition which applies to an employee who has not satisfied the examination and/or certification requirements for the classified position occupied.

DISCIPLINARY ACTION

1. No permanent or limited status employee covered by this agreement shall be disciplined without just cause...

2. The appointing authority... may dismiss an employee for just cause.

6. From September 1980 to January 29, 1985, Grievant was continuously employed by the Vermont Department of Corrections. During that period, Grievant's workplace was the Rutland Correctional Center, and he occupied the permanent position of Correctional Officer B. On January 29, 1985, Grievant was dismissed from his employment.

7. Following his 1985 dismissal from employment, Grievant filed a grievance with the Vermont Labor Relations Board wherein he challenged his dismissal, and sought reinstatement to his position. Grievant was represented by private counsel in that matter.

8. By decision dated January 23, 1986, as amended by decision of June 23, 1986, the Board held that Grievant's dismissal was without just cause, reduced his dismissal to a 30-day suspension, and ordered that he be reinstated to his position with backpay and other benefits. 9 VLRB 14, 9 VLRB 135. The State appealed that decision to the Vermont Supreme Court.

9. By letter dated June 4, 1986, signed by the Acting Commissioner of Corrections, Joseph Patrissi, Grievant was informed of his reinstatement by the State. That letter provided, in pertinent part, as follows:

This is to notify you that, in compliance with the Labor Board order relating to your grievance, the Department hereby reinstates you as a Correctional Officer B. Your duty station will be the Rutland Correctional Center and your first day of work will be Sunday, June 15, 1986...

As you know, the State has appealed the Labor Board decision on your grievance to the Vermont Supreme Court. Should the Court reverse the Board and affirm the State's original decision to dismiss you, you should be advised that the Department reserves the right to reimpose the original dismissal decision at that time. Since the back pay award will be disputed on appeal, the State does not believe it is appropriate at this time to pay that award to you.

As you also know, the Board found that your actions toward Terri Forte amounted to sexual harassment. Upon your reinstatement, the Department will provide you with training to ensure that you are aware of our expectations regarding appropriate behavior, including behavior toward Department employees of the opposite sex. You are advised that any recurrence of sexual harassment or other inappropriate behavior toward Department staff could result in discipline, up to and including your immediate dismissal. If at any time you are unsure what actions would be viewed as inappropriate, please consult with your supervisor. Mr. Wright will meet with you after your return to work to begin any necessary training related to appropriate relationships between you and other Department employees.

The Department will work to insure that the differences we have regarding the Labor Board's decision will not interfere with our ability to work with you. We expect you to do the same. However, since the Labor Board found you guilty of sexual harassment, which is a very serious form of misconduct, you should realize that, in a very real sense, you need to work hard to again prove your suitability for employment with the Department (Grievant's Exhibit 6).

10. In accepting reinstatement, Grievant understood that the Employer was reserving the right to dismiss him if the Supreme Court affirmed the Employer's dismissal decision. Nothing which happened subsequently lead him to believe that the Employer had waived the reserving of the right to reinstate his original dismissal.

11. Following his reinstatement, Grievant was paid at the same hourly rate he was paid prior to his dismissal. Grievant, was not required to serve a probationary period. In July of 1986, Grievant began paying dues to VSEA, the bargaining agent for classified employees, and was allowed to obtain coverage under the State Employee Medical Benefit Plan, and the Dental Plan (Grievant's Exhibit 7, pages 2, 3; Grievant's Exhibit 8, pages 1, 4-7).

12. Following Grievant's reinstatement, all personnel actions involving Grievant indicated that Grievant was a permanent classified employee (Grievant's Exhibit 7, pages 4-6).

13. Following his reinstatement, Grievant was not given credit for prior years of service in determining rate of accrual for sick and annual leaves. He accrued sick and annual leave benefits at the rate of one day per month (the rate established under the Contract for employees with under five years of service), rather than at the rate of one and one-quarter days per month (the rate established under the Contract for employees with from five to 10 years of service)(Grievant's Exhibit 8, pages 2, 3).

14. On May 27, 1988, the Vermont Supreme Court reversed the decision of the Labor Relations Board concerning the dismissal of Grievant in 1985. The Supreme Court Entry Order provided:

Reversed; the order of the Vermont Labor Relations Board is vacated, and the dismissal is reinstated.

15. On June 2, 1988, Michael O'Malley, Superintendent of the Rutland Community Correctional Center, informed Grievant by letter of his immediate dismissal. The letter provided in pertinent part as follows:

...It is my decision to effectuate the May 27, 1988 Vermont Supreme Court decision to reinstate your dismissal of January 1985.

...This decision is consistent with the right the Department of Corrections reserved when it reinstated you, pending the Supreme Court decision (Grievant's Exhibit 13, page 3).

16. The State did not dismiss Grievant based on any conduct of Grievant during the period of his reinstatement.

MAJORITY OPINION

Grievant contends that he was a permanent status employee during the period beginning with his rehire in June, 1986; that the Employer lacked the authority to change the conditions of his employment in that status; and that, accordingly, the Employer's attempt to reserve the right to "reinstate" his dismissal in the event of a favorable Supreme Court ruling on the appeal of his original dismissal was void.

The Employer contends that, at the time Grievant was reinstated in June, 1986, the Employer clearly reserved its right to reimpose Grievant's dismissal in the event of a favorable Supreme Court ruling, and that Grievant fully understood this. Thus, the Employer contends that it did not waive the right to reinstate his original dismissal and simply acted consistent with that reserved right when the Supreme Court upheld the original dismissal of Grievant. Moreover, the Employer contends this grievance is untimely because the actions which gave rise to the grievance took place on or shortly after Grievant's reinstatement, more than two years before the grievance was filed.

We first address the timeliness argument raised by the Employer. We conclude the operative date for the filing of the grievance is the action from which the employee is grieving, in this case Grievant's dismissal on June 2, 1988. Prior to that date, there was no reason for Grievant to file a grievance with respect to his tenure of employment since he was employed. In any dismissal case, the burden is on management to demonstrate by a preponderance of the evidence that just cause exists for dismissal. In re Grievance of Muzzy, 141 Vt. 463, 472-473 (1982). If events occurring two years prior to a dismissal affect the subsequent dismissal, they may be considered in

the analysis determining whether just cause existed for dismissal. However, there is no obligation on an employee to grieve actions which may weaken or support a subsequent dismissal which may never happen.

We turn to the merits of this case. Under the circumstances, we conclude that the Employer acted without just cause in dismissing Grievant on June 2, 1988. In so concluding, we recognize that the Employer had the absolute right to reinstate Grievant, pending appeal of the Labor Relations Board decision reversing Grievant's 1986 dismissal, conditioned upon a notice to Grievant that he would be dismissed if the Supreme Court reinstated the 1986 dismissal.

However, if the Employer conditioned reinstatement any further than simply informing Grievant he would be dismissed if the Supreme Court upheld the original dismissal, the Employer did so at its own peril. Here, the Employer did condition reinstatement further by indicating in the June 4, 1986, letter informing Grievant of his reinstatement that the Employer "reserved the right to reimpose the original dismissal decision" should the Court affirm the Employer's original dismissal and further stated "you need to work hard to again prove your suitability for employment with the Department". This wording implies that dismissal would not be automatic given a Supreme Court decision favorable to the Employer, and that a further judgment would be made as to whether Grievant should be dismissed. Given these conditions that were placed on Grievant's reinstatement, the Employer was required to demonstrate that some aspects of Grievant's conduct during his reinstatement resulted in just cause for his dismissal. Given the undisputed evidence that the Employer did not dismiss

Grievant on June 2, 1988 based on any conduct of Grievant during the period of his reinstatement, the dismissal was without just cause.

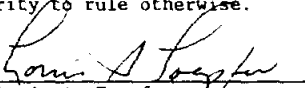
We recognize that the Supreme Court by its May 27, 1988 decision "reinstated" the 1986 dismissal. The effect of the Supreme Court decision taken together with our views herein are that Grievant is entitled to no back pay and other benefits during the period from the date of his original dismissal (i.e. January 29, 1985) to the date of his reinstatement pending appeal (i.e. June 15, 1986). Grievant is entitled to back pay and other benefits from his June 2, 1988 dismissal to his death on November 29, 1988.


Charles H. McHugh, Chairman


William G. Kemsley, Sr.

DISSENTING OPINION

I believe the Majority Opinion is wrong. The June 2, 1988, dismissal of Grievant was consistent with a successful appeal of the Board's original order reinstating Grievant. The Employer appealed to the Supreme Court the Board's determination that just cause did not exist for the 1985 dismissal, at all times reserving the right to reinstate the dismissal if the Supreme Court determined just cause existed. The Supreme Court decided that there was just cause for this dismissal. The Employer is entitled to act upon that decision and the Board has no authority to rule otherwise.


Louis A. Toepfer

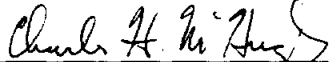
ORDER

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

1. The Grievance of John Gorruso is SUSTAINED;
2. Grievant's estate shall be awarded backpay and benefits from the date commencing with his discharge on June 2, 1988, until his death on November 29, 1988, minus any income (including unemployment compensation received and not paid back) received by Grievant in the interim;
3. The interest due Grievant's estate on back pay shall be at the rate of 12 percent per annum and shall run from the date each paycheck was due during the period commencing after Grievant's dismissal, and ending on the date of his death; such interest for each paycheck date shall be computed from the amount of each paycheck minus unemployment compensation received by Grievant during the payroll period; and
4. The parties shall submit to the Board by February 1, 1989, a proposed order indicating the specific amount of backpay and other benefits due Grievant's estate; 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.

Dated this 18th day of January, 1989, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Charles H. McHugh, Chairman


William G. Kemsley, Sr.