VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 90-43
FRANCES ANN TAYLOR	)	

FINDINGS OF FACT, OPINION, AND ORDER

Statement of Case

On July 13, 1990, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Frances Ann Taylor ("Grievant") with the Vermont Labor Relations Board, alleging that the State of Vermont, Department of Environmental Conservation ("Employer") violated the management rights and non-discrimination articles of the collective bargaining agreements between the State and VSEA for the Non-Management Unit, effective for the period July 1, 1988 to June 30, 1990, and from July 1, 1990 to June 30, 1992 ("Contract"), by purportedly dismissing Grievant, in that a) she was never advised, in writing or otherwise, of her right to grieve her dismissal, and/or (b) she was threatened with adverse consequences if she sought VSEA assistance. In addition, Grievant alleged that her purported dismissal violated the disciplinary article of the Contract in that (a) the person who dismissed her was not the appointing authority, (b) there was no just cause therefore, and (c) no dismissal letter was ever written.

A hearing was held before Board members Chairman Charles McHugh, Catherine Frank, and Louis Toepfer, on November 29, 1990. Michael Seibert, Assistant Attorney General, represented the Employer. Michael Zimmerman, VSEA Staff Attorney, represented Grievant.

Grievant filed a Memorandum of Law on December 13, 1990. The Employer filed Proposed Findings of Fact and an accompanying Memorandum of Law on December 13, 1990.

FINDINGS OF FACT

1. The Contract provided, in pertinent part, as follows:

> NO DISCRIMINATION OR HARASSMENT
>
> SECTION 1. NO DISCRIMINATION, INTIMIDATION OR HARASSMENT
>
> In order to achieve work relationships among employees, supervisors and managers at every level which are free of any form of discrimination, neither party shall discriminate against, intimidate, nor harass any employee because of race, color, religion, creed, ancestry, sex, marital status, age, national origin, handicap, membership or non-membership in the VSEA, filing a complaint or grievance, or any other factor for which discrimination is prohibited by law.
>
> ...
>
> DISCIPLINARY ACTION
>
> 1. No permanent... employee covered by this Agreement shall be disciplined without just cause. The parties jointly recognize the deterrent value of disciplinary action. Accordingly, the State will:
>
> a. act promptly to impose... corrective action within a reasonable time of the offense;...
> ... c. impose a procedure of progressive... corrective action in increasing order of severity; ...
> ... e. In performance cases, the order of progressive 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 30 days to six 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.
>
> f. The parties agree that there are appropriate cases that may warrant the State ... bypassing ... corrective action ...
>
> ...
>
> 2. The appointing authority or his authorized representative may dismiss an employee for just cause with two weeks' notice or two weeks pay in lieu of notice. Written notice of dismissal must be given to the employee within 24 hours of verbal notification. In the dismissal notice, the appointing authority shall state the reasons(s)

for dismissal and inform the employee of his right to appeal the dismissal at Step IV before the Vermont Labor Relations Board within the time limit prescribed by the rules and regulations of the Board.

...

4. Whenever an appointing authority contemplates dismissing an employee from his/her position, the employee will be notified in writing of the reasons(s) for such actions, and will be given an opportunity to respond either orally or in writing, normally within three workdays...

...

11. In any case involving dismissal based on performance deficiencies, the Vermont Labor Relations Board shall sustain the State's action as being for just cause unless the grievant can meet the burden of proving that the State's action was arbitrary and capricious. It is understood that this paragraph does not bar a grievance alleging that progressive corrective action was bypassed.

...

DEFINITIONS

Unless a different meaning is plainly required by the context, the following words and phrases mean:

APPOINTING AUTHORITY - the person authorized by statute, or lawfully-delegated authority, to appoint and dismiss employees...

2. At all times relevant herein, the Rules and Regulations for Personnel Administration have provided, in pertinent part, as follows:

CHAPTER 2 - DEFINITIONS

2.038 SEPARATION is the termination of an employee from employment by the State through resignation, removal, dismissal, retirement, or layoff.

2.0381 DISMISSAL is an involuntary separation of an employee other than by layoff, retirement or removal.

...

2.0384 RESIGNATION is a separation of an employee from the state service by his own voluntary act.

...

12.02 Resignation: An employee who resigns shall give at least two weeks' notice and reasons for such action in writing to the appointing authority. A resignation once submitted shall not be withdrawn by the employee without the consent of the appointing authority.

3. Grievant, was hired on or about May 1, 1989 as a Secretary B for the Hazardous Material Management Division of the Department of Environmental Conservation. William Ahearn, Division Director, hired Grievant and served as her supervisor until October, 1989, when Ann Wright, a Secretary C who reported directly to Ahearn, became Grievant's immediate supervisor. Wright remained her immediate supervisor until Grievant's departure from the Department on June 15, 1990. Ahearn was not the Department's Appointing Authority, as defined in the Contract. Ahearn reported to Chief of Operations, Reginald LaRosa. LaRosa reported to Department Commissioner Timothy Burke. Burke was the appointing authority.

4. Grievant's duties as a Secretary B included telephone responsibilities, typing letters and memos, and generally assisting in office clerical functions. There were approximately 34 classified employees in her division, including one other Secretary B, one Secretary C, and one receptionist (Grievant's Exhibit 3).

5. Grievant received a performance evaluation at the end of her six month probationary period on or about December 7, 1990, with an overall rating of "3" ("Consistently meets job requirements/standards"). Grievant received "3" or "4" ("Frequently exceeds job requirements/standards") ratings in all individual rating factors, except that she received a "2" ("Inconsistently meets job requirements/standards") rating in the individual rating factor of "Work Habits" with the comment: "Has had problems with arriving on time, absences without prior notice". In "Areas of Improvement", the following comment appeared: "Timeliness, reliability can be improved." Grievant filed no grievance concerning this performance evaluation (Grievant's Exhibit 5).

6. Grievant received a "special" performance evaluation on or about March 5, 1990, covering the period November 1, 1990 to February 28, 1990, with an overall rating of "2". The evaluation was signed by Wright and Ahearn. This performance evaluation specifically warned:

> "Absenteeism and tardiness should become less frequent. Quality of work should improve with using spell check and proofreading. Less time interacting with co-workers. We are establishing a 3 month period for evaluation."

Grievant received "2's" and the following comments in four categories: 1) "Quality of Work" ("Fran needs to spend more time proofreading or use electronic spellchecking to improve accuracy"); 2) "Quantity of Work" ("Fran should spend less time interacting with co-workers in order to produce more quality work"); "Work Habits" (...Absenteeism and tardiness too frequent....Use of radio and profanity is very distracting to others..."); and 4) "Attitude, Interest & Initiative" ("Fran's attitude has waned for several months, mostly due to personal problems, an effort to separate personal/professional needs is in order") (Grievant's Exhibit 6).

7. This "special" three-month evaluation was issued pursuant to the Contract, (see Finding #1 above) which allows the Employer to place an employee in a three-month prescriptive period for remediation for identified performance problems. Grievant did not grieve this "special" performance evaluation evaluation (Grievant's Exhibit 1, Page 3).

8. In early May, 1990, Ahearn and Wright met with Grievant before the prescriptive period expired. They discussed their continuing concerns regarding her tardiness and what they considered non-work related activity in the office.

9. Ahearn sent Grievant a memo subsequent to this meeting, on May 18, 1990, which stated, in pertinent part:

> Last week we discussed placing you in a warning period of thirty days for tardiness and non-work related activities such as personal conversations and telephone calls. I had intended to start the thirty days effective May 6, 1990. I cannot do that however, because the special evaluation ...provided a three-month prescriptive period. I intend to wait the resolution of the prescriptive. I must, however, inform you that your tardiness continues to be a problem, as well extended personal conversations have occurred within the prescriptive period to date. We will plan on meeting June 4 to discuss your performance further (Grievant's Exhibit 7).

10. On Tuesday, June 5, 1990, Ahearn and Wright met with Grievant and presented her with an evaluation covering the period March 1, 1990 to June 5, 1990 (incorrectly typed on the evaluation itself as "6/5/90 to 7/5/90"). The evaluation was signed by Ahearn and Wright. Grievant received an overall rating of "1" ("Unsatisfactory"). Although Grievant did not receive any "1's" in specific categories, she did receive three "2's": 1) "Quality of work" ("...more time should be spent proofreading"); 2) " Work Habits" ("Tardiness must improve...has not remained alert on the job"); and 3) "Attitude, Interest & Initiative" ("Accept responsibilities improve actions, and manner reflecting her attitude in order to contribute to work environment"). In the Section, "Areas for Improvement", the following comments were made:

> Tardiness must stop. Fran has developed a pattern of arriving late; has failed to inform her supervisor of late arrivals. With regard to work quality, Fran must proofread and use electronic spellchecking when available because of high typographic error rates. We are establishing a 30-day reevaluation period. We will meet weekly to discuss problems and corrective measures (Grievant's Exhibit 8).

11. Accompanying the performance evaluation provided to Grievant was a memorandum from Wright to Grievant, dated June 5, 1990, which provided as follows:

> I am writing to inform you, subsequent to our earlier discussions about your work performance.

> Under the State employees' contract the progressive discipline measures outlined include oral notice of deficiency, written performance evaluation, warning period and dismissal. I am writing to notify you that we are placing you in a warning period of 30 days. We have exhausted all measures short of this step. You must improve your tardiness and work accuracy.
>
> I will meet with you weekly to discuss your progress. I would like to meet on Tuesday, June 12 at 9:30 a.m. for that purpose (Grievant's Exhibit 9).

12. During the period May 1, 1990 to June 5, 1990, Grievant was tardy for work approximately 10 days.

13. Ahearn told Grievant at the June 5, 1990, meeting that she was being placed in a 30-day warning period because of her continued tardiness, as well as an increased pattern of typographical errors. Ahearn told Grievant she could not be tardy more than "a few" times. Grievant knew Ahearn was serious when he said "a few times" and she understood her tardiness was the main issue. Ahearn told Grievant that if she did not show significant improvement, the next step would be dismissal. He informed her that if she demonstrated significant improvement during the warning period, she could come out of the warning period. Ahearn told Grievant she would have weekly meetings with Wright during this 30-day warning period.

14. Grievant was 30 minutes late on June 7th, and 45 minutes late on June 8th during the first week of her 30-day warning period. Wright had her first weekly meeting with Grievant on Tuesday, June 12th. Wright expressed dissatisfaction with Grievant's continued tardiness and her failure to reduce her typographical errors. Wright expressed sympathy concerning the difficulties in Grievant's personal life (i.e. Grievant was a single parent with a young daughter and a young son) , as she was a single parent herself. However, Wright indicated that Grievant had to overcome this problem and get to work

on time. At some point prior to June 12, Wright had provided Grievant with the opportunity to change her daily starting time from 7:30 a.m. to 7:45 a.m. Grievant had declined this opportunity.

15. The next day, June 13th, Grievant was one hour and 20 minutes late. In addition, a division employee complained to Wright that Grievant had returned a file to him in disarray. Wright met with Grievant regarding the file. Grievant denied responsibility for the state of the file. Wright then met with Ahearn and expressed her dissatisfaction with Grievant's overall progress during the 30-day warning period.

16. After Ahearn's meeting with Wright, Ahearn contemplated dismissing Grievant. He called the Department's personnel officer, Margaret Sancibrian. Sancibrian told Ahearn he would have to hold a pretermination meeting with the employee, present her with the reasons for the contemplated dismissal, and give her an opportunity to respond to these reasons. These are called the Loudermill requirements, based on a US Supreme Court decision of that name, 105 S. Ct. 1487 (1985), and are articulated by the Employer in Finding #17 below.

17. The next day, June 14th, Grievant was again one hour and 20 minutes late. This was the fourth time Grievant was tardy in her 30-day warning period. Ahearn felt Grievant had clearly exceeded "a few" days at this point. On June 13 and/or June 14, Ahearn spoke to Reginald LaRosa, who was then serving as acting Commissioner of the Department. Ahearn discussed with LaRosa the situation involving Grievant's performance, including the attempts which had been made to correct her performance. A decision was made to move toward Grievant's dismissal, but to provide Grievant with the opportunity to

resign in lieu of dismissal. The following Loudermill letter, which was dated June 15, 1990, and which was signed by LaRosa for Burke, was prepared:

> Re: Pre-Termination Meeting
>
> As a result of your actions explained below, I am contemplating your dismissal from the position of Secretary B. You have the right to respond to the specific allegations listed below, either orally or in writing, before the final decision is made. You have the right to consult your VSEA representative or other counsel to assist at the meeting should you wish to respond orally.
>
> The reason dismissal is contemplated is as follows:
>
> Dismissal is being contemplated as a result of continued verbal warnings, three-month prescriptive period (November 1, 1989 - February 28, 1990), and 30-day warning notice issued June 5, 1990, as a result of continued tardiness and work deficiencies. It has been noted that since the 30-day warning notice was issued, you have been late six out of nine days.
>
> You are required to notify me within 72 hours of receipt of this letter of your intention to respond to these allegations and whether your response will be orally or in writing. If you make no response within that time frame, the decision regarding dismissal will then be finalized based on the information available.
>
> Once you make the decision to respond, you have an additional two work days in which to submit a written response to me. If you choose to respond orally, I will schedule a meeting with you and your representative within two work days.
>
> The purpose of any such meeting is to give you a chance to present points of disagreement with what the Department believes the facts to be; to identify witnesses who support your defense; to identify any mitigating circumstances which should be considered; and to offer any other argument which you feel may be appropriate (Grievant's Exhibit 11).

18. Wright told Grievant on June 14, 1990, that there would be a meeting the next day, Friday, June 15th, with Grievant, Wright and Ahearn. Wright advised Grievant that she might wish to have a VSEA representative attend the meeting with her.

19. The June 15, 1990, meeting was scheduled to begin at 1:30 p.m., but started as much as one-half hour later in the afternoon. At the beginning of the meeting, Grievant was again advised, this time by Ahearn, that she had the right to have a VSEA representative with her. Grievant, who was not a VSEA member, declined to have a VSEA representative present.

20. At the meeting, the following transpired. Ahearn, who did much of the talking at this June 15th meeting, discussed Grievant's performance. Ahearn spoke in a normal, conversational tone throughout the June 15 meeting. He advised Grievant that she had not had apparent success with her tardiness and that she had not reduced her typographical errors. Ahearn told Grievant he thought the process for remediation had been reasonable and in compliance with the Contract. Ahearn mentioned that Grievant had been given a three-month prescriptive period for improving her performance pursuant to the Contract, followed by the 30-day warning period pursuant to the Contract. Ahearn told her that his intent was to now lead to her dismissal. Ahearn referred to the above-mentioned Loudermill letter (See Finding #16) and showed it to Grievant at some point in the conversation. Ahearn gave Grievant the opportunity to resign, but told her that, if she did not resign, the Employer would move to dismiss her by the end of the next week. Grievant tried to defend her record, but it was clear to her that Ahearn intended to discharge her. Grievant did not wish to resign, nor did she wish to be dismissed. She felt embarrassed and humiliated and she lost her composure. Ahearn gave Grievant the opportunity to recompose herself midway through the meeting, and there was a brief recess.

21. After the recess, Ahearn recommended to Grievant that she resign so that a dismissal would not be on her record. He further explained that if she was willing to resign that afternoon, she could leave that day and receive two weeks' pay. Ahearn viewed this offer as an incentive to resign because Grievant would receive two weeks pay without working. On the contrary, if Grievant was dismissed, Ahearn informed Grievant that he would recommend that Grievant be provided with two weeks notice of her dismissal and that she would be required to work those two weeks. Grievant asked if she could have at least 72 hours to think about resigning, but Ahearn told her that, while she did not have to make the decision at the meeting, she had to make her decision that afternoon. Grievant then informed Ahearn that she accepted the two weeks' pay for her resignation. A discussion followed about how they would explain Grievant's sudden departure from the office with her co-workers, as well as Ahearn's handling of Grievant's future references with prospective employers. Ahearn allowed Grievant the opportunity to again regain her composure privately in his office before she departed. Ahearn agreed to meet Grievant at the office the next day, which was a Saturday, to help her clean out her desk without co-workers being present.

22. On Saturday, June 16, 1990, Ahearn met Grievant at the office, and they spent approximately one hour cleaning out Grievant's desk. On June 16, Grievant said nothing to Ahearn indicating that she had changed her mind about resigning.

23. Grievant never submitted her resignation in writing.

MAJORITY OPINION

Grievant contends that her grievance should be granted and that she should be reinstated to the position with the Department of Environmental Conservation on several theories. She contends that the Employer violated the Contract when it purportedly dismissed her by not advising her of her right to grieve this dismissal and/or by threatening her with adverse consequences if she sought VSEA assistance. Further, Grievant contends this purported dismissal was a violation of the Contract because the person who dismissed her was not the appointing authority, there was no just cause for her dismissal, and no dismissal letter was ever written.

Grievant's contention that she was not given the opportunity to seek VSEA assistance and/or that she was threatened with adverse consequences if she sought such assistance is not supported by the evidence. Grievant's supervisor, Ann Wright, gave Grievant an opportunity to seek VSEA assistance prior to the June 15 meeting at which her contemplated dismissal and her resignation were discussed. In addition, at the outset of the June 15 meeting, Division Director William Ahearn provided her with the opportunity to have a VSEA representative at the meeting. Under these circumstances, and absent any evidence indicating that Grievant was threatened with adverse consequences if she sought VSEA assistance, we reject Grievant's allegation.

As an affirmative defense, the Employer contends that Grievant was not dismissed; that she, in fact, voluntarily resigned. Thus, the first issue we must decide is whether Grievant did voluntarily resign on June 15, 1990. If, in fact, Grievant did resign from her position

and her act was a voluntary one, we need not reach the allegations concerning Grievant's purported dismissal since no dismissal would have occurred.

Grievant contends that she did not resign because there was no written resignation, as required by section 12.02 of the Rules and Regulations of Personnel Administration, and because she did not act voluntarily.

Grievant contends that Section 12.02 is clear in its requirement that resignations must be in writing. Although it is true that Section 12.02 does require an employee to put a resignation in writing, we do not interpret Section 12.02 of the Personnel Rules to preclude an employer from accepting a resignation based on an employee's verbal representations and other actions, if that employee fails to resign in writing. Grievance of Baldwin, 13 VLRB 20, 35-37 (1990). We see no compelling reason to depart from our previous ruling in Baldwin. Without more, Grievant's failure to submit a written resignation does not invalidate the resignation.

Grievant further contends that she did not resign because she did not act voluntarily. Grievant contends that, under all of the facts and circumstances here, the "Hobson's Choice" of "resign or be fired", which Ahearn gave Grievant on June 15, 1990, led to the application of undue influence on Grievant sufficient to overcome her will and to render invalid any resulting "resignation".

We would agree with Grievant that her resignation was involuntary, and thus invalid, if it resulted from undue influence on her by the Employer. However, just because an employee is presented with a "resign or be fired" choice does not make a resignation

involuntary if the employee understands the options he or she is presented with and there is no undue influence.

Undue influence is a phrase used to describe persuasion which tends to be coercive in nature, persuasion which overcomes the will without convincing the judgment. Odorizzi v. Bloomfield School District, 246 Cal. App. 2nd 123, 130-131 (1966). The hallmark of such persuasion is high pressure. Id. A person may be led, but not driven, and his or her acts must be the offspring of his or her own volition and not of someone else. Id.

We conclude that undue influence was not brought to bear on Grievant at the June 15, 1990, meeting, and that she did voluntarily resign at that meeting. First, the context in which the meeting occurred supports this conclusion. The meeting was preceded by more than three months of persistent, clear management efforts to improve Grievant's performance with no apparent success. Just 10 days earlier, Grievant had been placed in a 30-day warning period, and she knew that failure to show significant improvement with respect to her tardiness record and typographical errors would result in her dismissal. Yet, her tardiness problems had persisted, as she was substantially late for work four of the first seven workdays of the warning period.

Under these circumstances, when Grievant was told by her supervisors the day prior to the June 15 meeting and at the outset of the June 15 meeting that she may wish to have a VSEA representative present at the meeting, Grievant should have understood the gravity of the situation and recognized that her employment was in jeopardy. Grievant reasonably should have been aware coming into the meeting

that the content of the meeting would be whether her employment would continue. Thus, the context in which the June 15 meeting occurred does not indicate undue influence by Grievant's supervisors.

Further, an examination of the June 15 meeting itself does not indicate undue influence was brought to bear on Grievant even though Ahearn presented Grievant with a "resign or be fired" choice and attempted to persuade her to resign. It is true Grievant was presented with less than attractive options, but they were options which presented a voluntary choice resulting from the product of her work performance. Although Grievant was distraught and upset at this meeting, we believe that she did comprehend her situation. She did not wish to be dismissed and she clearly understood that would be the next step. She eventually made a voluntary choice to accept two weeks' pay, without working for it, for her resignation, in lieu of being dismissed and having to work to receive the two weeks' pay.

We are troubled by the fact that Grievant was under pressure on June 15 to decide that day whether to resign or face being dismissed. However, we believe she had adequate opportunity to weigh her options and choose what appeared to be the best solution. Our conclusion in this regard is reinforced by the fact that she had the opportunity for, but declined, VSEA representation. Thus, we conclude Grievant voluntarily resigned and deny her grievance.

Catherine L. Frank

Louis A. Toepfer

CONCURRING OPINION

I am constrained to concur with the findings of fact and the conclusions of law set forth in the opinion of my colleagues. Our precedents are very clear with respect to the holding that there was in fact a voluntary resignation.

However, I would be remiss indeed if I did not express my sympathy and concern for the personal difficulties that were the occasion of Grievant's problems that prevented her from being the compleat employee in the eyes of her supervisors.

The State of Vermont as the Employer should have an interest in retaining the services of a mostly satisfactory and productive employee who was making an obvious and sincere effort to support herself and two children over a period of time. The State also has the same interest in avoiding the substantial financial responsibilities of her not being employed. In addition to its self-interest, the State also has an obligation to assist all of its citizens in leading productive and dignified lives not only for themselves but as role models for their children. It appears that there was a zealous commitment to abstract logic that sometimes seems to overwhelm our State bureaucracy. Here the abstraction requires this State office to be operated as if it was a European railroad no matter what the consequences. It is a fine ideal as an abstraction, but has nothing to do with the reality of life in Vermont. Especially is this so when there has been no showing that being on time was really of the essence. The allowances that are made to many employees because of handicap and hardship are commonplace. In the instant matter it seems that the services of some social agency on an outreach

basis should have been made available by the State. It would have been an exercise in good business sense. An offer to adjust Grievant's schedule by 15 minutes certainly did not address the problem.

Single parenthood is a most daunting problem that has no instant cure. But surely the State could have made a better cost-productive effort in this case. The course taken has no rational basis and does little to lift the spirit and dignity of those who truly want to be a part of the mainstream of society.

Charles H. McHugh

ORDER

Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the Grievance of Frances Ann Taylor is DISMISSED.

Dated this 8th of February, 1991, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh, Chairman

Catherine L. Frank

Louis A. Toepfer