

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 94-69
CLINT GLOVER)	

MEMORANDUM AND ORDER

At issue is the appropriate remedy in this matter pursuant to the June 30, 1995, Findings of Fact, Opinion and Order of the Labor Relations Board. 18 VLRB 352. In our June 30 decision, after concluding that the Employer lacked just cause to dismiss Grievant from his shift supervisor position at the Northeast State Correctional Facility, we remanded this matter to the parties to attempt to fashion an appropriate remedy based on our decision. The parties were unable to agree upon a remedy, and have left it to the Board to fashion an appropriate remedy.

Grievant contends that, because the Board concluded that Grievant was improperly dismissed from his position as shift supervisor, he should be granted the usual wrongful termination remedy of reinstatement into that position with permanent status and back pay. The Employer contends that, because the Board's ruling is predicated on an analysis of the performance evaluation issue, under the Contract the Board must remand the case to the Employer. Further, the Employer contends that the Board has invalidated a long-standing practice of returning employees who fail promotional probation to their former positions, and accordingly the Employer should have the opportunity to consider the case under the Board's current guidance.

We do not concur with the remedy proposed by either party. We conclude, contrary to Grievant's position, that it is not appropriate to reinstate Grievant to the

shift supervisor position in a permanent status with back pay. This is not a situation in which the evidence is sufficient for us to conclude that, but for the violation of the Contract by the Employer, Grievant would have received an overall satisfactory performance evaluation at the conclusion of his promotional probationary period. c.f., Grievance of Butler, 17 VLRB 342 (1994) (female state trooper reinstated as a permanent status employee, with full back pay, where the Board concluded that, but for sex discrimination, the employee would have received an overall satisfactory performance evaluation at the conclusion of the extension of her probationary period). The performance evaluation resulting in Grievant's dismissal from the shift supervisor position was fundamentally flawed, as discussed in our June 30 decision, but the state of the evidence does not warrant a conclusion that Grievant's overall performance as a shift supervisor was satisfactory, warranting attainment of permanent status in that position.

Also, unlike the typical situation when we order a dismissed employee reinstated with back pay, Grievant was not completely removed from the state workforce. Upon dismissal from the shift supervisor position, he was returned to his previous position as a correctional officer. These considerations lead us to conclude, contrary to Grievant's position, that it is not appropriate to reinstate Grievant to the shift supervisor position in a permanent status with back pay.

We also conclude that the Employer has not proposed an appropriate remedy. The Employer's position that the Contract requires us to remand this matter to the Employer, because we based our decision on an unsatisfactory performance evaluation, is unsupported by case law. In Grievance of Schmitt, 15 VLRB 454

(1992), the Board, upon concluding that the dismissal of an employee based on an unsatisfactory performance evaluation was without just cause, did not remand the matter to the employer but ordered that the employee be reinstated with full back pay.

We also reject the contention by the Employer that the Board has invalidated a long-standing practice of returning employees who fail promotional probation to their former positions, and accordingly the Employer should have the opportunity to consider the case under the Board's current guidance. Although Grievant was returned to his former correctional officer position, the evidence in this case utterly fails to support a conclusion that the State had a long-standing practice of returning employees who failed promotional probation to their former position. Moreover, a recent case heard by the Board demonstrated no such practice. In Grievance of Mason, 16 VLRB 222 (1993), a Department of Social Welfare clerk who was performing her duties satisfactorily was promoted to a dispatcher position with the State Police. The employee did not successfully complete her promotional probationary period in the dispatcher position, and she was dismissed from state employment rather than returned to her former clerk position. In upholding the dismissal of the employee, the Board parenthetically noted its recognition of the unfortunate situation in which Grievant found herself, and stated:

There should be some mechanism in the Contract to require the State to place employees in Grievant's position in another position in State government, or give such employees preference for available positions for which they are qualified. Unfortunately for Grievant, such mechanism was not in place and her dismissal from employment was warranted under the Contract. Id. at 243.

Thus, it is obvious that the State had no long-standing practice of returning employees who fail promotional probationary periods to their former positions. The Employer's contention is unfounded and provides no support for remanding this matter to the Employer.

We are left to fashioning our own remedy. We are confronted by circumstances of the Employer lacking just cause to dismiss Grievant from the shift supervisor's position, the evidence not warranting a conclusion that Grievant's overall performance as a shift supervisor was satisfactory, warranting attainment of permanent status in that position; and Grievant being returned to his former correctional officer position. Under these circumstances, we conclude that the most appropriate remedy is that: a) Grievant be placed in the next available shift supervisor position opening at the Northeast State Correctional Facility, b) Grievant be treated as at the beginning of his promotional probationary period in that position, c) Grievant forthwith shall receive the difference in pay, if any, between what he earned as a correctional officer and what he would have earned as a shift supervisor in a promotional probationary period, from his July 1994 dismissal from his shift supervisor position until this date; and d) Grievant shall continue to be paid as a shift supervisor in a promotional probationary period until such time as he completes the promotional probationary period unless such pay would be less than he is entitled to receive in his current position . This is the most appropriate remedy that can be fashioned to redress the Contract violation, take into account Grievant's performance and present situation, and recognize the operational needs of the Northeast State Correctional Facility.

NOW THEREFORE, based on the foregoing reasons, it is hereby ORDERED that the Findings of Fact, Opinion and Order issued in this matter on June 30, 1995, are incorporated herein by reference; and

1. The State of Vermont, Department of Corrections, shall rescind the unsatisfactory performance evaluation issued Grievant in July 1994 concerning his promotional probationary period as a shift supervisor at the Northeast State Correctional Facility;
2. Grievant shall be placed in the next available shift supervisor position opening at the Northeast State Correctional Facility;
3. Upon placement in the shift supervisor position, Grievant shall be treated as being at the beginning of his promotional probationary period in that position;
4. Grievant forthwith shall receive the difference in pay, if any, between what he earned as a correctional officer and what he would have earned as a shift supervisor in a promotional probationary period, from his July 1994 dismissal from his shift supervisor position until this date; and
5. Grievant shall continue to be paid as a shift supervisor in a promotional probationary period until such time as he completes the promotional period unless such pay would be less than he is entitled to receive in his current position.

Dated this 29th day of September, 1995, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Charles H. McHugh
Charles H. McHugh, Chairman

/s/ Catherine L. Frank
Catherine L. Frank

/s/ Carroll P. Comstock
Carroll P. Comstock