

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)
) DOCKET NO. 94-34
TAMMY PUTVAIN)

FINDINGS OF FACT, OPINION AND ORDER

Statement of case

On July 11, 1994, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Tammy Putvain ("Grievant"). The grievance alleged that the State of Vermont Department of Employment and Training ("Employer"), violated Articles 5, 14 and 31 of the collective bargaining agreement between the State and VSEA for the Non-Management Unit, effective for the period July 1, 1992, to June 30, 1994 ("Contract"). Specifically, Grievant alleged that Article 14 was violated because there was no just cause for a five day suspension imposed on Grievant, and Article 31 was violated because Grievant was improperly denied compensation for a floating holiday, Martin Luther King, Jr.'s Birthday. In addition, Grievant alleged that Article 5 was violated in that she was harassed and discriminated against for asserting her contractual rights.

A hearing was held before Labor Relations Board Members Charles McHugh, Chairman; Leslie Seaver and Carroll Comstock on January 19, 1995. Samuel Palmisano, VSEA Legal Counsel, represented Grievant. Michael Seibert, Assistant Attorney General, represented the Employer. At the hearing, Grievant withdrew her allegation that Article 5 was violated. The parties filed post-hearing briefs on January 26, 1995.

FINDINGS OF FACT

1. Article 31 of the Contract provides in pertinent part:

ARTICLE 31
OBSERVANCE OF HOLIDAYS

...

SECTION 3. FLOATING HOLIDAYS

a. ...Martin Luther King, Jr.'s Birthday...shall be [a] regular [workday] for State employees. Employees assigned to work that day, or who have that day as a regularly scheduled day off, shall as a "floating holiday" receive compensatory time off at straight time rates for a full day.

Such "floating holiday" day off shall be scheduled with at least a month's advance notice by the employee with the approval of the appointing authority. If an employee is subsequently required to work on such scheduled "floating holiday" day off, he or she shall be paid for that day as if it were a designated time-and-one-half holiday.

...

SECTION 5. COMPENSATION

...

a. An employee who is normally scheduled to work on a day observed as a legal holiday and does not work that day shall receive no extra compensation.

...

SECTION 7.

An employee who is off payroll due to disciplinary suspension or absent without authorization for any portion of the workdays immediately prior to, or the next following, or the day of that observed as a holiday, and who does not work on such holiday shall not be eligible for holiday compensation, unless the employee actually works on the holiday.

...

2. Grievant has been an employee of the State of Vermont since 1989 and, during all relevant time periods, she has been an employee of the Department of Employment and Training.

3. Grievant is a Secretary C in the Contributions Section. At all time relevant, she reported to Victoria Lawson,

Administrative Assistant to the Chief of Contributions. Lawson reported to David Tucker, Chief of Contributions.

4. Maria Beede, Assistant Chief of Contributions, works in Grievant's section. Beede is not in Grievant's chain of command.

5. During the spring and early summer of 1993, Grievant, a mother of two young children, experienced personal problems. She was in the process of obtaining a divorce, her boyfriend "totaled" her car, and her telephone service was often disconnected due to financial problems. Grievant became clinically depressed as a result of her personal problems and sought medical treatment. Grievant's supervisors were aware of her personal problems.

6. Due to her car problems, Grievant did not always have reliable transportation to her work station, located in Montpelier, approximately 25 miles from her home in Hardwick. Because Grievant did not always have immediate access to a telephone, she did not always call her supervisor in a timely manner when she was going to be late or absent.

7. In a written reprimand dated June 25, 1993, Tucker informed Grievant that he was suspending her due to "continued absences from work" and failure to properly notify her supervisor if she was going to be absent from work. Tucker informed Grievant in the written reprimand of the following procedure if she was going to be absent: "If absent, you must notify by 8:00 a.m., Vicki Lawson, or in her absence, me, or if both Vicki and I are out, Mr. Douse" (State's Exhibit 1).

8. On July 26, 1993, after Grievant had further instances of absences, tardiness and failure to properly notify supervisors of absences, Tucker suspended Grievant for five days without pay. The letter of suspension provided in pertinent part as follows:

The basis for the suspension is your continued unwillingness to properly notify us when you are going to be absent or late to work. Your arrival at work this morning 45 minutes late is only the most recent example of your lack of cooperation with our frequent communications regarding proper notification.

(State's Exhibit 4).

9. Grievant did not file grievances over the written reprimand or suspension.

10. After she received her five day suspension in July, Grievant arranged for reliable transportation to work with a co-worker, Bob Smith, and she did not have problems with absences or tardiness through mid-December 1993.

11. Grievant's telephone was disconnected again in December, 1993, because she was still experiencing financial difficulties. On December 16, 1993, Grievant asked a neighbor, Sara Camely, to call her office for her the next day, December 17, because she knew she had to be absent. Grievant was later told that no one had called the Employer. Tucker questioned Grievant about this incident, and she told him that Camely had called her office for her on December 17. Tucker requested that Camely provide him with documentation of this call.

12. Camely wrote Tucker a letter verifying she had telephoned the Employer for Grievant on December 17, 1993. Tucker investigated this and could not verify who, if anyone, had

received such call. He then requested a copy of Camely's telephone bill as further verification. Camely for whatever reason refused to submit such bill. Grievant did not hear anything further about this incident from Tucker until February 1, 1994 (see Finding No. 22) (State's Exhibit 7).

13. Grievant asked Lawson in advance for permission to take Martin Luther King, Jr.'s Birthday off on its designated holiday date, Monday, January 17, 1994. Grievant's day care provider was not going to be open on that date. Lawson granted Grievant permission to take the day off.

14. On Friday, January 14, 1994, Smith called Grievant early in the morning and told her he could not give her a ride because he was not going to work that day. Grievant did not have any other means of transportation that morning to Montpelier. At approximately 7:45 a.m., Grievant called Lawson's telephone number at work to tell her she did not have a ride to work that morning.

15. Beede answered Lawson's telephone because Lawson was not yet at her desk. Grievant told Beede about her transportation problem that morning, and discussed the possibility of coming to work later that day if she could find a ride. She also discussed working on Monday, even though it was a scheduled holiday for her. Grievant understood from this conversation that she had told Beede that, if she did not work that day, she would try to work on Monday. Beede understood Grievant to say that, if she did not work that day, she would work on Monday.

16. Immediately after Beede hung up the telephone, Lawson

arrived at her desk. Beede told Lawson her understanding of what Grievant had told her.

17. Beede did not take notes while she was talking with Grievant. She merely transmitted her understanding of Grievant's message to Lawson immediately after she got off the telephone with Grievant. She did not think about this matter for four days.

18. Grievant was unable to find a ride to work on Friday, January 14, 1994.

19. Lawson knew Grievant was scheduled to have Monday, January 17, 1994, off from work. She now assumed that Grievant would work on Monday based on what Beede had told her.

20. Grievant did not work on Monday, January 17. She did not call her supervisor that day to inform her that she would not be in to work because she had been granted the day off.

21. Lawson worked on Monday, and she expected Grievant to work that day. Lawson told Tucker about the telephone conversation between Grievant and Beede the previous Friday and that Grievant had not reported to work that day, as Lawson had expected she would.

22. Tucker spoke to Grievant about this the next day, Tuesday, January 18, 1994. Grievant told Tucker she had been authorized to take Monday off. She denied that she had told Beede she would work on Monday.

23. Tucker then questioned Beede about her conversation with Grievant the previous Friday. He directed Beede to write a memorandum setting forth her understanding of the conversation.

Beede knew at the time she wrote such memorandum that there was a dispute about what Grievant had told her. Beede's memorandum stated in pertinent part:

Friday morning, January 14, 1994, I received a phone call from [Grievant] stating that [Smith] had not come by this morning to pick her up and that she would not be in unless she found a ride.

She also stated that she was supposed to have Monday, January 17, 1994, off, but if she did not make it in that day she would be in on Monday (State's Exhibit 5).

24. Tucker met with Grievant and her VSEA representative regarding her failure to work on January 17, 1994. He did not believe Grievant's version of her conversation with Beede and determined that she was absent without authorization. On February 1, 1994, Tucker gave Grievant a memorandum which provided in pertinent part as follows:

This memo is to transmit my decision regarding your absence from work on January 17, 1994.

You called in on January 14th. Maria Beede, Assistant Chief of Contributions, answered Vicki Lawson's phone for her. You told Maria that your ride had not come by to pick you up, that you would try to get a ride in, but if you couldn't, you would come in on Monday, January 17th, instead of taking the day off as a floating holiday . . .

You did not come in on January 17th, and did not call to inform us of your absence.

We have discussed your unauthorized absences on a number of occasions in the past. Your failure to comply with our written instructions about proper notification led to a suspension from work on July 26, 1993. You are the one who called here on the 14th, informing the Assistant Chief of Contributions of your change in plans. We have to be able to rely on your own word, and the last information we were given was you would be here on the 17th. Your failure to come in or to notify us makes you absent without authorization on the 17th of January. You will not be paid for that day.

You are suspended from work without pay from February 2nd through February 8th. If you do not comply with our

instructions upon your return, and again fail to come in or properly notify us of your absence, I will take action to affect (sic) your immediate dismissal.

(State's Exhibit 6).

25. On that same day, February 1, 1994, Tucker completed his investigation of the December 17, 1993, incident and determined that he could not discipline her for her absence that day. Tucker sent Grievant a memorandum on February 1 which provided in pertinent part:

...

Without substantiation, I don't know if [Camely] called in, but it would appear from her refusal to provide the phone bill that she did not. The remaining issue is whether or not her failure to call in constitutes grounds for disciplinary action against you.

Not believing [Camely] and knowing with certainty what happened that day are arguably two different matters. Since I cannot prove she did not call, anymore than you can prove that she did, imposing discipline for your absence is not appropriate...(State's Exhibit 7).

26. Beede acknowledged to Grievant's attorney, VSEA Legal Counsel Samuel Palmisano, shortly before the day of the hearing in this matter, that there was a possibility that Grievant had told her on Friday, January 14, 1994, that she would try to work on the following Monday, January 17, Martin Luther King's Birthday, as opposed to telling her that she would work that day.

OPINION

At issue is whether the Board should uphold the disciplinary action of a five day suspension taken against Grievant. Also at issue is whether the Board should uphold the denial of compensation for the Martin Luther King holiday on the grounds that Grievant was absent without authorization that day. The parties agree that both actions the Employer took against

Grievant flow from the same event involving whether Grievant told Maria Beede on Friday, January 14, 1994, she would work on Monday, January 17, the King holiday, or whether she said she may work that day.

To establish just cause for discipline, it is necessary for the Employer to show that disciplining the employee for certain conduct is reasonable; and the employee had fair notice, express or implied, that such conduct would be grounds for discipline. In re Brooks, 135 Vt. 563, 568 (1977). Grievance of Gregoire, 18 VLRB 78, 100 (1995). Grievance of Scott, 17 VLRB 46, 69 (1994). On the issue of fair notice, the ultimate question is whether the conduct was or should have been known to the employee to be prohibited by the employer. Brooks, 135 Vt. at 568. The burden of proof on all issues of fact required to establish just cause is on the employer, and that burden must be met by a preponderance of the evidence. Grievance of Collieran and Britt, 6 VLRB 235, 264-5 (1983).

In determining whether just cause for imposition of some sort of discipline exists, we examine whether the Employer has established the charge against Grievant. The Employer charges that Grievant was on unauthorized leave when she failed to work on the Martin Luther King holiday.

The determination whether the Employer established the charge against Grievant turns on whether the Employer showed by a preponderance of the evidence that Grievant told Beede she would work on the Martin Luther King holiday. It is uncontested that Grievant was scheduled to take the Martin Luther King holiday

off. At no subsequent time did Grievant's supervisor withdraw this approval. It is also uncontested that Grievant attempted to call her supervisor on January 14, but talked to Beede instead.

Beede did not take notes contemporaneous with the call, she is not in Grievant's chain of command, and would not have known at the time of the call that the contents of this conversation would take on such a consequential nature. These circumstances would tend to cast some doubt on the certainty of Beede's recollection of the specific words spoken during that conversation. Further, and most pertinent, although Beede understood from this phone conversation that Grievant would be into work on the Martin Luther King holiday, Beede subsequently acknowledged in a conversation with Grievant's attorney the possibility that she may have misunderstood what Grievant had said to her. She acknowledged that there was a possibility that Grievant had told her she would try to come into work on Monday, which is the way Grievant understood the conversation.

There obviously is a substantial distinction between Grievant indicating she would come into work, and Grievant indicating she would try to come into work, in determining whether Grievant was absent without authorization on the Martin Luther King holiday. Given the evidence before us, we cannot conclude with certainty what Grievant told Beede. The only conclusion we can draw is that the conversation between Grievant and Beede was ambiguous, and that there was a misunderstanding as to the specific content of the conversation.

In short, the Employer has not shown by a preponderance of the evidence that Grievant told Beede she would work the Martin Luther King holiday. Grievant had advance permission to take the day off, such permission was not withdrawn, and her absence that day was authorized. Thus, the Employer has not established the charge against Grievant, and there was no just cause to impose disciplinary action for her absence.

We recognize that Grievant could have taken action to dispel the misunderstanding which arose. Grievant could have contacted her supervisor late Friday or early Monday to make her plans whether to work on the holiday clear; it was she, after all, who raised the possibility of working on Monday and changing previously scheduled plans. Such measures by Grievant were particularly advisable in light of previous disciplinary actions taken against her. She could ill afford the possibility of a misunderstanding over an attendance issue. Grievant's failure to prevent such misunderstanding, however, does not translate into her committing the misconduct of being absent without authorization, as charged.

Given the misunderstanding in communications which can occur in phone conversations, particularly under the circumstances present in this case, it is evident that the Employer overreacted to what essentially boiled down to a communications failure. In this regard, the timing of the action Tucker took against Grievant is suspect. This is because Grievant was suspended on the same day Tucker informed her by memorandum that she was not being disciplined for an incident, occurring a month before the

Martin Luther King holiday incident, in which doubt existed as to whether Grievant had fulfilled her responsibility to notify the Employer of her absence. In that memorandum, Tucker made it clear that he was not fully convinced Grievant had fulfilled her responsibility. The fact that Tucker did not close his investigation on this case until the same day he suspended Grievant for a substantially later, but similar, incident raises the question whether the overreaction to the Martin Luther King holiday incident may have resulted in part from Tucker's frustration at the inconclusive result on the earlier incident. We need make no conclusive determination in this regard, but the timing is sufficiently suspect to warrant comment.

We turn to addressing the second issue before the Board, whether the Employer violated Article 31 of the Contract by withholding compensation for the Martin Luther King Birthday. Article 31, Section 7, provides that employees will not be compensated for a holiday if the employee is "off payroll due to disciplinary suspension or absent without authorization" that day or the day preceding or following the holiday. As earlier stated, we find Grievant's absence on the holiday was authorized. There was no claim or evidence that Grievant was on unauthorized leave the day before or after the holiday. Accordingly, the Employer violated Article 31 by withholding compensation for the Martin Luther King holiday.

Grievant contends that the compensation to which she is entitled for the Martin Luther King holiday should be calculated at a time-and-one-half holiday rate. She bases this claim on

Article 31, Section 3 (a) of the Contract which provides that, if an employee has approval to take a floating holiday off on its designated date, but is "...subsequently required to work on such scheduled "floating holiday" day off, he or she shall be paid for that day as if it were a designated time-and-one-half holiday." Grievant makes this claim in light of the actions the Employer took against her, from which she infers that the Employer "required" her to work. As set forth above, the Employer failed to prove that Grievant was required to work on the Martin Luther King holiday.

The Contract provides that employees who are normally scheduled to work on a holiday, and do not work that day, receive no extra compensation. Article 31, Section 5. This more accurately describes Grievant's circumstances than Article 31, Section 3(a) and, thus, Grievant is entitled to compensation for the Martin Luther King holiday at a straight time rate.

Finally, Grievant contended in her post-hearing brief that the Employer violated Article 27, the overtime provision of the Contract. We decline to address this issue because Grievant untimely raised it. Section 18.3 of the Board Rules of Practice requires that a grievance filed with the Board contain a concise statement of the nature of the grievance, and the specific references to the pertinent section or sections of the collective bargaining agreement alleged to have been violated. The grievance filed here contained no reference to an alleged violation of Article 27. Grievant raised this specific issue for the first time in her post-hearing brief. Grievant thus raised this issue

in an untimely manner. Grievance of Danforth, 16 VLRB 7, 29 (1993).

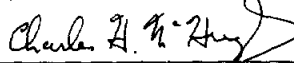
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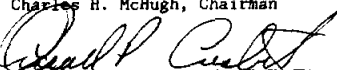
NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED:

1. The Grievance of Tammy Putvain ("Grievant") is SUSTAINED;
2. The disciplinary action taken by the State of Vermont, Department of Employment and Training ("Employer"), of suspending Grievant for five days, is RESCINDED;
3. The Employer shall RESCIND its action of withholding from Grievant compensation for the January 17, 1994, Martin Luther King holiday;
4. The Employer shall pay Grievant six days wages at her rate of pay at the time of her suspension and withholding of compensation for the Martin Luther King holiday, plus 12 percent interest per annum from the date the Employer withheld wages from Grievant due to such actions, and such payment shall be made within 30 days of this final order; and
5. The Employer shall remove all references to Grievant's suspension and the withholding of compensation for the Martin Luther King holiday from Grievant's personnel file and other official records.

Dated this 28th day of March, 1995, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Charles H. McHugh, Chairman


Carroll P. Comstock


Leslie G. Seaver