VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 94-33
KATHY ROGERS	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On June 27, 1994, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Kathy Rogers ("Grievant"). The grievance alleged that the dismissal of Grievant, during her initial probationary period, from employment with the State of Vermont, Department of Libraries ("Employer"), constituted discrimination on the basis of disability. Grievant contended that the dismissal violated 3 V.S.A. Section 1001, and Article 5 of the collective bargaining agreement between the State and VSEA for the Non-Management Unit, effective for the period July 1, 1992-June 30, 1994("Contract"). As a remedy, Grievant requested that she be reinstated to her position with full back pay and benefits.

On December 2, 1994, the Employer filed a Motion to Dismiss on the grounds that the Board lacked jurisdiction over Grievant's claims based on disability discrimination because the grievance jurisdiction of the Board does not extend to claims of disability discrimination made by a state employee in an initial probationary period. Grievant filed a Memorandum in Opposition to State's Motion to Dismiss on December 13, 1994.

A hearing was held before Labor Relations Board Members Charles McHugh, Chairman; Catherine Frank and Leslie Seaver on December 22, 1995. The hearing was limited to oral argument and an evidentiary hearing on the issue of the jurisdiction of the Board.

Samuel Palmisano, VSEA Legal Counsel, represented Grievant. Assistant Attorney General Michael Seibert represented the Employer. The parties filed post-hearing briefs on January 6, 1995.

FINDINGS OF FACT

1. At all times relevant, Grievant was a Secretary B in her initial probationary period, employed by the State of Vermont, Department of Libraries.

2. On or about May 5, 1994, Grievant submitted a request to the Employer, indicating that she had suffered a back injury and requesting certain "reasonable accommodations" to overcome the limitations created by that injury.

3. On or about May 26, 1994, Grievant was dismissed from her position.

4. In a May 5, 1989, decision reversing a decision of the Vermont Labor Relations Board (7 VLRB 248), the Vermont Supreme Court held that the State's refusal to bargain with VSEA about conditions of employment for state employees serving in their initial probationary periods constituted an unfair labor practice. VSEA v. State of Vermont, 151 Vt. 492 (1989). The Supreme Court docket number in that case was 84-509. The Court decision contained the following statement with respect to 3 V.S.A. Section 1001:

> In examining the entire subject matter of this dispute, we find substantial evidence that the Legislature did not intend 3 V.S.A. Section 904(a)(9) to preempt the field with respect to probationary employees. For example,the parties agree that probationary employees are limited by statute in their right to appeal grievances to the Board. 3 V.S.A. Section 1001(a) (classified employees in initial probationary period may grieve claims of discrimination based on race, color, creed, sex, age, or national origin) . . . Thus, when the Legislature sought to deny probationary employees certain grievance rights available to other classified

> employees through the collective bargaining process . . it did so in a clear and unequivocal fashion . . . Id. at 495-96.

5. In the Summer of 1989, the State and VSEA began negotiating over proposals concerning conditions of employment for employees in their initial probationary periods. In a August 14, 1989, letter to Thomas Ball, State Director of Employee Relations, Thomas Whitney, VSEA Executive Director, stated as follows with respect to the Court decision and pending negotiations:

> . . . To restate our position, the court decision merely affirms our original position that we may represent employees on original probationary status and negotiate over their working conditions. Further, we recognize we are excluded from negotiating over the rules and regulations pertaining to the State's management, or administration, of the final decision regarding the original probationary status.
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> . . .
>
> (State's Exhibit 1)

6. The State and VSEA reached agreement in negotiations over probationary employees in April, 1990. The agreement, which was incorporated as Appendix A in the 1990-92 and 1992-94 collective bargaining agreements, provided in pertinent part as follows:

> This Memorandum of Agreement outlines our understanding of the rights and benefits of original probationary employees in permanent, classified positions in accordance with the decision of the Vermont Supreme Court, Docket Number 84-509, VSEA v. State of Vermont.
>
> 1. Effective July 1, 1990, classified employees, upon hire and while serving in their original probationary status, shall be covered by the terms and conditions of the collective bargaining agreements, negotiated by the VSEA, Inc., and State of Vermont, except as provided below.
>
> 2. Probationary employees may be extended in probationary status, disciplined, laid off or dismissed by the State solely at the discretion of management without regard to the provisions of this agreement and with no right to the

grievance process, but they shall otherwise be covered by all terms of this agreement, except as restricted below.

. . .

d. The following contract provisions shall not apply to original probationers:

Military Leave with Pay
Medical Leave of Absence
Sick Leave Bank and LTD Bank
Tuition Reimbursement
Moving Time (State Police)
Corrections Competency Supplement
Corrections Work Week/Work Year
State Police Work Week/Work Year
Injury on the Job - Disability RIF

. . .

4. Upon execution of this Agreement, the parties agree that the Court's ruling does not expand nor diminish the statutory rights of probationary employees to grieve decisions relative to their original probationary status in accordance with Title 3, VSA, Ch. 27, Section 1001 . . .

7. Article 5 of the Contract provides in pertinent part that "neither party shall discriminate against . . . any employee because of . . . handicap . . ."

OPINION

At issue is whether we should grant the Employer's Motion to Dismiss. The Employer contends that we do not have jurisdiction over Grievant's claim that her dismissal violated 3 V.S.A. Section 1001(a) and Article 5 of the Contract because she was discriminated against on the basis of her disability.

We can address summarily Grievant's claim that 3 V.S.A. Section 1001(a) provides protection to her from discrimination based on her disability. Section 1001(a) provides that classified state employees in their initial probationary period may appeal to the Board "if they believe themselves discriminated against on account of their race, color, creed, sex, sexual orientation, age or

national origin." The Board has held on several occasions that, if discrimination is not alleged for one of the stated reasons, then the Board is without authority to review grievances of employees covered by 3 V.S.A. Section 1001(a). Grievance of McCluskey, 7 VLRB 359, 361-62 (1984). Grievance of Cole, 6 VLRB 204 (1983). Grievance of Peplowski, 6 VLRB 16 (1983). Grievance of Lyon, 3 VLRB 131 (1980). Accordingly, we lack authority to review this grievance pursuant to Section 1001(a).

We turn to addressing whether we have authority to review Grievant's claim that Article 5 of the Contract was violated. In so deciding, we must interpret Appendix A to the Contract, relating to terms and conditions of the Contract which are extended to probationary employees. The Employer contends that Appendix A is clear and unambiguous in providing that the right of probationary employees to grieve their dismissal to the Board is limited to their right to appeal to the Board on the grounds provided by 3 V.S.A. Section 1001.

Grievant interprets Appendix A to provide that, while probationary employees have no general right to the grievance procedure, they are otherwise covered by all terms of the Contract with the exception of specific contractual provisions excluded by Section 2(d) of the Appendix. Accordingly, since Article 5 is not specifically excluded by Section 2(d), Grievant contends that she is covered by the Article 5 discrimination provisions of the Contract.

We disagree with Grievant's interpretation of the Contract. We conclude that the provisions of Section 2 and 4 of the Appendix A, when read together, make it clear that the right of probationary

employees to grieve their dismissal to the Board is limited to the reasons specified in 3 V.S.A. Section 1001(a). In stating that "probationary employees may be . . . dismissed . . . solely at the discretion of management without regard to the provisions of this agreement and with no right to the grievance process", Section 2 makes it clear that probationary employees may not file grievances over their dismissals under the Contract. In stating that "upon execution of this Agreement, the parties agree that the Court's ruling does not expand nor diminish the statutory rights of probationary employees to grieve decisions relative to their original probationary status in accordance with (3 V.S.A. Section 1001)", Section 4 of Appendix A makes it clear, when read in conjunction with Section 2 of the Appendix, that the right of probationary employees to grieve their dismissal to the Board is limited to Section 1001(a).

Grievant's contention that she is covered by the Article 5 discrimination provisions of the Contract, since Article 5 is not specifically excluded by Section 2(d), misses the point. The issue is whether she can grieve a violation of that provision to the Board in contesting her dismissal. Sections 2 and 4 of Appendix A make it clear that she possesses no such grievance rights. Grievant's argument in effect reads the above-cited provisions of Sections 2 and 4 out of the Contract. That Section 2(d) provides no assistance to Grievant's claim is made obvious by the fact that Article 14, the disciplinary article of the Contract, also is not specifically excluded by Section 2(d) of the Appendix; yet Grievant certainly

could not credibly claim that she could only be dismissed for just cause pursuant to the disciplinary article.

Thus, we conclude that we are without authority to review Grievant's claim that Article 5 of the Contract was violated, and we grant the Employer's motion to dismiss.

ORDER

NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the Employer's Motion to Dismiss is GRANTED and the Grievance of Kathy Rogers is DISMISSED.

Dated this 16th day of February, 1995, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh, Chairman

Catherine L. Frank

Leslie G. Seaver