

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF: )  
MICHAEL YASHKO, from a decision of the )  
Department of Health with reference to ) DOCKET NO. 78-103S  
his dismissal from that department, )  
pursuant to Non-Management Contract, )  
Article XI. )

FINDINGS OF FACT, OPINION AND ORDER

Statement of the Case

On October 31, 1978 the Vermont State Employees Association (hereinafter "VSEA") filed a grievance on behalf of one of its members, Michael Yashko, from a decision of the Vermont Department of Health to dismiss Michael Yashko from that department. On November 2, 1978 the VSEA filed an amended pleading adding two additional allegations of fact to the initial grievance. On November 21, 1978 the State of Vermont (hereinafter "State") filed an answer to the grievance.

A hearing was held on the matter on December 21, 1978. Present for the Board were Kimberly B. Cheney, Chairman and Robert H. Brown. The grievant was represented by Alan S. Rome, Counsel for VSEA, and the State was represented by Bennett E. Greene, Assistant Attorney General. Requests for findings of fact and conclusions of law were submitted by the VSEA on January 16, 1979 and by the State on January 17, 1979.

FINDINGS OF FACT

1. The grievant, Michael Yashko, was employed as a sanitationarian with the Vermont Department of Health. On February 28, 1977 grievant was dismissed from State service.

2. Grievant appealed his dismissal to this Board and on November 10, 1977 the Board ordered that the State reinstate the grievant in "his former position as sanitarian for a probationary period of three months at the current rate of pay and fringe benefits afforded for his job description and classification". (Grievance of Michael Yashko, #77-42S, Findings of Fact, Opinion and Order).

3. The Board's order further provided that:

- a. Grievant should receive no back pay from the date of discharge to the date of the order;
- b. Grievant be afforded counselling;
- c. All personnel records and notices should remain in the personnel file of the grievant and may be considered in future disciplinary action in the event that grievant is unable to improve his performance during the probationary period.

4. The State appealed the Board's decision to the Vermont Supreme Court. The appeal was dismissed on June 16, 1978 for lack of jurisdiction.

5. On July 17, 1978 the grievant returned to work in his former job as sanitarian with the Department of Health. Upon his return to work he was placed at the bottom of his pay scale (pay grade 11) and was not awarded any back pay by the State retroactive to the Board's order dated November 10, 1977.

6. On August 9, 1978 the VSEA filed a motion to enforce the Board's order of November 10, 1977. On December 8, 1978, after a hearing on the motion, the Board ordered that the grievant be paid retroactively from the date of the Board's order of November 10, 1977 to the date grievant returned to work. The Board specified that grievant be paid at his former salary plus the 16.6%

raise given to all State employees effective July 1, 1978.

7. On October 17, 1978, three months after his reinstatement, grievant was dismissed for the second time from State service. On that date he received a letter from his supervisor, Ms. Joan Bouffard, Chief of Food/Lodging Regulations, informing him of his dismissal. The letter clearly expressed that the State viewed grievant as a probationary employee during the period of his reinstatement and as such grievant was not entitled to reasons for his dismissal or to appeal the State's decision to dismiss him. Ms. Bouffard further stated, however, that in the event the Board viewed the grievant as in a warning period rather than in a probationary period, he had the right to appeal the dismissal decision and the following reasons were cited for his dismissal:

1. You have not shown the ability to organize and plan work without supervision.
2. You have not been able to demonstrate a full working knowledge of the regulations and the correct application of the regulations to various facilities.
3. Reports are not completed accurately and neatly.
4. You have not made your supervisor aware of facilities operating without a license.  
(Grievant's 3)

8. Grievant's performance evaluation dated October 17, 1978 covered the three month period of his reinstatement. In the evaluation he received a rating of "2" (inconsistently meets job requirements/standards) in every category as well as for his overall job performance. The evaluation was prepared by his supervisor, Ms. Bouffard, who stated in her comments that grievant on occasion had shown ability to work very well under very close

supervision but that the job required independence of action which grievant had not shown the ability to do. (Grievant's 2)

9. Ms. Bouffard was grievant's supervisor prior to his initial dismissal and during the entire three month period of his reinstatement. While she viewed grievant as a probationary employee, she did not decide to dismiss grievant until the beginning of October.

10. During the period of his reinstatement grievant was unsure as to whether he was in a probationary period or a warning period. Based on his conversations with Ms. Bouffard, he believed that the State viewed him as a probationary employee and that he was therefore subject to dismissal at any time.

11. During the period of grievant's reinstatement he required a great deal more supervision than other sanitarians under Ms. Bouffard's supervision. Ms. Bouffard's principal problems with the grievant were the quantity and repetitiveness of his mistakes which resulted in the inequitable application of the department's regulations to facilities which were inspected by the grievant. Ms. Bouffard prepared numerous incident reports documenting the inadequacies of grievant's performance which are summarized in State's Exhibit A. In all there were a total of 86 incidents which were reported by Ms. Bouffard in memos addressed to the grievant. (Grievant's 4-7)

12. In response to Ms. Bouffard's incident reports, grievant prepared a summary diary after his dismissal giving his version of what had happened on each of the occasions referred to by Ms. Bouffard. (Grievant's 8)

13. In accordance with the Board's order of November 10, 1977, grievant was counselled during his period of reinstatement by Jonathan Coffin, a psychologist at The Howard Mental Health Center. In Mr. Coffin's opinion grievant was under a great deal of stress during the period of his reinstatement which was primarily due to his uncertainty as to his status and whether or not he could be terminated at any time as a probationary employee. Mr. Coffin also believed that it was not clear to grievant how he should relate to his supervisor or how he should improve his job performance.

14. Grievant himself believed that because he was under a lot of pressure at the time, his performance during the period of his reinstatement was adversely affected.

#### OPINION

The issue raised by both sides in this matter is whether the Board by its order of November 10, 1977 intended that the grievant be placed in a "warning period" or a "probationary period". The crucial difference between the two is that a State employee who is in a "warning period" cannot be dismissed without "just cause", has the right to be given reasons for his dismissal, and to appeal the dismissal to this Board, while a "probationary employee" can be terminated at any time and is not entitled to reasons or to an appeal. A probationary employee is also paid at the bottom of the pay scale for his pay grade.

The State argues that since the Board's order specifically refers to "a probationary period", grievant was not entitled to reasons for his dismissal or to appeal that decision and that during the period of his reinstatement he was only entitled to be paid at the bottom of his pay scale. The VSEA, on the other hand, argues that the Board did not use the term "probationary" in its order as that term is defined in the Non-Management Unit Agreement between the VSEA and the State, and actually intended that the grievant be in a "warning period" during his reinstatement. Grievant was, therefore, entitled to be reinstated at the rate of pay he was receiving when he was initially dismissed; could not be dismissed without "just cause"; is entitled to be given reasons for his dismissal; and to appeal the dismissal decision. VSEA further argues that the State lacked "just cause" for dismissing grievant under Article XI of the Agreement.

We agree that the Board's order of November 10, 1977 is not crystal clear on this issue. However, the intent of the order was that grievant be rehired at his former rate of pay and be given a three month period to improve his performance. In our view he did not do so during his period of reinstatement. While his supervisor's "incident reports" appear to be occasionally picayune and trivial and perhaps difficult for an employee to adjust to, they nevertheless document and justify the ratings given to the grievant in his performance evaluation and the reasons for his dismissal.

The grievant's uncertainty as to his status is not sufficient reason to hold otherwise. He held a responsible job subject to public criticism and evaluation. The pressure of uncertainty is only one of many grievant had to meet and we do not feel

it provides an independent excuse for substandard performance. Whether he was in a "warning period" or a "probationary period" is, therefore, legally irrelevant since we find just cause for dismissal. While we may question the wisdom of the decision, we cannot say it is legally insupportable (cf. Grievance of Gage, Vermont Supreme Court, February, 1979).

ORDER

For the foregoing reasons it is hereby ORDERED that the grievance of Michael Yashko be dismissed and it is DISMISSED; and that grievant be reimbursed by the State for the difference between the rate of pay he received during the period of his reinstatement and his old rate of pay prior to his first dismissal for the three months during which he worked.

Dated this 15 day of February, 1979 at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly F. Cheney, Chairman

Robert H. Brown

*Supreme Court  
Reversed Order  
6/3/80*