

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 97-20
SARAH ROYEA)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On March 27, 1997, the Vermont State Employees Association, Inc. ("VSEA") filed a grievance on behalf of Sarah Royea ("Grievant") against the State of Vermont Agency of Transportation, Department of Motor Vehicles ("Employer"), alleging that the Employer violated the collective bargaining agreement between the State and the VSEA for the Non-Management Bargaining Unit, effective for the period July 1, 1996 to June 30, 1997 ("Contract"). Specifically, Grievant alleged that the Employer: 1) violated Article 5 of the Contract by harassing her and failing to reasonably accommodate her handicap; and 2) violated Article 14 of the Contract by dismissing her without just cause, improperly bypassing progressive discipline and failing to apply discipline with a view towards uniformity and consistency.

A hearing was held on June 12, 1997, in the Vermont Labor Relations Board hearing room in Montpelier before Board Members Richard Park, Acting Chairperson; Louis Toepfer and Carroll Cornstock. Assistant Attorney General David Herlihy represented the Employer. VSEA Legal Counsel Samuel Palmisano represented Grievant. On July 7, 1997, the parties filed a partial Stipulation to Facts and post-hearing briefs.

All evidence presented at the hearing in this case, and the arguments submitted by the parties, have been considered and weighed by the Board. The

following Findings of Fact are based on the preponderance of the evidence and are those necessary to a determination of the material issues presented. To the extent that the testimony of certain witnesses is not in accord with the findings herein, such testimony conflicts with the preponderance of the evidence.

FINDINGS OF FACT

1. The Contract does not contain a specific definition of the term "disability RIF". However, Article 35 of the Contract, entitled "INJURY ON THE JOB", provides in pertinent part:

3. . . . An employee who, due to a job-related or non job-related disability, is separated from his or her position, but is not retired, shall be granted RIF reemployment rights under the RIF article with the 90-day probationary period. The employee must meet minimum qualifications and be physically able to perform the duties of the position to which he or she is being reemployed. Such employee will be eligible for health benefit coverage under Section 25 of the Reemployment Rights (Recall Rights) article. If an employee is disabled from performing his or her duties and is separated from employment for that reason, (s)he shall be entitled, after compliance with the State's Reasonable Accommodation Policy, to RIF reemployment rights to other state Positions under Article 70, with a 90-day probationary period.

2. Article 35 provides for employees to receive RIF reemployment rights (recall rights) under Article 70 of the contract if the employee is separated from his or her position due to a job-related or non-job related disability. The "disability RIF" procedure under Article 35 requires that an employee first comply with the State's Reasonable Accommodation Policy. If no accommodation for a disability can be made, the employee is entitled to RIF rights.

3. The State has allowed some employees, during the past couple of years, to obtain a "disability RIF", with recall rights under Article 70, by stipulation of the parties. In circumstances where a disability RIF has been provided for by

stipulation (outside of Article 35), employees have not been required to first comply with the Reasonable Accommodation Process by filing a Reasonable Accommodation Request.

4. Policy 3.2 of the State Personnel Policies and Procedures also addresses disability RIF's.

5. The State's Reasonable Accommodation policy was established consistent with a 1990 federal law, the Americans with Disabilities Acts ("ADA"). Under the policy, an employee with a disability completes a Request for Accommodation form. The employee's department then reviews and responds to such request. The employee request and employer response is reviewed by a Reasonable Accommodation Committee, which makes a recommendation to the employer regarding the employee's request.

6. Article 36 of the Contract states in pertinent part:

**ARTICLE 36
OFF PAYROLL AND ADMINISTRATIVE LEAVES OF ABSENCE**

...

1. POLICY

...

(1) An employee who fails to return from a leave of absence, paid or unpaid, for five (5) consecutive workdays after a leave is terminated, or an employee who is absent from work for five (5) consecutive workdays without notifying management shall be considered a voluntary quit ...

7. Grievant enrolled in the Vermont Career Opportunity Program ("VCOP") in 1991. She attended classes two days a week and worked three days a week in the Commercial Vehicles Division of the Vermont Department of Motor Vehicles. The Employer hired Grievant as a full time employee after she completed

the VCOP training. She received three promotions during her tenure and last held the position of Service Representative III. As a Service Representative III, Grievant reported to Supervisor of Counter Services Valerie Parker Smith. Parker Smith reports to Chief of Counter Services Linda Snyder.

8. Grievant received satisfactory annual performance evaluations throughout her tenure, which ended on March 11, 1997, when the Employer dismissed her. Prior to her dismissal, Grievant had not been disciplined (Grievant's Exhibit 1).

9. As a customer service representative, Grievant worked on one of 18 counters at which numerous types of motor vehicle transactions, such as renewing drivers' licenses, were processed. The customer service representative position is stressful and demanding. The Employer sets production quotas for this position, as well as other positions in the Department, and uses such quotas to evaluate employee productivity.

10. Grievant is married and has two sons. Prior to May 1996, Grievant helped her only sibling, a sister, care for her sister's children, one with cerebral palsy.

11. Grievant experienced mild depression in early 1995 brought on by the stresses in her life. Her primary care physician's assistant, Starr Strong, prescribed an antidepressant medication to help her cope with stress. Grievant remained on this medication until May 1996 when Strong prescribed a different medication.

12. At the end of May 1996, Grievant's sister died unexpectedly, leaving the care of her two young children to Grievant and Grievant's mother. Grievant's

sister's death had a profound effect on her and she became deeply depressed. Strong cared for Grievant during this time and wrote a note to the Employer requesting that Grievant be placed on medical leave until June 19, 1996. She later requested an extension of this leave until June 24, 1996. The Employer granted these leave requests (Grievant's Exhibits 2, 3, 4; State's Exhibits 11 - 14).

13. Grievant was hospitalized in Central Vermont Hospital from June 25, 1996 - July 3, 1996. Her physician requested that the Employer grant Grievant an extension of her medical leave until the end of August 1996. The Employer also granted this request (Grievant's Exhibit 5).

14. During the Summer of 1996, there were 22 Department employees assigned to work on the Department's 18 customer service counters. Keeping all 18 counters open requires that there be at least 20 employees working; one or more counters are closed when there are less than 20 employees available. If a counter is closed, the public often is kept waiting longer and employees may be required to work overtime.

15. Grievant's absence left 21 employees available to work during a time of year when there is a high demand by employees to use earned annual leave. Grievant's absence created a difficult situation for Parker Smith, who was responsible for staffing the service counters. Snyder and Parker Smith initially asked for volunteers to work overtime. As the summer progressed, however, employees stopped volunteering and it became necessary for Snyder and Parker Smith to assign involuntary overtime.

16. Snyder submitted a request to hire a temporary employee from July

7, 1996 - September 13, 1996, to work on the "check-in" counter; this is a position which requires little training and normally is staffed on a rotating basis by customer service representatives. This request was granted and Snyder hired temporary employees during the Summer of 1996 (State's Exhibit 10).

17. On or about August 26, 1996, Dr. Matthew Weiner, a physician at a mental health community center who treated Grievant after her release from the hospital, wrote a letter to the Employer stating that Grievant could return to work the first week of September on a part time basis. Strong also wrote a letter to the Employer in which she stated that Grievant could increase her hours to full time over the month. Strong also noted that Grievant "may need to miss hours occasionally due to continuing increased family obligations" (Grievant's Exhibits 8 - 10; State's Exhibits 15, 16).

18. Grievant proposed a 28 hour per week work schedule, which Parker Smith accepted. This part time schedule enabled Grievant to return to work but gave her the flexibility to attend counseling sessions and to care for the children. Grievant and her supervisors agreed that she should not return to her customer representative position immediately because of the more demanding nature of that position.

19. Grievant returned to work on September 3, 1996, and worked part time in quality control, mail rating and processing customer transactions at the counter. She had exhausted her leave accruals by the time she returned to work.

20. Grievant continued to experience symptoms of depression. Her physician wrote letters on September 24, 1996, and October 15, 1996, recommending that she continue working on a part time basis. This request was

approved (Grievant's Exhibit 12).

21. Grievant continued to work part time but also continued to experience stress and depression. On or about October 15, 1996, Grievant submitted an "Application for Leave" to take 15 days of leave in mid-February to visit her brother-in-law in Florida for a family vacation for "stress release". Grievant's physician and physician's assistant agreed that such a trip may help her cope with her medical problems and family demands. This leave request was denied because Grievant had no accrued leave time and other employees were close to losing some of their accrued leave under a "use or lose it" provision of the contract; they had not been able to use their accrued leave because of staff shortages caused in part by Grievant's extended absences (State's Exhibit 8).

22. On or about October 15, 1996, Dr. Weiner requested that Grievant work on a part time basis until at least until December 1, 1996. The Employer approved this request (Grievant's Exhibit 13; State's Exhibit 8).

23. Grievant was treated for sinusitis/bronchitis and missed work from approximately October 28, 1996 to November 4, 1996 (Grievant's Exhibits 14, 15).

24. On or about November 3, 1996, Snyder and Parker Smith met with Grievant. They told her that they were disappointed in her production and stated that they did not think that she was ready to return to work. They recommended that she take more time off to deal with her problems and indicated that she should not return to work until she was ready to be productive.

25. Grievant was very upset and cried during this November 3 meeting with Snyder and Parker Smith. She felt humiliated that her supervisors did not think

she was performing satisfactorily. Grievant had been encouraged by her progress because she had been able to return to the demanding task of waiting on customers at the counter. She asked if she could continue to work part time, and Snyder and Parker Smith told her that she could not continue to work part time (State's Exhibit 7).

26. In response to Snyder and Parker Smith's request, Grievant went to see Strong, who wrote a note excusing Grievant's absence. Grievant later met and talked with Weiner, who wrote a note on November 12, 1996, requesting that Grievant be placed on leave until January 6, 1997. Weiner stated in this note that it would be helpful if Grievant could return to work on a part time basis when she returned to work in January (State's Exhibits 7, 19; Grievant's Exhibit 17).

27. Snyder did not think that Weiner's note was sufficiently specific and asked Grievant for permission to speak to Weiner. Snyder called Weiner and explained that she needed Grievant working full time and meeting production demands when she returned to work. Weiner agreed that Grievant could return to work on a full time basis in January. The Employer approved the unpaid medical leave of absence request, effective November 10, 1996, to January 6, 1997 (State's Exhibits 7, 19, 20; Grievant's Exhibits 17, 18).

28. Grievant's annual performance evaluation was due to be completed in early November 1996. Parker Smith completed the evaluation and rated Grievant's performance for the first six months of the rating period, from November 1995 until the time of her sister's death in May 1996. She gave Grievant a "satisfactory" rating for this period. Parker Smith noted under "performance expectations" that Grievant

needed to enroll in refresher courses in certain areas and indicated that she would subsequently perform a special performance evaluation after Grievant completed such courses and after she had consistently worked for 60 days. On or about December 3, 1997, Grievant met with Parker Smith and signed the evaluation, but was still unhappy about being asked to take unpaid medical leave (Grievant's Exhibit 1).

29. On or about the first of December 1996, Grievant filed a discrimination complaint with the Vermont Human Rights Commission ("HRC") because she felt that her supervisors had not treated her fairly.

30. Grievant continued to seek treatment and counseling while she was on her medical leave of absence. On or about December 9, 1996, Strong requested that Grievant remain on leave until February 3, 1997. On December 10, 1996, Snyder wrote a letter to Grievant approving the leave extension until February 3, 1997. Her letter stated in pertinent part:

This letter is to advise you that as of this day forward any time you use as medical leave without pay, the Department is considering as time used under the Family Leave policy under Article 38, Section 4 of the VSEA contract.

Your leave is granted from 11/10/96 to 02/03/97, and you are expected to return to work full time on February 3, 1997. Your continued absence is having an adverse effect on the work place as it is limiting the amount of leave we are able to grant others.

(State's Exhibit 9)

31. Sometime in January, 1997, Grievant and her husband went to Florida and stayed with her brother-in-law. While there, Grievant thought about not returning to work with the Department or not returning as a customer service representative.

She was humiliated by what had happened to her, but also recognized that she could not fully perform the duties of a customer service representative at that time. She called her VSEA representative, Richard Lednicky, and asked him for advice. Lednicky told Grievant that she could apply for a disability RIF. Lednicky recommended that she contact her doctor and have him or her write a letter on her behalf. He indicated that if she did this that he would "take care of it".

32. Grievant called Strong, who agreed to write a letter for Grievant. On or about January 23, 1997, Strong sent a letter to Lednicky which stated in pertinent part:

Sarah Royea has been a patient in the practice for many years and has been followed closely by me for the last year or so, especially in the interval since her sister's death.

I believe, as does Sarah, that she is unable currently to return to the rather demanding position of customer service representative #3 secondary to the persistent depression she has experienced after her sister's death and the increased responsibility she feels for her sister's children. She is unable to intellectually process and recall as much information as this position requires at the present time. I do feel, as does she, that she is able to work in a less mentally demanding position and would be an asset in that position.

Please feel free to contact me if I can be of further assistance (Grievant's Exhibit 25).

33. VSEA received Strong's letter on January 27, 1997.

34. Grievant assumed that Lednicky had received Strong's letter and was working on her disability RIF. She did not contact Snyder or Parker Smith because she relied on Lednicky to contact the Employer and to arrange her disability RIF.

35. Jolene Chase is a Department customer service representative and Grievant's friend. She knew Grievant was expected to return to work on February 3,

1997, and she also was aware that Grievant was still in Florida. She obtained Grievant's Florida telephone number and called her on Sunday, February 2, 1997.

36. Grievant told Chase that her doctor had sent a note to Lednický and that she did not have to be back at work the next day. She also told Chase that she did not want to talk to her supervisors because she felt they had been unfair to her. During this conversation with Chase, Grievant said that she and her husband had been thinking about relocating in Florida and not returning to Vermont.

37. Parker Smith prepared for Grievant's return to work on Monday, February 3, 1997, and came to work to meet with her. This was inconvenient for Parker Smith because her grandchild was in a hospital in Burlington and she wanted to be with her family; however, she felt it was important to greet Grievant on her first day back at work.

38. Chase knew about Parker Smith's family situation and felt that Grievant should have called her supervisor and informed her that she did not intend to return on February 3. Chase told Parker Smith that she had spoken with Grievant, Grievant was in Florida, and Grievant did not know when she was coming back. Parker Smith told Snyder that she had just learned that Grievant was in Florida and would not be returning to work that day. Parker Smith left work to be with her family and had no further involvement in Grievant's employment situation.

39. Charly Dickerson became the Employer's Director of Human Resources in December 1996. Snyder told Dickerson about Grievant's failure to return to work on her expected date of return. He advised her to wait until Friday and, if Grievant had not returned to work, to call her. He further advised Snyder that, if

she was unable to reach Grievant on Friday by telephone, she should write her a letter. Snyder located Grievant's Vermont telephone number and attempted to call her at that number on Friday, February 7, 1997. When she dialed the telephone number, she discovered that Grievant's telephone had been disconnected. Snyder sent Grievant a note to her Vermont address reminding her that she had been expected to return to work on February 3, 1997, and asking Grievant to call her right away. Although Snyder and Parker Smith knew on February 3, 1997, that Grievant was in Florida, neither Snyder nor Parker Smith attempted to find a Florida telephone number or address for Grievant (State's Exhibit 5).

40. Grievant's mother picked up her mail, and forwarded it to her in bulk every few weeks while Grievant was in Florida. Grievant's mother did not send Snyder's letter to Grievant immediately. Grievant was unaware that her supervisor had been trying to get in touch with her and did not call Snyder.

41. Grievant did not contact her supervisors before or after February 3, 1997, because she believed that Lednicky had arranged a disability RIF for her.

42. On February 13, 1997, Dickerson sent Grievant a Loudermill letter by certified mail which stated in pertinent part:

As a result of your behavior described below, the Commissioner of Motor Vehicles and the Agency of Transportation are contemplating your dismissal from the position of Motor Vehicle Customer Service Representative II . . .

. . .

You did not report to work on February 3, 1997 nor did you contact your supervisor. An attempt was made to reach you by telephone at the number which we have on file for you. That number is currently listed as disconnected.

A letter was sent to you on Friday, February 7, 1997. The letter restated your return to work date of February 3, 1997 and requested that you call your supervisor immediately. As of this date you have not contacted your supervisor or responded in any way.

Article 36 of the Non-management Unit collective bargaining agreement states that "an employee who fails to return from a leave of absence, paid or unpaid, for five (5) consecutive workdays after a leave is terminated, or an employee who is absent from work for five (5) consecutive workdays without notifying management shall be considered a voluntary quit".

You must notify me within twenty-four (24) hours after receiving this letter whether you wish to respond to the above allegations. You must also then indicate whether you wish to respond in writing or orally in a meeting. If you do not respond within that time frame, a final decision will be made based on the information available . . . (State's Exhibit 1).

43. On or about Thursday, February 20, 1997, Grievant's mother picked up her mail and discovered Dickerson's certified letter. She immediately called Grievant and read her most of Dickerson's letter. Grievant was confused as to why Dickerson would send such a letter to her after Lednicky had arranged a disability RIF. She asked her mother to call Dickerson right away, which she did.

44. Dickerson told Grievant's mother that Grievant should have called her supervisor and informed her that she did not intend to return to work on February 3. He said he planned to terminate Grievant because she had not returned from her leave of absence on February 3. Grievant's mother told Dickerson that Grievant would be home that weekend and would call him on Monday, February 24.

45. Grievant returned from Florida over the weekend. At some point, Grievant called Lednicky to find out what was going on. He told her that he had received Strong's letter in January and had faxed it that same day to Pam Ankuda, the Employer's personnel administrator.

46. Grievant also may have contacted someone at the Human Rights Commission when she returned from Florida, as both VSEA and the Human Rights Commission were involved with her employment situation. It is not known whether *Lednický* knew about the discrimination complaint Grievant had filed earlier with the Human Rights Commission.

47. Grievant received Snyder's February 7, 1997, letter after her mother read her the February 13, 1997, certified letter from Dickerson. Grievant made no attempt to contact Snyder once she received Dickerson's letter because she assumed that he was now handling her employment situation for the Employer.

48. Grievant called Dickerson's office on February 24 and 25, 1997. Dickerson sounded angry to Grievant, and asked Grievant why she had not returned to work on February 3. She told him that *Lednický* had faxed her doctor's note to Ankuda in January and that she was under the impression that *Lednický* had obtained a disability RIF for her. Dickerson told Grievant that he did not want to hear about her doctor's note and that she was not eligible for a disability RIF. There was a discussion about the complaint Grievant had filed with the Human Rights Commission, and Dickerson stated that Grievant "was suing" the Department. Grievant indicated that she did not think that she was suing the Department. Dickerson stated, "What do you think they do at the Human Rights Commission?" or words to that effect. Dickerson asked Grievant what she wanted to do. She told him that *Lednický* would be in touch with him.

49. At some point Dickerson checked with various employees of the Employer to determine whether any of them had received Grievant's doctor's note

from Lednicky. The employees indicated that they had not seen it, and did not know anything about it. There are no records of the Employer or VSEA indicating that Lednicky contacted the Employer at the time he received Grievant's doctor's note in January.

50. At some point Lednicky tried to get in touch with Dickerson and was unsuccessful. He later saw Dickerson at a local restaurant, the Thrush Tavern, where Lednicky and Dickerson occasionally met and discussed business. Lednicky asked Dickerson why he had sent Grievant a Loudermill letter. There was a discussion about Strong's letter and the possibility of a disability RIF for Grievant. Dickerson had not seen Strong's letter, but indicated to Lednicky that he would check if his office had received this letter.

51. Lednicky gave Ankuda a copy of Strong's letter on February 26, 1997, while she was attending a meeting at VSEA. Ankuda showed the letter to Dickerson and to Snyder and both denied previously seeing it.

52. Lednicky made no further attempts to contact Ankuda or Dickerson until March 10, 1997.

53. On February 27, 1997, Dickerson instructed Ankuda to prepare a dismissal letter to Grievant for his signature and to date the letter March 4, 1997, because he was going to be out of the office until that time. Ankuda called Assistant Attorney General Thomas McCormick for advice on drafting the letter. McCormick was handling the discrimination complaint Grievant had filed with the Human Rights Commission. Ankuda drafted a termination letter for Dickerson's signature and sent it to McCormick for his review. This letter was never sent but formed the basis of the

subsequent dismissal letter sent to Grievant, set forth below in Finding of Fact No. 58 (State's Exhibit 3).

54. At some point Lednický told Grievant about his exchange with Dickerson that took place at the Thrush Tavern and indicated that he was waiting to hear back from Dickerson. Grievant kept checking with Lednický, but he did not have any further information.

55. At some point in early March 1997, Grievant called the Vermont Department of Personnel and requested that she be sent a Request for Accommodation application. When Grievant received the application form, Jolene Chase helped Grievant complete it. Grievant's husband delivered the application to the Employer sometime prior to March 11, 1997 (Grievant's Exhibit 8).

56. On March 10, 1997, Grievant was concerned because she had not heard anything from the Employer or Lednický so she went to the VSEA office in Montpelier to speak with Lednický. Lednický called Ankuda on the telephone in Grievant's presence to find out what was going on with Grievant's disability RIF application. Ankuda told Lednický that she did not know what was going on because Dickerson was handling the matter.

57. Dickerson prepared a draft of a dismissal letter for Grievant dated March 10, 1997. He concluded dismissal was justified because Grievant had not returned to work on February 3, 1997, had remained absent without notice for three weeks and had been put on notice that dismissal was being contemplated (State's Exhibit 4).

58. Snyder received Grievant's Request for Accommodation on or about

March 10, 1997, and faxed it to Ankuda and Dickerson. Legal counsel for the Employer suggested that Dickerson modify his March 10, 1997, dismissal letter to Grievant to reflect this request. Dickerson's amended letter, dated March 11, 1997, stated in pertinent part:

The decision has been made to dismiss you from your position of Motor Vehicle Customer Service Representative II. You were notified in a letter dated February 13, 1997 that your dismissal was being contemplated and the reasons for the contemplated dismissal. You did not respond to that letter in the time frame presented in the contract because you were in Florida. I have, however, considered the information which you provided when we spoke on February 24, 1997.

Your decision to be absent without notice for three (3) weeks has left us with no other choice but to terminate your employment effective March 10, 1997. You will not receive two weeks notice or pay in lieu of notice.

You are being dismissed for the reasons which were stated in the February 13, 1997 letter. Your extended medical leave of absence expired on February 3, 1997. You did not report to work on February 3, 1997 nor did you contact your supervisor. A letter was sent to you on February 6, 1997 which restated your return to work date and requested that you call your supervisor immediately. An earlier attempt was also made to reach you by telephone.

You did not contact your supervisor or respond in any way to these various attempts to communicate with you. Your first contact with the Agency of Transportation after learning that your dismissal was contemplated was on February 24, 1997. You were absent without authority for twenty-three (23) consecutive workdays, specifically from February 3, 1997 through March 10, 1997.

Article 36 of the Non-management Unit collective bargaining agreement which [states] that "an employee who fails to return from a leave of absence, paid or unpaid, for five (5) consecutive workdays after a leave is terminated, or an employee who is absent from work for five (5) consecutive workdays without notifying management shall be considered a voluntary quit". Therefore, pursuant to the contract you were considered to have voluntarily quit your job well before you contacted the Agency on February 24, 1997.

Even if Article 36 did not apply to this circumstance, your unauthorized absence between February 3, 1997 through the present would provide just cause for your dismissal.

A letter written by your physician on January 23, 1997 was sent to Richard Lednický of the Vermont State Employees Association. This letter was not provided to this Agency until Mr. Lednický did so on February 26, 1997. We have also received your ADA Reasonable Accommodation request on March 10, 1997. In light of the behavior discussed above, we consider the ADA request untimely . . . (State's Exhibit 2).

59. The status or outcome of Grievant's discrimination complaint filed with the Human Rights Commission is not known.

OPINION

The Employer contends that the dismissal of Grievant is warranted because she voluntarily quit her job under Article 36 of the Contract. The Employer bases this voluntary quit determination on Grievant failing to return to work on February 3, 1997, her designated date of return from an extended leave of absence; failing to notify her supervisor that she was not returning to work prior to that date; and not responding to attempts by the Employer to contact her. Article 36 of the Contract states, "An employee who fails to return from a leave of absence . . . for five (5) consecutive workdays after a leave is terminated . . . without notifying management shall be considered a voluntary quit". Alternatively, the Employer contends that, even if Article 36 does not apply, Grievant's unauthorized absence for nearly five weeks provides just cause for her dismissal.

It is clear that Grievant did not return to work within five workdays of February 3, 1997, her designated date of return from an extended leave of absence; and did not notify her supervisor that she was not returning to work prior to that date. It is also clear that Grievant did not respond to attempts by her supervisors to contact her during the week of February 3. We look to the circumstances surrounding these

events to determine whether the Employer was justified in concluding that Grievant had voluntarily quit her job.

The lack of notification to Grievant's supervisors prior to the expiration of Grievant's leave on February 3, 1997, resulted from inexcusable negligence on the part of Grievant's VSEA representative, Richard Lednicky. Grievant's unpaid leave of absence stemmed from her depression as a result of a personal tragedy in May 1996 when her only sibling unexpectedly died. While Grievant was in Florida attempting to recover from her depression, she recognized that she remained unable to fully perform the duties of her position of customer service representative. She sought the advice of Lednicky sometime in January. He advised her to have her doctor send him a letter and he said that he would take care of arranging a disability RIF for her. Grievant followed Lednicky's advice and her physician's assistant sent Lednicky a letter on or about January 23, 1997, which was received by the VSEA on or about January 27, 1997, one week prior to Grievant's expected date of return to work.

Despite Lednicky's assurances that he would take care of arranging a disability RIF for Grievant, he failed miserably in following through on this representation. Although he claims to have faxed the physician's assistant's letter to the Employer, no representative of the Employer actually received the fax and Lednicky produced no records confirming that the fax had been sent. In any event, the mere faxing of the physician's assistant's letter would constitute woefully inadequate representation of an employee facing possible termination of her employment. The letter does not specifically request that a disability RIF be arranged

for Grievant, and Lednický had told Grievant he would take care of this. There are three avenues to initiate or pursue such a disability RIF request: submitting a reasonable accommodation request, seeking to enter into a stipulation with the Employer for certain "recall rights", or following a procedure under the State Personnel Policies and Procedures. There is no evidence that Lednický pursued any of these options on Grievant's behalf prior to February 3, 1997. Grievant, meanwhile, assumed Lednický was working on her disability RIF and did not contact her supervisors because she reasonably relied on Lednický to contact the Employer.

We need to determine whether Lednický's failings translated into the Employer reasonably concluding that Grievant had voluntarily quit her job. In the dismissal letter, Charly Dickerson, the Employer's Human Resources Director, bases the voluntary quit determination not only on Grievant failing to return to work and failing to notifying her supervisor at the end of her leave of absence, but also on not responding to attempts by the Employer to contact her during the first week of her scheduled return to work.

On February 3, 1997, the date Grievant was due to return to work, her supervisors learned from a co-worker of Grievant's that Grievant was in Florida and would not be returning to work that day. A determination was made at that point by the Employer to attempt to contact Grievant and allow her an opportunity to explain her continuing absence. Given her extended disability and troubled recent work history, the Employer's efforts to contact Grievant, while not contractually required, were a good employment practice. However, the way the attempt was carried out was not reasonable nor consistent with that decision. This is particularly so since, in the

dismissal letter, Grievant is charged with not responding to attempts by the Employer to contact her.

The Employer failed to make such reasonable attempts. Although Grievant's supervisors knew that Grievant was not in Vermont, the Employer attempted to contact Grievant the first week she failed to return to work at her Vermont telephone number and address. Predictably, such attempts were unsuccessful because Grievant was in Florida. If the Employer had made reasonable attempts to contact Grievant in Florida, it is likely Grievant would have become aware of the problems concerning her leave of absence to allow her to inform the Employer in a timely manner (i.e., prior to the expiration of the five day period at the end of a leave of absence) that she was not voluntarily quitting her job.

The Employer took no further steps to contact Grievant until after the expiration of this five day period when Dickerson sent Grievant a certified letter inviting her to respond to allegations that she had voluntarily quit her job through not returning to work on February 3 and failing to respond to her supervisor's attempts to contact her. Upon receiving notice of this letter on February 20 through her mother, who had picked up Grievant's Vermont mail that day and called Grievant in Florida, Grievant responded immediately by asking her mother to call Dickerson immediately, which her mother did. Grievant then spoke to Dickerson two work days later upon her return to Vermont.

In their discussion, Grievant told Dickerson that she had not returned to work because she thought that Lednický had obtained a disability RIF for her. Dickerson responded to Grievant's explanation of her absence with hostility. He told her that

he did not want to hear about her doctor's note and that she was not eligible for a disability RIF. In short, although Dickerson invited Grievant to respond to the allegations that she had "voluntarily quit" her job in his February 13 letter, he disregarded her explanation when he heard it.

Within the next few days, Lednicky discussed Grievant's request for a disability RIF with Dickerson and the Employer received a copy of Grievant's physician's assistant's letter which formed the basis for her disability RIF request. The Employer never answered this request or engaged in any meaningful discussion with Grievant or her union representative about the possibilities of a disability RIF.

In sum, we conclude that the Employer did not make reasonable attempts to contact Grievant and, once they did contact her, did not reasonably consider her explanation of her continuing absence. Under all the circumstances of this case, the Employer was not justified in dismissing Grievant for voluntarily quitting her job, or for the alternative justification of unauthorized absence. Although Grievant certainly was hindered by the inadequate efforts of her VSEA representative, we do not believe she should be considered to have voluntarily quit her job or to have engaged in an unauthorized absence warranting her dismissal. Once she became aware of problems concerning her leave of absence and request for a disability RIF, she attempted to resolve those problems responsibly and in a timely manner.

The appropriate remedy under all the circumstances of this case is not the normal remedy for an improper dismissal of reinstatement with back pay. Grievant has not sought to return to her prior position since the expiration of her leave of absence. Instead, she has sought a disability RIF. We conclude that the appropriate

remedy is to require the Employer to consider Grievant's request for a disability RIF.

ORDER

NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the Grievance of Sarah Royea is SUSTAINED, and the State of Vermont Agency of Transportation shall consider and determine whether to grant Grievant's request for disability reduction in force reemployment rights.

Dated this 16th day of September, 1997, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD



Richard W. Park, Acting Chairperson

/s/ Louis A. Toepfer

Louis A. Toepfer



Carroll P. Comstock