

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 99-3
JAMES ADAMS	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On February 8, 1999, James Adams ("Grievant") filed a grievance against his employer, the State of Vermont, Agency of Human Services, Department of Social and Rehabilitation Services ("Employer"). Therein, Grievant alleged that the Employer violated Article 14, Sections 1 and 6, of the collective bargaining agreement between the State of Vermont and the Vermont State Employees' Association, effective July 1, 1997 – June 30, 1999 ("Contract"), in suspending Grievant for two days. Specifically, Grievant alleged that he was disciplined without just cause and that his suspension was substantially based on a letter of supervisory feedback that was not in his personnel file.

Hearings were held on July 15 and 28, 1999, before Labor Relations Board Members Catherine Frank, Chairperson; Carroll Comstock and Richard Park in the Board hearing room in Montpelier. Grievant represented himself. Assistant Attorney General William Reynolds represented the Employer. Grievant filed a post-hearing brief on August 10, 1999. The Employer filed a brief on August 11, 1999.

FINDINGS OF FACT

- I. Article 14 of the Contract provides in pertinent part as follows:
  1. No permanent . . . employee covered by this Agreement shall be disciplined without just cause. The parties jointly recognize the deterrent value of disciplinary action. Accordingly, the State will:  
...
    - (c) impose a procedure of progressive discipline . . .
    - (d) In misconduct cases, the order of progressive discipline shall be:

- (1) oral reprimand;
- (2) written reprimand;
- (3) suspension without pay;
- (4) dismissal.

...  
 (f) The parties agree that there are appropriate cases that may warrant the State:

- (1) bypassing progressive discipline ...

...  
 6. No written warning or other derogatory material shall be used in any subsequent disciplinary proceeding or merged in any subsequent evaluation unless it has been placed in an employee's official personnel file.

...  
 7. Whenever an employee is required, by his or her supervisor or management, to give oral or written statements on an issue involving the employee, which may lead to discipline against an employee . . he or she shall be notified of his or her right to request the presence of a VSEA representative ...

8. The appointing authority or authorized designee may suspend an employee without pay for reasons for a period not to exceed thirty (30) workdays. Notice of suspension, with specific reasons for the action, shall be in writing ...

10. In any misconduct case involving a suspension . . . should the Vermont Labor Relations Board find just cause for discipline, but determine that the penalty was unreasonable, the Vermont Labor Relations Board shall have the authority to impose a lesser form of discipline.

2. The State Sexual Harassment Policy, which was issued by the Department of Personnel and became effective March 1, 1996, provides in pertinent part as follows:

... Sexual harassment is a form of discrimination on the basis of sex and is, therefore, prohibited in the work place . . . It is also unlawful to retaliate against an employee for filing a complaint of sexual harassment or for cooperating in an investigation of sexual harassment.

All employees, including but not limited to staff, supervisors, managers, and appointing authorities, are expected to comply with this policy and take appropriate measures to ensure that sexual harassment does not occur. Disciplinary action, up to and including dismissal, will be taken against any employee who engages in sexual harassment or who otherwise violates this policy.

In addition, every manager and supervisor within the State of Vermont is responsible for providing a work place free from sexual harassment. This

duty includes informing and discussing this policy with all employees; ensuring that employees know they are not required to endure sexual harassment; that sexual harassment will not be allowed; that this policy will be enforced; and that charges of sexual harassment will be impartially and immediately investigated . . . Any manager or supervisor who does not deal with sexual harassment complaints consistent with the terms of this policy may be subject to disciplinary action.

#### **DEFINITION OF SEXUAL HARASSMENT:**

Sexual harassment is a form of sex discrimination and means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, when:

- a) submission to such conduct is made either explicitly or implicitly a term or condition of employment; or
- b) submission to or rejection of such conduct by an individual is used as a component of the basis for employment decisions affecting that individual; or
- c) the conduct has the purpose or effect of unreasonably interfering with an individual's work performance or of creating an intimidating, hostile, or offensive work environment.

#### **PROHIBITED CONDUCT:**

Sexual harassment can be either verbal, physical, auditory, or visual. It can be either subtle or overt. Sexual harassment refers to behavior that is not only unwelcome, but which can also be personally offensive, fails to respect the rights of others, lowers morale and interferes with work effectiveness, or violates a person's sense of well-being.

Examples of . . . forms of prohibited sexual harassment include, but are not limited to the following, when such acts or behaviors come within one of the above definitions:

**Verbal:** Sexual innuendos, suggestive comments, jokes of a sexual nature, sexual propositions, threats, unwelcome sexual flirtations, persistent requests for dates, degrading words used to describe an individual, other verbal comments of a sexual nature, and graphic commentaries about an individual's body.

**Non-Verbal:** Sexually suggestive or offensive objects or pictures, written comments, suggestive or insulting sounds, leering, whistling, obscene gestures.

**Physical:** Unwanted physical contact, which may include touching, pinching or brushing the body, coerced sexual intercourse, and assault.

#### **REPORTING & RESOLUTION OF COMPLAINTS:**

The State, through this policy, commits itself to quick and effective actions to ensure that sexual harassment does not occur or persist. However, the fulfillment of that commitment will in large part depend on the willingness of employees to report prohibited behavior. A timely response to sexual harassment is essential to protect victims from further unwelcome behavior. It also ensures that the person responsible for objectionable behavior understands its impact on others. A timely report provides the best opportunity for the employer to expeditiously and effectively address the matter with the least possible adverse impact on all parties concerned.

...

(A)ll employees should report any incidents of sexual harassment they experience, witness or know of ...

The following process will allow employees to freely report incidents of sexual harassment, free from threats of reprisal ...

...

#### **TO PROCESS A COMPLAINT:**

1. All complaints received by supervisors, managers, EEO officers, or Department of Personnel staff will be referred immediately to the departmental personnel officer. The personnel officer will coordinate with the appointing authority to ensure that a timely and complete review of the complaint is made. A report of any investigation will first be reviewed with the Department of Personnel Employee Relations Staff, and then a copy of the final report will be provided to the appointing authority. The appointing authority will identify and take steps promptly to remedy the harassment and prevent its recurrence.

2. Within five (5) work days, the appointing authority shall issue a written response to the complainant acknowledging the complaint and providing notice, if applicable, that any prohibited activity is expected to cease. An investigation will be done promptly and a written response will be provided to the complainant. The investigation and response will normally be completed within thirty (30) days.

...

6. Any intimidation, harassment, or interference for filing a complaint or assisting in an investigation and/or intentionally filing a false complaint of sexual harassment will be subject to appropriate discipline, up to and including dismissal.

...

(State's Exhibit 34)

3. At all times relevant, Grievant was a social worker assigned to the Social Services Division, Department of Social and Rehabilitation Services office in Morrisville. Grievant does most of the child abuse investigations done by the Morrisville office.

4. From 1987 to 1995, Gerald Jeffords was Casework Supervisor in the Morrisville office. In that role, he was immediate supervisor of Grievant. Since 1995, Jeffords has been District Director of the Morrisville District Office. Michael Feulner became Grievant's immediate supervisor in approximately January of 1998, and has remained in that role until the present.

5. In 1990 and 1997, Jeffords informed Grievant that he needed to conform his behavior to the State's sexual harassment policies. In March 1998, the Morrisville office staff received two hours of sexual harassment training. Grievant attended the training. Among the written materials received by Grievant was the State Sexual Harassment Policy. Shortly after the training, Feulner reviewed the training with Grievant. Feulner indicated to Grievant that he needed to be aware of how his comments may be perceived by other persons who had varying degrees of sensitivity. Feulner told Grievant that he needed to adapt his behavior so as not to offend the most sensitive persons.

6. On October 28, 1998, Jeffords informed Grievant by letter that he was being temporarily relieved from duty with pay so the Employer could investigate remarks Grievant allegedly made to co-worker Diane LeClair. The letter provided in pertinent part:

...  
During this period of relief from duty, you are to abide by the following instructions:

...  
4. You are to be available and reachable by phone during normal working hours to participate as needed in the Department's investigation...

...  
Failure to comply with the above instructions may be considered an offense of insubordination and may result in discipline against you, up to and including dismissal.

...  
(State's Exhibit 3)

7. Joe Benner, Personnel Administrator for the Agency of Human Services, was assigned to investigate the incident. During the investigation of the incident, Benner told Grievant that he needed to cooperate in the investigation.

8. By letter dated November 6, 1998, Feulner gave Grievant a letter of "supervisory feedback" with respect to the incident concerning LeClair. Feulner met with Grievant on November 9, 1998, and discussed the letter with him in detail. The letter included the following statements:

In order to put you on clear notice of what is and what will be expected of you . . . I am providing you with the following set of performance expectations:

- You will at all times behave in a courteous and considerate manner to all of your co-workers.

- You will make no comments which could reasonably cause distress or discomfort to your co-workers.

- You will refrain from any gratuitous comments or actions which could reasonably be interpreted as having sexual connotations.

...

If at any time it becomes apparent that a co-worker has misinterpreted any comments of yours as having personal connotations, you will take prompt action to correct that misapprehension.

...  
(State's Exhibit 7)

9. The letter of supervisory feedback was not placed in Grievant's personnel file.

10. As of November 10, 1998, Kathi Ferrer had been employed for approximately 10 months as a Resource Coordinator in the Morrisville Social and Rehabilitation Services office. Prior to November 10, 1998, Grievant had not made comments of a sexual nature to Ferrer.

11. On the morning of November 10, 1998, there was a meeting of the Unit Chiefs in the Morrisville office. Kathi Ferrer and other members of the staff were scheduled to make presentations at the meeting. Ferrer wore a business suit consisting of a skirt, shirt and jacket. She had worn this outfit to work on other occasions.

12. At some point on November 10 prior to the meeting, Ferrer was walking down the hall in the office when she encountered Grievant walking towards her. As Grievant got closer to Ferrer, he looked up and down her body, as if surveying her, and said, "Oh, yeah!", in a throaty voice.

13. Grievant's behavior caused Ferrer to feel demeaned, and to feel like an object. This encounter damaged Ferrer's confidence prior to the meeting. She immediately went into her office to "gather" herself. She then went to the Unit Chiefs' meeting and gave her presentation.

14. At approximately 4:30 p.m. that afternoon, Ferrer told Feulner about the incident with Grievant. Feulner requested that Ferrer write a report of the incident.

Subsequently that afternoon, Ferrer sent Feulner and Jeffords an e-mail message on the incident which provided in pertinent part:

. . . I was walking down the hall towards my office and Jim was walking towards me. As he got closer, he looked me up and down (as if surveying me) and said, "Ohh, Yeahhh!!!" Then made some comment about it being a nice day or something like that and moved on down the hallway. Normally, Jim's comments, although sometimes inappropriate, do not bother me. However, this incident made me feel bad about myself and needs to be addressed . . .

(State's Exhibit 8)

15. Benner was assigned to investigate this incident. On November 13, 1998, Benner interviewed Grievant and Ferrer at the Morrisville office. Benner began the interview with Grievant by asking Grievant if he remembered encountering Ferrer in the Morrisville office on November 10 prior to the Unit Chiefs' meeting. Grievant responded that he did not recall. Grievant then told Benner that he was not going to discuss the incident involving Ferrer any further because he was going to file sexual harassment complaints against Ferrer, LeClair and others. Benner asked Grievant the basis for his complaints. Grievant said they were creating a hostile environment for him by making false statements against him. Benner asked Grievant whether, by charging Ferrer with making false statements about him, he was denying her version of the November 10 incident. Grievant then said he was not going to answer Benner's questions (State's Exhibit 13).

16. On November 20, 1998, Benner sent a memorandum to Fred Ober, Social Services Division Director informing him of the results of his investigation. Benner set forth the following "conclusions" in the memorandum:

Ms. Ferrer was very credible and convincing in her description of the incident which inspired her complaint. Both because of her credibility and



because of Mr. Adams's refusal to deny the incident, it is reasonable to conclude that the incident took place as Ms. Ferrer described it. Mr. Adams's behavior in this incident is clearly of a type which is prohibited by the State Sexual Harassment Policy.

...  
(State's Exhibit 13)

17. On November 30, 1998, Feulner gave Grievant a letter from Jeffords to Grievant informing Grievant of his "suspension without pay for two workdays" based on the November 10 incident with Ferrer. In the letter, Ferrer's account of the incident was accepted. The letter otherwise provided in pertinent part as follows:

... The reasons for this suspension are as follows:

As a result of a co-worker's complaint regarding certain comments you made, you were issued a letter of supervisory feedback dated November 6, 1998.

That letter established a series of performance expectations, including that: you will at all times behave in a courteous and considerate manner to all of your co-workers; you will make no comments which could reasonably cause distress or discomfort to your co-workers; and you will refrain from any gratuitous comments or actions which could reasonably be interpreted as having sexual connotations.

...  
Your conduct on November 10, 1998, toward Ms. Ferrer violated not only the State Sexual Harassment Policy, but also the specific expectations that were so recently established for you. The seriousness with which SRS takes your action can hardly be overstated. If you again violate the State Sexual Harassment Policy, you will be subject to progressively more severe discipline up to and including dismissal from your position.

Your conduct on November 12, 1998, during the investigation also violated the expectations for SRS employees. You essentially declined to answer any questions regarding Ms. Ferrer's complaint. SRS employees have an obligation to cooperate with work-related investigations, and that includes providing complete and truthful answers to the questions of investigators. You do not have a right to refuse to answer such questions, and you will be subject to progressive discipline if you fail to cooperate in the future, during investigations.

...  
(State's Exhibit 16)

18. In suspending Grievant, the Employer determined that, although Grievant had violated the State Sexual Harassment Policy, he had not engaged in sexual harassment.

19. Prior to being suspended, Grievant had no disciplinary action of record during his employment .

#### OPINION

Grievant alleges that the Employer violated Article 14, Sections 1 and 6, of the Contract by suspending him for two days. Specifically, Grievant alleges that he was disciplined without just cause and that his suspension was substantially based on a letter of supervisory feedback that was not in his personnel file.

To establish just cause for discipline, it is necessary for the Employer to show that disciplining the employee for certain conduct is reasonable; and that the employee had fair notice, express or fairly implied, that such conduct would be grounds for discipline. In re Grievance of Brooks, 135 Vt. 563, 568 (1977). On the issue of fair notice, the ultimate question is whether the employee knew, or should have known, the conduct was prohibited. Brooks, 135 Vt. at 568. Grievance of Towle, 164 Vt. 145 (1995).

We first discuss whether the Employer has established the charges made against Grievant in suspending him. 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, 265 (1983).

The Employer made two charges against Grievant: 1) that his conduct on November 10, 1998, towards Kathi Ferrer violated the State Sexual Harassment Policy; and 2) that his conduct on November 12, 1998, during the investigation of the incident

involving Ferrer violated the expectations for employees to cooperate in work-related investigations.

We first address the charge that his conduct towards Ferrer violated the State Sexual Harassment Policy. In suspending Grievant, the Employer determined that, although Grievant had violated the State Sexual Harassment Policy, he had not engaged in sexual harassment. Thus, we need to determine whether an employee can violate the Sexual Harassment Policy based on conduct of a sexual nature towards another employee without engaging in sexual harassment.

The policy provides that disciplinary action "will be taken against any employee who engages in sexual harassment or who otherwise violates this policy." In reviewing the policy in its entirety, the salient provisions of which are set forth in the Findings of Fact, we interpret it to provide that an employee can be disciplined based on conduct of a sexual nature towards another employee only when the employee engages in sexual harassment as defined by the policy. The provision of the policy that an employee will be disciplined "who otherwise violates this policy" covers prohibited conduct relating to the filing of sexual harassment complaints. This includes situations such as a supervisor or manager not dealing with complaints consistent with the terms of the policy, an employee making a threat of reprisal against an employee making a complaint, an employee intimidating or harassing an employee for filing a complaint or assisting in an investigation, an employee interfering with the filing of a complaint or the investigation, or an employee intentionally filing a false complaint of sexual harassment.

Thus, we conclude that the Employer has not established the charge that Grievant violated the State Sexual Harassment Policy based on his conduct on November 10,

1998, towards Ferrer because the Employer did not conclude that he engaged in sexual harassment. In reaching this conclusion, we are not condoning the inappropriate behavior Grievant engaged in with respect to this incident. We simply are concluding that the Employer would have to establish that Grievant engaged in sexual harassment towards Ferrer as defined in the Sexual Harassment Policy to sustain this charge, and the Employer has not charged that he engaged in sexual harassment.

Given our conclusion in this regard, it is unnecessary to address Grievant's contention that Article 14, Section 6, of the Contract was violated because his suspension was substantially based on a letter of supervisory feedback that was not in his personnel file. The letter of supervisory feedback is relevant in this case, and was admitted into evidence, only for the purpose of demonstrating that Grievant was on notice that he could be disciplined for his conduct towards Ferrer. Since we have determined that the Employer has not sustained the charge with respect to Grievant's conduct towards Ferrer, we need not address this issue.

We next address the charge against Grievant that his conduct on November 12, 1998, during the investigation of the incident involving Ferrer, violated the expectations for employees to cooperate in work-related investigations. We conclude that the Employer has established this charge. In the interview with the Personnel Administrator investigating the complaint that Ferrer made against Grievant, Grievant told the investigator that he did not recall the incident involving Ferrer although it had occurred only three days earlier. Grievant then told the investigator that he was not going to discuss the incident involving Ferrer because he was going to file sexual harassment complaints of his own against Ferrer and others, and that he was not going to answer the

investigator's questions. His evasive actions, and outright refusal to discuss the specifics of the incident, constituted a failure to cooperate in the investigation.

The fact that one of the charges against Grievant has not been proven does not necessarily mean that his suspension lacks just cause. Failure of the employer to prove by a preponderance of the evidence all the particulars of a disciplinary letter does not require reversal of the disciplinary action. Grievance of Regan, 8 VLRB 340, 366 (1985). In such cases, the Board must determine whether the remaining proven charge or charges justify the penalty. Colleran and Britt, *supra*. Grievance of Buckbee, 15 VLRB 34, 51 (1992).

We look to the factors articulated in Colleran and Britt, 6 VLRB at 268-69, to determine whether the proven charge justifies the disciplinary action. The pertinent factors here are: 1) the nature and seriousness of the offense and its relation to Grievant's responsibilities, 2) the clarity with which Grievant was on notice that such conduct could lead to discipline, 3) the employee's past work record and disciplinary record, and 4) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

Grievant's proven offense was serious. Like other employees, he has the responsibility to cooperate in the investigation of sexual harassment complaints to promote their quick and effective resolution. The State Sexual Harassment Policy sets forth the State's commitment to "quick and effective actions to ensure that sexual harassment does not occur or persist" and the objective to "expeditiously and effectively address the matter with the least possible adverse impact on all parties concerned". The

Policy reflects the recognition that sexual harassment issues are best handled quickly and informally with the active involvement of all parties.

Grievant frustrated these worthy goals by his lack of cooperation during the investigation. This eliminated the potential of any quick and effective resolution of Ferrar's complaint against him. Instead, his actions set into motion a more formal, adversarial and time-consuming resolution through a Board grievance proceeding.

Grievant had fair notice that his conduct was prohibited. During a previous investigation of a complaint an employee made against Grievant, Grievant was informed in a letter from his superior that failure to be available to participate in the Employer's investigation may result in discipline. Also, the Employer's investigator informed Grievant that he needed to cooperate in the investigation. These communications from representatives of the Employer provided sufficient notice to Grievant that his failure to cooperate in investigations could result in his discipline.

In determining whether Grievant's offense was sufficiently serious to warrant his suspension, we recognize that Grievant had no prior disciplinary action of record during his employment. Nonetheless, we conclude that his offense was sufficiently egregious to warrant the bypassing of progressive discipline. His conduct completely frustrated the possibility of resolving a sexual harassment complaint quickly and informally. A two day suspension is a reasonable action to deter Grievant and others from engaging in such conduct in the future.

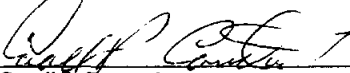
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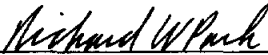
NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the Grievance of James Adams is DISMISSED.

Dated this 8th day of October, 1999, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

  
Catherine L. Frank, Chairperson

  
Carroll P. Comstock

  
Richard W. Park