

VERMONT LABOR RELATIONS BOARD

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| GRIEVANCE OF: |) | |
| |) | DOCKET NO. 99-34 |
| MATTHEW GREENIA |) | |

MEMORANDUM AND ORDER

Statement of Case

This case is on remand from the Vermont Supreme Court. In May 1999, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Matthew Greenia ("Grievant") alleging that the Vermont Department of Corrections ("Employer") violated Articles 5 and 14 of the collective bargaining contract ("Contract") by restricting the areas Grievant was allowed to work when he was reinstated pursuant to a decision of the Labor Relations Board in Grievance of Greenia, 22 VLRB 18 (1999). Grievant contended that the Employer violated Article 5 by discriminating and retaliating against him for filing a successful grievance. Grievant also contended that the employer's actions were disciplinary actions and there was no just cause for such discipline in violation of Article 14 of the Contract.

After hearing, the Board majority of Carroll Comstock and John Zampieri concluded that the Employer violated Article 5 of the agreement by imposing restrictions on where Greenia could work due to discrimination against him for filing a grievance that resulted in the Board ordering his reinstatement. Grievance of Greenia, 22 VLRB 336 (1999). Board Chairperson Catherine Frank dissented because she disagreed that Grievant's protected conduct was a motivating factor in the Employer's treatment of him upon his reinstatement. Given the majority's conclusion that the Employer violated Article 5, the majority indicated that there was no need to discuss Greenia's further

contention that the restrictions placed on his employment were disciplinary actions in violation of Article 14.

The Employer appealed the Board decision to the Supreme Court. On appeal, the Court reversed the Board conclusion that the Employer imposed these restrictions in retaliation for filing a grievance. The Court determined that the conclusion by the Board majority that the Employer imposed these restrictions in retaliation for filing a grievance was not consistent with the Board's factual findings regarding the motive of the Employer's actions. The Court remanded for the Board to consider the Article 14 claim of Grievant not addressed by the Board.

Grievant and the Employer briefed Grievant's Article 14 allegation when this case was initially before the Board so it is ripe for decision without further briefing. Grievant contends that, upon his reinstatement, Superintendent Murphy improperly disciplined him for a second time, on the basis of the same allegations that formed the basis for his dismissal, by restricting the areas in which he was allowed to work. Grievant maintains that the memorandum announcing the restrictions may be considered a written reprimand pursuant to Article 14, and this double punishment is prohibited by the just cause protections contained in the Contract. Grievant contends further that, even if the Board were to disagree with him that the memorandum constituted a written reprimand, the actions of Superintendent Murphy still violated the just cause protections of the Contract because it would mean the Employer imposed a form of discipline not agreed to by the parties.

The Employer contends that the restrictions imposed by Superintendent Murphy do not constitute or resemble the forms of discipline recognized by Article 14 of the

Contract: oral reprimand, written reprimand, suspension without pay, dismissal and demotion. The Employer contends that nothing in the Contract suggests that the exercise of judgment by management in determining that a certain employee should be given certain assignments constitutes punishment. To the contrary, the Employer contends that the Management Rights article of the Contract reserves to management the right to exercise such judgment by providing: “nothing in this Agreement shall be construed to interfere with the right of the Employer to carry out the statutory mandate and goals of the agency, to restrict the State in its reserved and retained lawful and customary management rights, powers, and prerogatives, including their right to utilize personnel, methods and means in the most appropriate manner possible”.

MAJORITY OPINION

We conclude that the restrictions placed on Grievant upon his reinstatement constituted the improper imposition of discipline in violation of the Article 14 prohibition against disciplining employees without just cause. If an employer takes an adverse action against a reinstated employee based on alleged misconduct by the employee that formed a basis for the employee’s dismissal, then the employer is imposing discipline on the employee. This is what occurred here.

Superintendent Murphy issued the directive imposing restrictions on where Grievant could work because he continued to believe that Grievant committed the misconduct of engaging in an inappropriate course of conduct with female offenders for which he was initially charged. Because of this, he did not want Grievant working near female offenders. 22 VLRB at 339. This constituted an adverse action based on Grievant’s alleged misconduct. As we stated in our initial decision in this case:

We conclude that Murphy's restrictions on the areas Grievant was allowed to work was an adverse action. Prior to his discharge, Grievant hoped to become a shift supervisor and had the opportunity to work as an acting shift supervisor on second and third shift. Murphy's restrictions resulted in the adverse effect on Grievant of not being able to work as an acting shift supervisor on third shift, or as a float officer, positions he routinely held prior to his discharge. Further, the adverse effect on Grievant is reflected in his being embarrassed that inmates and officers are aware of Murphy's restrictions on his work and his belief that the inmates take him less seriously because they know Murphy continues to believe that he engaged in misconduct. It also has a deleterious effect for Grievant to be put in the position of having to explain these restrictions to new officers he trains who come to the facility without knowledge of the accusations against him. Id. at 343.

It would be inappropriate to permit Superintendent Murphy to discipline Grievant for a second time for the same alleged misconduct. In the initial decision concluding that just cause did not exist for Grievant's dismissal and ordering Grievant's reinstatement, the Board found that the Employer had failed to prove by a preponderance of the evidence that Grievant had engaged in an inappropriate course of conduct with female offenders. Grievance of Greenia, 22 VLRB 18 (1999). Having once decided that conduct engaged in by Grievant warranted disciplinary action, and having that action reversed, the Employer then may not again discipline Grievant for the same alleged misconduct. Otherwise, the Board decision concluding that the Employer had failed to prove the alleged misconduct would lose its force and effect.

The fact that the Employer did not employ one of the forms of discipline set forth in the Contract does not change our conclusion. It would be inappropriate to allow an employer to circumvent the prohibition against disciplining an employee twice for the same alleged misconduct by calling an action non-disciplinary. Grievance of Colleran, 13 VLRB 9, 17-18 (1990). The Employer cannot avoid the provisions of the Contract providing that employees may only be disciplined for just cause by imposing sanctions

based on alleged misconduct, and calling it non-disciplinary. In sum, we conclude that the Employer disciplined Grievant without just cause by taking the adverse action of imposing the restrictions based on Grievant's alleged misconduct.

Carroll P. Comstock

John J. Zampieri

DISSENTING OPINION

I disagree with my colleagues that the restrictions constituted imposition of discipline. The restrictions imposed by Superintendent Murphy do not constitute or resemble the forms of discipline recognized by Article 14 of the Contract: oral reprimand, written reprimand, suspension without pay, dismissal and demotion.

In alleging that the restrictions placed on him constituted discipline, Grievant is attempting to put a square peg into a round hole. The Supreme Court remanded this case because the earlier conclusion by the majority that the Employer imposed these restrictions in retaliation for Grievant filing a grievance was not consistent with the Board's factual findings regarding the motive of Murphy's actions. Similarly here, the conclusion by the majority that Grievant was disciplined is not consistent with the fact that the restrictions imposed by Murphy do not resemble any of the forms of discipline set forth in the Contract.

Catherine L. Frank, Chairperson

ORDER

Now therefore, based on the foregoing reasons, it is ordered:

- 1) The grievance of Matthew Greenia is SUSTAINED with respect to his allegation that Article 14 of the Contract was violated; and
- 2) The memorandum issued by Superintendent John Murphy on February 5, 1999, is rescinded and the Employer shall forthwith reinstate Matthew Greenia to his position without the restrictions set forth in that memorandum.

Dated this 20th day of December, 2001, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Carroll P. Comstock

John J. Zampieri