

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:

RUTH MUZZY

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DOCKET NO. 80-37

FINDINGS OF FACT, OPINION AND ORDER

Statement of the Case

On April 23, 1980, the Vermont State Employees' Association, Inc. ("VSEA") filed a grievance with the Vermont Labor Relations Board on behalf of Ruth Muzzy, appealing her dismissal from State service.

The State filed an Answer on May 5, 1980, maintaining Ms. Muzzy ("Grievant") was dismissed for "just cause" under the Agreement between VSEA and the State for the Non-Management Unit, effective July 1, 1979 (the "contract").

A hearing was held on September 4, 1980, at the Board hearing room in Montpelier before Board members William G. Kemsley, Sr. and Robert H. Brown. Chairman Kimberly B. Cheney was absent, having disqualified himself from any participation in and consideration of this case. Member Brown presided as Acting Chairman. Assistant Attorney General Bennett E. Greene represented the State. Counsel for VSEA, Michael R. Zimmerman, represented Grievant.

Memoranda and requests for findings of fact were filed by attorneys Zimmerman and Greene on September 12 and September 18, 1980, respectively.

Findings of Fact

1. At all times relevant herein, Grievant was a permanent status employee as that term is used in the contract, the Agreement between the State of Vermont and the Vermont State Employees Association, Inc.,

for the Non-Management Unit, effective July 1, 1979, (Joint Exhibit #1).

2. On December 28, 1970, Grievant was employed by the State as a Typist B, pay scale four, in the office of the Secretary of State.

3. Grievant's duties and responsibilities in that position were generally of a clerical nature and are accurately set forth in Grievant's Exhibit #1, the current Department of Personnel Class Description of that type of job. Throughout her employment in the Secretary of State's office, Grievant's primary duties were those set forth in her Position Description (State's Exhibit #19), the registration, re-registration, and cancellation of corporation tradenames.

4. By certified letter dated March 28, 1980, from Secretary of State James Guest (State's Exhibit #1), Grievant was notified of her dismissal, effective immediately, because of continued unsatisfactory performance.

5. On January 4, 1980, approximately three months prior to her dismissal, Grievant was placed in a warning period by her immediate supervisor, Jane McManus. (State's Exhibit #10) Ms. McManus cited as reasons for this action Grievant's continual inaccuracies and subsequent failure to achieve a satisfactory performance rating in two prior consecutive performance evaluations. (State's Exhibits #15 and #11).

6. Enclosed in the dismissal letter was a copy of the performance evaluation report covering the warning period immediately preceding her dismissal, January 4, 1980, through March 28, 1980 (State's Exhibit #4), in which Grievant received an overall rating of 2 ("inconsistently meets job performance standards").

7. In addition to the three performance reports received by Grievant during the period of August 24, 1979, through March 28, 1980

(State's Exhibits 15, 11 and 4), Grievant also received several other written communications from Ms. McManus (State's Exhibits 14, 12, 10, 9, 8 and 6) and her supervisor before Ms. McManus, Gloria Hurd (State's Exhibits 17 and 16) regarding identified performance deficiencies and prescribed performance standards and goals.

8. Grievant admitted that: 1) the incidents subject to the various communications she received in finding No. 7 infra did occur; 2) that she was given specific instructions and guidelines for reducing the incidence of errors in her work; 3) and that despite these communications from and frequent consultations with her supervisors, she still encountered problems with tradename procedures up to the time of her dismissal.

9. Ms. McManus prepared a memorandum, dated March 13, 1980 (State's Exhibit #7) for the purpose of reviewing Grievant's recent work performance prior to making a recommendation to the Secretary of State regarding her continued employment. The memorandum was not given to Grievant or any other person at that time, but was composed by Ms. McManus for her own use. The incidents of errors contained in State's Exhibit #7 do accurately reflect the same or similar types of performance deficiencies that were identified and communicated directly to Grievant.

10. Ms. McManus was of the opinion that both the number and nature of errors which Grievant continued to make throughout the period of January through March, 1980, necessitated her dismissal, or else the efficient operation of a critical function of the Secretary of State's office would be substantially impaired.

11. Secretary of State Guest based his decision to dismiss Grievant on consultation with Ms. McManus regarding whether she thought Grievant would improve over time and upon his review of Grievant's personnel file in general, and the following documents contained therein, in

particular: State's Exhibits 17, 16, 15, 14, 13, 12, 11, 10, 9, 8, and 7.

12. During the period beginning, roughly, January 1980, until March of 1980, Grievant noticed that she was frequently thirsty and occasionally very tense or depressed. Grievant found these problems to be unusual, but attributed them to the fact she was getting older.

13. On March 19, 1980, Grievant consulted her physician about these symptoms. Her physician, Dr. Tomasi, advised Grievant that she should be immediately hospitalized in order that a series of tests be run to diagnose her condition.

14. On March 23, 1980, Grievant was admitted to the hospital, where she remained until April 7, 1980. As a result of the tests performed during Grievant's hospitalization, she was diagnosed as having diabetes.

15. Because Ms. McManus and Secretary of State Guest did not know (nor did Grievant) when Grievant would be released from the hospital, and Grievant's warning period expired on Monday, March 31, 1980, they felt it necessary, regrettably (on the advice of the Personnel Department), to send a dismissal letter to Grievant at the hospital on Friday, March 28, 1980.

16. Based on her own testimony, Grievant's job performance was not adversely affected by her health. Grievant's physician made no representation to her to that effect, but was disturbed that Grievant had received her notice of dismissal during her hospitalization.

17. Rule 2.043 of the Rules and Regulations for Personnel Administration (Joint Exhibit #2, p. 15) defines "Warning Period" as a specified period immediately following the receipt of a marginal or unsatisfactory performance rating by an (sic) non-probationary employee, during which he is expected to achieve an adequate level of performance.

18. Rules 13.01 and 13.02 of the Rules and Regulations relate to "Performance Evaluations" (Joint Exhibit #2, p. 26-27), and provide in pertinent part:

13.01 Procedure: Each agency shall evaluate the performance of each employee at the end of the probationary period and any extension thereof, at the time of the annual performance review, at such other times as is necessary, and upon separation from the agency.

13.011 The immediate supervisor shall rate those employees under his supervision on a prescribed form in accordance with procedures established by the Personnel Board.

13.012 The rating of the immediate supervisor shall be reviewed by at least one higher level of supervision within the agency, except where the agency head is the immediate supervisor.

13.013 All performance evaluation reports shall be subject to the approval of the appointing authority or his designated representative.

13.014 Employees shall be notified of their performance evaluation by their supervisors. One copy of the rating form shall be provided to the employee and one copy shall be retained by the agency. The immediate supervisor shall discuss the rating with the employee, calling attention to particular areas of performance and, when necessary, pointing out specific ways in which performance may be improved. The employee copy of the rating shall constitute official notice to the employee of his rating.

13.015 Ratings shall be based upon the following standards:

- (a) Outstanding - Performance which substantially exceeds standards of performance for the position and State service.
- (b) Fully Satisfactory - Performance which consistently meets or occasionally exceeds standards of performance for the position and State service.
- (c) Adequate - Performance which, although acceptable, may not fully and consistently meet the standards of performance for the position and State service.
- (d) Marginal - Performance which frequently does not meet standards of performance for the position and State service.
- (e) Unsatisfactory - Performance which is significantly below standards established for the position and State Service.

13.016 An employee who disagrees with a performance evaluation report or a salary adjustment granted as a result of an annual performance evaluation may seek redress through the grievance procedure. Disagreements unresolved through the grievance procedure shall be adjudicated by the Personnel Director. The determination of the Director shall not be appealable to the Board of Personnel Appeals.<sup>1</sup>

<sup>1</sup>Board of Personnel Appeals abolished by statute. Employees have right to grieve as provided for by general contract and 3 V.S.A. §1001 (b).

13.02 Use of Performance Evaluation Reports: Performance evaluation reports shall be used:

13.021 At the time of scheduled completion of probationary periods, traineeships, or warning periods.

13.022 In conducting the annual performance review.

...

13.025 In determining when a warning period is to be imposed to improve employee performance and when failure to show such improvement will result in demotion, intra-departmental transfer or dismissal.

...

13.027 On the separation of an employee from a position in state service.

13.028 At any other time deemed proper and necessary.

19. Grievant testified that her supervisor, Jane McManus, had been fair and helpful to her in attempting to improve her performance. During their concurrent employment at the Secretary of State's Office, the personal relationship between Grievant and Ms. McManus was positive and without any ill will or rancor.

### OPINION

In this case we are required to determine whether just cause existed for Grievant's dismissal. In so doing, we must apply the standard set forth by our Supreme Court in In re Grievance of Albert Brooks, 135 Vt. 563, 568 (1977), which defines "just cause" as

some substantial shortcoming detrimental to the employer's interests, which the law and a sound public opinion recognize as good cause for his dismissal. Instances of repeated conduct insufficient of themselves may accumulate so as to provide just cause for dismissal.  
(cites omitted)

Then, under the standard in In re Grievance of Michael Yashko, \_\_\_\_ Vt. \_\_\_\_ (1980), S. Ct. Docket # 102-79, June 3, 1980, we must be assured the affected employee had sufficient notice of "dismissable offenses" before we can sustain the State's action. We are instructed

...that a discharge may be upheld as one for "cause" only if it meets two criteria of reasonableness: one that it is reasonable to discharge employees because of certain conduct, and the other, that the employee had fair notice, express or fairly implied, that such conduct would be ground for discharge.  
(Yashko, supra, p.2)

We find both standards were met in the instant grievance. Not only did Grievant's continuing performance deficiencies constitute a substantial shortcoming detrimental to the State's interests, but Grievant was given ample notice of the types of performance deficiencies which could result in her dismissal. The State, in our opinion, was diligent in its efforts to counsel Grievant in an attempt to correct those deficiencies, which Grievant either would not or could not do. Only after more than a year of intense supervision did her supervisor find it necessary to condition Grievant's continued employment upon an overall satisfactory level of performance. We think the State acted reasonably and fairly.

Where no due process violations are evident, we will, in examining the merits of a dismissal for performance reasons, give considerable deference to the evaluator(s). The answer to the essential question of whether an employee's actions or inactions constitute "a substantial shortcoming detrimental to the employer's interests" is predicted on the State's ability to establish that fact not by a preponderance of the evidence [as would be required in a case of dismissal for misconduct, cf. Grievance of Robert DeForge, 3 VLRB 204 (1980) and Grievance of Peter Carlson, 3 VLRB 303 (1980)], but by substantial evidence. It is then necessary for the grievant to rebut the facts and reasons given by the State to a degree sufficient to discredit and diminish the State's case to one without substantial evidence of cause.

In Grievant's case, however, we were not required to evaluate substantial rebuttal evidence. Grievant admitted responsibility for the errors typifying her continual performance deficiencies, although she attributed them generally to an increased workload in the Secretary of State's Office. And, while counsel for Grievant suggested in his memorandum that Grievant's then unknown diabetic condition could have adversely affected her work performance during the warning period preceding her dismissal, Grievant's testimony was far less conclusive about the interrelationship of the two. Neither she nor her doctor had felt her hidden health problem contributed significantly, if at all, to her work problems or vice versa.

Grievant's remaining rebuttal argument would have the Board find that the State violated the contract [Article XV (1)(c)] by not applying progressive discipline in Grievant's case. We disagree. Dismissal




based on performance deficiencies, while for cause, is not a disciplinary action contemplated by the contract under the progressive discipline system. Disciplinary actions, we think, are imposed for some act of misconduct, not nonperformance. Grievant's dismissal here was a matter of employee performance evaluation, an area covered in Article XIII of the contract, and the Rules and Regulations. The concept behind the imposition of a warning period under Rules 2.043, 13.01 and 13.02 (findings 17 and 18, infra), is analogous to the intent behind a progressive discipline policy: to identify and correct behavior. While both are integral parts of a merit principle personnel system and the contract, respectively, the appropriate procedures for dealing with performance as opposed to misconduct problems are distinct.

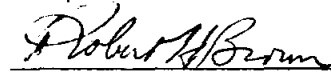
ORDER

Now, therefore, based on these findings of facts and for all the foregoing reasons, the grievance of RUTH MUZZY is ORDERED DISMISSED and is DISMISSED.

Dated this 2<sup>nd</sup> day of October, 1980, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

  
William G. Kemsley, Sr.

  
Robert H. Brown

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2nd Hearing - Settlement by  
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