

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:

DENNIS MURPHY

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DOCKET NO. 80-9

FINDINGS OF FACT, OPINION AND ORDER

Statement of the Case

On January 28, 1980, the Vermont State Employees' Association, Inc., (hereinafter, "VSEA"), filed a grievance with the Vermont Labor Relations Board on behalf of Dennis Murphy (hereinafter, "Grievant"). Grievant, through his representative, is appealing his dismissal from his position as a Psychiatric Technician Day Charge at the Vermont State Hospital, an institution of the State of Vermont Department of Mental Health. Grievant contends he was discriminated against on the basis of his handicapped status in violation of Article VII of the Agreement between the State of Vermont and VSEA for the Non-Management Unit, effective July 1, 1979. Grievant alleges also that his dismissal was in violation of Article XV of the Agreement which provides for a system of progressive discipline.

The State's answer, denying the allegations, was filed by Assistant Attorney General Bennett Greene on February 1, 1980.

A hearing was held at the Board hearing room in Montpelier on May 15, 1980. Chairman Kimberly B. Cheney disqualified himself from the case. Members Robert H. Brown and William G. Kemsley, Sr., were present. Robert H. Brown presided as Acting Chairman. The State was represented by Assistant Attorney General Bennett Greene. Counsel for the VSEA, Michael Zimmerman, represented Grievant.

Requests for findings and memoranda were filed by Attorneys Zimmerman and Greene on July 11 and 13, 1980, respectively.

FINDINGS OF FACT

1. At all times relevant herein, Grievant was a permanent-status employee with the rights and privileges conferred by the Agreement between the State of Vermont and the Vermont State Employees' Association, Inc., for the Non-Management Unit, effective July 1, 1979, (hereinafter, "the contract").

2. On January 10, 1972, Grievant began service as an employee of the State of Vermont, at the Vermont State Hospital, Waterbury, Vermont. From January 10, 1972, and continuously until December 28, 1979, (the date of Grievant's dismissal), Grievant was employed at the Vermont State Hospital. During that period Grievant held the following positions:

(A) Psychiatric Aide A, from January 10, 1972, to some time between March, 1973, to July, 1973;

(B) Psychiatric Aide B from some time between March and July, 1973, to June 30, 1975.

(C) Psychiatric Technician from July 1, 1975, to June 30, 1977.

(D) Psychiatric Technician Day Charge from July 1, 1977, to December 28, 1979.

3. The Vermont State Hospital at Waterbury is maintained for the care and institutionalization of the mentally ill. It is headed by a Superintendent, who, at all times relevant herein, was George W. Brooks, M.D. The Vermont State Hospital is a part of the Vermont Department of Mental Health.

4. The position of Psychiatric Technician Day Charge was, at all times relevant herein, a pay scale 6 position. It involved a certain amount of supervisory responsibility over junior psychiatric aides. It, like all

psychiatric aide and technician positions, involved working with patients on the various wards at Vermont State Hospital. The duties of the position, like other psychiatric technician positions, were sometimes "quasi-medical," involving the administration of medication to patients. Psychiatric technicians occasionally were required to physically subdue violent or obstreperous patients.

5. On February 4, 1978, Grievant injured his right knee while involved in subduing a patient on Weeks I (Grievant's Exhibit 2). The injury was a minor one, and resulted only in some temporary swelling of the right knee; no permanent damage occurred.

6. Some time thereafter, Grievant was assigned to the Psychiatric Technician Day Charge position for the afternoon shift on Weeks III, another ward (Grievant's 27, page 1). One prerequisite of that assignment was a medical certificate indicating that Grievant's previously injured right knee was free of permanent damage. Grievant provided that certification.

7. Thereafter, but before July 12, 1978, Grievant was assigned to serve as Psychiatric Technician Day Charge on Weeks II, the admission and patient evaluation ward. Grievant was not happy with this assignment, and discussed that fact with Mrs. Lois Sabin, the Head of Nursing Service Personnel at Vermont State Hospital. Grievant told Mrs. Sabin that he did not want the assignment to Weeks II, and fearing that someone was going to get hurt on that ward. Nonetheless, Grievant was assigned to Weeks II, and worked there continuously until July 12, 1978.

8. Patients on Weeks II were recent admittees to the hospital and were assigned to that ward until they had been examined and diagnosed by medical personnel at the Vermont State Hospital. The patient population on that ward tended to be the most acutely disturbed. After patients in Weeks

II were diagnosed and treatment programs were selected, they were then transferred to other wards. Because of the uncertainty felt by patients and staff alike on Weeks II, patients on Weeks II tended to be more unpredictable than those on the other wards.

9. On July 12, 1978, Grievant, while working on Weeks II as the Psychiatric Technician Day Charge was involved in an attempt with other ward workers to physically subdue a patient. In the course of that effort, Grievant's right knee was injured. The nature of the injury was a fracture of Grievant's right tibial plateau (Grievant's Exhibit 3, 4, 23).

10. As a result of his injury, Grievant was hospitalized for several days (Grievant's Exhibit 23) and was treated thereafter as an outpatient by Russell P. Davignon, M.D., an orthopedic surgeon. Also as a result of his injury, Grievant was unable to and did not work from July 13, 1978, to April 2, 1979 (Grievant's Exhibits 4, 5, 6, 7, 8, 9, 10, 12, 13, and 14).

11. As a result of his injury, Grievant filed a claim for Workmen's Compensation under Vermont's Workmen's Compensation laws (Grievant's Exhibit 3), and his claim was assigned the number N 16753 (Grievant's Exhibit 4, 24). As a result of Grievant's claim, the State Board on State Employee Benefits ordered, among other things, that Grievant was entitled to compensation for temporary total disability (Grievant's Exhibit 4) and compensation for a 17 1/2 percent permanent partial disability of his right knee (Grievant's Exhibit 24). The Department of Mental Health and the Vermont State Hospital were aware of Grievant's Workmen's Compensation Claim at every step, and of the permanency of his disability (Grievant's Exhibit 22, 23).

12. In addition to, and as a consequence of, his knee injury, Grievant suffered from depression (Grievant's Exhibits 11, 17, 21), for which he consulted Nancy Collett, M.D., a psychiatrist.

13. Evidently in response to inquiries from the Vermont State Hospital, Grievant's doctors, in early March, 1979, indicated, by letter, their respective opinions about Grievant's ability to return to work. Dr. Collett, Grievant's psychiatrist, by letter dated March 5, 1979, to Mrs. Sabin and Alice Cook (Nursing Service Supervisor), indicated that Grievant was not yet emotionally ready for full-time employment (Grievant's Exhibit 11). Dr. Davignon, Grievant's orthopedic surgeon, by letter dated March 12, 1979, recommended as follows:

"I do not think he is capable of performing heavy duty ward service, especially where he may be in a position to be in altercations with unruly patients. At the current time, sedentary and semi-sedentary positions would be the most advisable" (Grievant's Exhibit 12).

14. On March 29, 1979, Alice Cook, Nursing Service Supervisor, Vermont State Hospital, informed Grievant by letter that his (Grievant's) leave of absence was to expire on April 1, 1979, and that he (Grievant) was to report for duty on April 2, 1979 (Grievant's Exhibit 14).

15. In response to Alice Cook's letter of March 29, 1979, Grievant conferred with Mrs. Cook. During that conference, Grievant was made to understand that since he (Grievant) had not been medically "cleared" for ward duty, he (Grievant) would be assigned to "the panel" (Grievant's Exhibit 18). Grievant also requested, in writing, an additional leave of absence until June 1, 1979 (Grievant's Exhibit 15), which request was denied.

16. On April 2, 1979, Grievant began working on "the panel," where he continued to work until December 14, 1979.

17. "The panel" is the term given by Vermont State Hospital employees to a room which can be characterized variously as a control center, security center, or listening post. It is an enclosed room with audio-visual monitors

of hospital wards and electronic controls for opening or locking of secured exits or entrances to the wards. The panel operator works alone in this enclosed area during his shift. The work is sedentary and does not involve direct physical contact with patients. There is no formal position (in the sense of a job description) for "panel operator"; rather, those persons manning "the panel" are drawn from all manner of formal categories of positions. Normally, those employees assigned to "the panel" are there because some temporary difficulty prevents them from performing their normal assignments, physical injury, for example.

18. By letter dated April 27, 1979, Russell P. Davignon, M.D., Grievant's orthopedic surgeon, recorded the fact that he had discharged Grievant from his care, since Grievant's knee had healed as much as it was going to. In that letter, Dr. Davignon discussed Grievant's work capabilities as follows:

"Dennis is left with some feeling of instability in the knee ... I think he could do most things, including light duty and medium duty, but I do not think he is in any kind of shape for the job which would require defending himself or getting involved in altercations of any type. The risk of re-injury to his knee is too great to allow his this type of employment." (Grievant's Exhibit 16).

This letter was made part of Grievant's personnel file.

19. In a memorandum dated May 8, 1979, to Nancy B. Collett, M.D., Grievant's psychiatrist, Mrs. Cook, Nursing Service Supervisor, wrote, among other things, the following:

"Dennis wants reassurance that he will be permanently on the panel and this cannot be given to him. Unless clearance is given for him to go back as Charge on his ward, he will eventually have to be demoted or removed from that position." (Grievant's Exhibit 18)

20. By letter dated May 15, 1979, Dr. Russell P. Davignon, M.D., Grievant's orthopedic surgeon, indicated that, in his opinion, Grievant's

right knee was 15 - 20% permanently disabled. (Grievant's Exhibits 19, 24).

This letter was made part of Grievant's personnel file.

21. By letter dated May 23, 1979, to Grievant, Mrs. Cook, Nursing Service Supervisor, wrote as follows:

"You are to report for duty as Afternoon Charge on Weeks II, June 3, 1979, or you will be removed from that position and demoted to Psychiatric Technician. Should you decide to give up your Charge position, I cannot promise that you will always remain on the 1B panel. Please advise me as to your intentions as soon as possible." (Grievant's Exhibit 20).

Evidently, there was no follow-up on that letter, since Grievant did not return to his Afternoon Charge position on Weeks II on June 3, 1979, was not demoted, and continued to work on the panel until December 14, 1979 (Finding 16, above).

22. By letter dated August 17, 1979, to Patrick L. Mahoney, M.D., Lloyd K. Moyer, of the Legal Division, Department of Mental Health requested an "independent medical evaluation and assessment" of Grievant's condition for purposes of Grievant's Workmen's Compensation Claim. (Grievant's Exhibit 22). In his report, Dr. Mahoney reported, among other things, the following:

"It is my opinion that this man has a permanent impairment of his right knee and I would estimate this at 35%. It is also my opinion that he is unable to do his former duties as a patient direct care worker. This work sometimes requires physical force to subdue psychiatric patients and I do not believe that his right knee would stand up to this kind of strenuous activity. He is able to perform the duties of other jobs involving no heavy lifting and, in fact, this is the type of work he has been doing since April, 1979." (Grievant's Exhibit 23, pages 1 and 2)

23. Also in August, 1979, a discussion took place between Grievant and Susan Ocker, Personnel Officer, Vermont State Hospital, regarding Grievant's future at the Hospital in light of his injury. During that discussion, it was proposed that Grievant be transferred from his position of Psychiatric

Technician Day Charge (Pay Scale 6) to Clerk (Pay Scale 4), at no loss in pay. Grievant agreed to that proposal, and he was informed that the necessary steps would be taken to accomplish this change. (Grievant's Exhibit 27, page 2).

24. In October of 1979, another discussion took place among Grievant, Susan Ocker, Personnel Officer, Vermont State Hospital, and Mrs. Cook, Nursing Service Supervisor, ~~concerning~~ the proposal last discussed in August. (Finding 23). At this time, ~~however~~, Grievant was informed that the Department of Personnel had audited the position (described in August as a Pay Scale 4 position), and had determined that the position was in fact a Clerk A (Pay Scale 2) position. Grievant was informed that if he accepted the Clerk A position, he would receive a cut in pay. For that reason, Grievant, at that meeting, refused to accept the Clerk A position.

25. No other possible position changes for Grievant at the Vermont State Hospital were considered between the time Grievant was injured and was dismissed. Nor was Grievant offered a position in State service outside of the hospital.

26. On October 30, 1979, the State Board on State Employee's Benefits issued a Supplemental Order, wherein the Board ordered, among other things, that Grievant receive a Workmen's Compensation award for the permanent partial disability (17 1/2%) of his right knee. (Grievant's Exhibit 24). This Supplemental Order became part of Grievant's personnel file.

27. By letter dated December 10, 1979, to Grievant, Alice Cook, Nursing Service Supervisor, informed Grievant as follows:

"Inasmuch as you have declined our offer of a position as Clerk A at the Vermont State Hospital this is to advise you that you are to report to Weeks 2, Saturday, December 15, 1979, as the Psychiatric Technician Day Charge of that ward, and assume all

duties and responsibilities associated with that position. Failure to report as directed will be considered unauthorized absence and could result in disciplinary action up to and including dismissal." (Grievant's Exhibit 25, emphasis added)

28. After receiving Mrs. Cook's letter of December 10, 1979, Grievant contacted his psychiatrist, Dr. Nancy B. Collett, and, as a result of that contact, Dr. Collett wrote a letter dated December 11, 1979, to Mrs. Alice Cook, Nursing Service Supervisor. In her letter, Dr. Collett indicated, in part, as follows:

"[Dennis] contacted me about your assignment of returning him to work as afternoon charge on Weeks II as of December 15th. Dennis is apprehensive about this assignment as he feels that he will have a strong tendency to protect himself from further injury and that situations may arise wherein this self-protective tendency would adversely effect patient care." (Grievant's Exhibit 26)

This letter was made part of Grievant's personnel file.

29. Also, after having received Mrs. Cook's letter of December 10, 1979, Grievant wrote a letter, dated December 13, 1979, to Dr. George Brooks, Superintendent of the Vermont State Hospital. In his letter, Grievant proposed that he be allowed to remain on "the panel" (Grievant's Exhibit 27, page 2), and suggested that, if continued "panel" duty required it, he (Grievant) be demoted to Psychiatric Technician (Grievant's Exhibit 27, page 2). Grievant also set forth the following as reasons, among others, for not wanting to return to his regular ward duties:

I may over protect myself, wondering when the hassel (sic) will start ...

Untheraputic atmosphere

Uneffective (sic) as a charge aide, my being there would make bad relation (sic) with all levels of staff and staff patient relationship. I would not ask them, ward staff to do what I won't do.

I followed their orders before and see what it got me. A perminate (sic) physical injury to my right leg, ... plus ... a depression, that seems to have no end ..." (Grievant's Exhibit 27, page 3).

30. On Saturday, December 15, 1979, Grievant, not having received a response from Dr. Brooks to his (Grievant's) letter of December 13, 1979, reported for duty at the Vermont State Hospital. When he was informed that his assignment for that day was not "the panel," but was to serve as the Psychiatric Technician Day Charge on Weeks II, Grievant, fearing for his safety, signed out, and left the Vermont State Hospital. (Grievant's Exhibit 3). page 1).

31. On Sunday, December 16, 1979, Grievant again reported for duty at the Vermont State Hospital. When he was informed that his assignment for that day was not "the panel," but was to serve as the Psychiatric Technician Day Charge on Weeks II, Grievant, fearing for his safety, signed out, and left the Vermont State Hospital. (Grievant's Exhibit 30, page 1)

32. On Monday, December 17, 1979, Grievant reported to work. On that day he was assigned, pursuant to Dr. Brooks' request, to "the panel," where he (Grievant) worked a full shift. (Grievant's Exhibit 30, page 1)

33. On December 18, 1979, Grievant was given a letter, dated December 18, 1979, from Dr. Brooks, which advised Grievant as follows:

"We have reviewed your latest letter to me in great detail and received the advice of the Personnel Department and the Attorney General's office that we have indeed, over several months, made every effort to accomodate you and can no longer leave you in your situation at the panel. As you know, this situation is very important to a number of people who are disabled and it would be very unfair to them. We cannot carry you on leave without pay. If you feel you cannot perform the work on Weeks II as the Psychiatric Technician Day Charge, you have the option of resigning from your position." (Grievant's Exhibit 28)

34. On Wednesday, December 19, 1979, a regular scheduled workday, Grievant did not report for duty at the Vermont State Hospital. (Grievant's Exhibit 30, page 1)

35. Thursday, December 20, 1979, and Friday, December 21, 1979, were Grievant's regularly scheduled days off. (Grievant's Exhibit 30, page 1)

36. On Thursday, December 20, 1979, Grievant wrote a note to Mrs. Cook, Nursing Service Supervisor, containing the following brief message in response to Dr. Brooks' letter of December 18, 1979 (Finding 33):

"I have no intention of resigning my post."

(Grievant's Exhibit 29). It is unknown when that note was delivered to Mrs. Cook, but the note did become part of Grievant's personnel file.

37. On five consecutive days, Saturday, December 22, 1979, through Wednesday, December 26, 1979, Grievant reported for duty at the Vermont State Hospital. On each day, when he was informed that his assignment for that day was not "the panel," but was to serve as the Psychiatric Technician Day Charge on Weeks II, Grievant, fearing for his safety, signed out, and left the Vermont State Hospital. (Grievant's Exhibit 30, page 1)

38. On December 28, 1979, Grievant was given a dismissal letter, dated that day, signed by Dr. Brooks, which informed Grievant, in pertinent part, as follows:

"... (Y)ou are being dismissed from your position as Psychiatric Technician Day Charge at the Vermont State Hospital effective immediately upon receipt of this letter. This dismissal is for gross neglect of duty, refusal to obey a lawful and reasonable order given by a supervisor, and gross misconduct ..."

The recited bases for the dismissal were the incidents recited above in Findings 30, 31, and 37 (infra) (Grievant's Exhibit 30).

39. From the beginning of his state service until the time of his injury in July, 1978, Grievant's Performance Evaluation Reports indicated the following overall ratings:

(A) For the period January 10, 1972, to July 10, 1972: "Fully Satisfactory" (Grievant's Exhibit 31);

(B) For the period July 1, 1972, to July 1, 1973: "Fully Satisfactory" (Grievant's Exhibit 32).

(C) For the period July 1, 1973, to June 30, 1974: "Outstanding" (Grievant's Exhibit 33)

(D) For the period July 1, 1974, to June 30, 1975: "Fully Satisfactory" (Grievant's Exhibit 34)

(E) For the period July 1, 1975, to June 30, 1976: "Consistently meets job requirements/standards" (Grievant's Exhibit 35)

(F) For the period July 1, 1976, to June 30, 1977: "Consistently meets job requirements/standards" (Grievant's Exhibit 36)

(G) For the period July 1, 1977, to June 30, 1978: "Frequently exceeds job requirements/standards" (Grievant's Exhibit 37).

40. Even though he was absent from work due to his injury from July 12, 1978, to April 2, 1979 (Findings 10, 11), Grievant did receive a Performance Evaluation Report for the period July, 1978, to June 30, 1979, in which he was given an overall rating of "consistently meets job requirements/standards" (Grievant's Exhibit 38).

41. The contract provides, in pertinent part, as follows:

(A) Article VIII: NO DISCRIMINATION ...

"1. There shall be no discrimination against any employee because of ... handicap ..."

(B) Article XV: DISCIPLINARY ACTION

"1. The parties jointly recognize the deterrent value of disciplinary action. Accordingly, the State will:

- (a) act promptly to impose discipline within a reasonable time of the offense;
- (b) apply discipline with a view toward uniformity and consistency; and
- (c) impose a procedure of progressive discipline, in increasing order of severity ...

The parties agree that there are appropriate cases that may warrant the State bypassing progressive discipline or applying discipline in differing degrees so long as it is imposing discipline for just cause.

"2. The appointing authority ... may dismiss an employee for just cause ... In the dismissal notice, the appointing authority shall state the reason(s) for dismissal and inform the employee of his right to appeal the dismissal at Step IV before the State Labor Relations Board within the time limits prescribed by the rules and regulations of the Board.

"3. Notwithstanding the provisions of Paragraph 2 above, an employee may be dismissed immediately without prior notice or pay in lieu of notice for any of the following reasons:

- (a) gross neglect of duty;
- (b) refusal to obey lawful and reasonable orders given by supervisors ..."

42. At no time after his return to work on April 2, 1979, was Grievant required to obtain (nor did he obtain) a medical clearance similar to the one he had been required to obtain after his injury in February of 1978 (See Findings 5, 6).

43. Grievant testified that had he been offered the opportunity to work on Weeks III, a ward where patients were ending their stay at the hospital, he would not have agreed to do so. The patient population of Weeks III did not present the risk of injury present in Weeks II, which caused Grievant to refuse to work.

OPINION

Grievant insists he was dismissed without "just cause," principally because the employer required that he expose himself to dangerous conditions at work. The danger cited is aggravation of his pre-existing injury in the event he is required to subdue an unruly patient on ward Weeks II. We concede there is a reasonable likelihood of injury there. He insists that the Vermont Occupational Safety and Health Act (VOSHA) 21 V.S.A. §201 et seq., which establishes a state policy that "performance of work or duty ... shall not be insofar as practical, dangerous to the life, body or well being of the employees," gives him the right to refuse such work without being discharged as a result. This right, he says, flows from his status as "a qualified handicapped person" as defined in federal regulations implementing the Rehabilitation Act of 1973, 29 U.S.C. 794, 45 C.F.R. 84.3(j), to whom the employer owes a duty to make "reasonable accommodation" in its program 45 C.F.R. 84.12. He invites this Board to apply the various rules of the Rehabilitation Act in conformity with VOSHA policy and find his dismissal a prohibited discrimination under Article VIII of the contract; and his refusal to work a protected activity under the doctrine of Whirlpool Corp. v. Marshall _____ U.S. _____ 48 L.W. 4189 (1980).

As intriguing as the invitation is, and conceding the ingenuity and imaginativeness of the argument, we decline to accept. Grievant's misfortune is that his prior on-the-job injuries made him physically unable to do his job. There is no avoidable and correctable working condition which the employer could devise to protect Grievant from harm. The job is inherently risky and Grievant, because of his disability, inherently subject to severe injury. Therefore we fail to see how Grievant can be a "qualified handicapped person" since he cannot "perform the essential functions of the job

in question" without undoubted risk of aggravating his pre-existing injury.
43 C.F.R. 84.3(K)(1).

Compassion leads us to hope that the Workmen's Compensation system has adequately compensated Grievant for his permanent disability. If not, however, we see no remedy we can legally fashion. Believing as we do, that on these facts, the laws and regulations of VOSHA and the Rehabilitation Act are inapplicable we have no occasion to consider the ramifications of the Whirlpool doctrine, as they may be applicable either directly or through the contract.

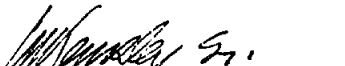
ORDER

For the foregoing reasons, the Grievance of Dennis Murphy is dismissed.

Dated this 1st day of July, 1980, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Robert H. Brown


William G. Kemsley, Sr.

Case \$, \$
*Decision reversed &
remanded by Supct
Nov 14 81*