VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 84-36
JAMES McCLUSKEY	)	

MEMORANDUM AND ORDER

On July 18, 1984, Attorney Nicholas Hadden filed a grievance on behalf of James McCluskey ("Grievant"), contesting the dismissal of Grievant from his position as Correctional Officer at the St. Albans Correctional Facility. On September 17, 1984, the State of Vermont ("State") filed a Motion to Dismiss this grievance. Upon investigation of the Motion, the Board requested additional information from the State, which information was provided to the Board on November 13, 1984. Grievant filed a Motion in Opposition to the State's Motion to Dismiss on November 28, 1984. The State filed a Response to Grievant's Memorandum on November 29, 1984.

The State contends this grievance should be dismissed because Grievant was a temporary employee when he was dismissed, and the Board has no jurisdiction to decide grievances of temporary State employees.

The Board, as a public administrative body, has such adjudicatory jurisdiction as is conferred on it by statute. In re Grievance of Brooks, 135 Vt. 563, 570 (1977). The State Employee Labor Relations Act (SELRA) does not give us jurisdiction over grievances of temporary State employees. 3 VSA §926 provides "(t)he Board shall hear and make final determination on the grievances of all employees who are eligible to appeal grievances to the Board... (t)he right to institute grievances extends to individual employees, groups of employees and collective

bargaining units". Temporary employees are not considered "employees" under SELRA. SELRA defines "state employee", in pertinent part, as "any individual employed on a permanent or limited-status basis by the State of Vermont... but excluding an individual: A) exempt or excluded from the State classified service under the provisions of Section 311 of this title..." 3 VSA §902(5). Temporary employees are expressly excluded from the State classified service by 3 VSA §311 which exempts from the classified service "persons employed in a temporary capacity with the approval of the governor for a period not to exceed 190 workdays in any one calendar year".

Nonetheless, Grievant maintains that the definition of "state employee" should not be interpreted too strictly by the Board since faculty employed by the Vermont State Colleges are subject to Board jurisdiction even though they are expressly excluded from the classified service by 3 VSA §311(a)(6). Grievant implies that if the term "employees" under 3 VSA §926 is broad enough to include the faculty, then it should likewise include temporary employees. Upon review of SELRA in its entirety, it is clear the Legislature intended to include State Colleges faculty under its coverage. 3 VSA §902(2), (5), (7) and (10); 905(a) and (b); 982(a). The same cannot be said for temporary employees, and thus the parallel drawn by Grievant between State Colleges faculty and temporary employees is not supported by statute.

Thus, temporary employees have no right to appeal grievances to the Board. On the face of the record before us, it is apparent Grievant is a temporary employee. The record contains an affidavit from Bonnie Vander Tuin, Personnel Recruitment Chief of the Department of Personnel,

and supporting documents which indicate Grievant was hired by the St. Albans Correctional Facility on January 11, 1984, as a temporary Correctional Officer A and he remained a temporary employee until his dismissal June 18, 1984. These facts are not contested by Grievant.

However, in the course of the investigation of this matter, the Board questioned whether Grievant was legitimately hired as a temporary employee since there may have been permanent positions available in the Department of Corrections at the time Grievant was serving as a temporary employee. Under such circumstances, the Board questioned whether Grievant should be considered a classified employee, not a temporary employee. We need not decide this issue, though, to rule on the Motion to Dismiss. Even if we were to assume Grievant was a classified employee, the most favorable result to him would be that he would be a classified employee in his original probationary period at the time he was dismissed. His appeal rights then would be governed by 3 VSA §1001(a), which provides:

> Persons who are applicants for state employment in the classified service and classified employees in their initial probationary period and any extension or extensions thereof may appeal to the state labor relations board if they believe themselves discriminated against on account of their race, color, creed, sex, age or national origin.

If discrimination is not alleged for one of the stated reasons, the Board is without authority to review grievances of employees covered by 3 VSA §1001(a). Grievance of Cole, 6 VLRB 204 (1983). Grievance of Peplowski, 6 VLRB 16 (1983). Grievance of Lyon, 3 VLRB 131 (1980). The gravamen of the grievance is that Grievant disputes the stated reasons for his dismissal (i.e., that he went into a highway rest area building and left an inmate unattended in a state vehicle and made an unauthorized

stop at his parents' home in a state vehicle). The grievance raises no claim of discrimination based on any of the factors stated in §1001.

Grievant seeks to amend his grievance to allege a "discriminatory application of a rule or regulation" pursuant to 3 VSA §902(14). Even if the amendment was allowed, that still would not bring Grievant under §1001, under which discrimination can be raised for other factors but not that there was a disparate treatment for similar offenses.

Finally, the record indicates Grievant was an applicant for state employment. That status also brings him under the coverage of §1001(a). Again, he is afforded no protection under that provision since he has raised no claim of discrimination prohibited by that provision.

Accordingly, whether Grievant is considered a temporary employee, a classified employee in a probationary period or an applicant for State employment, the Board is without jurisdiction to review his grievance.

Now therefore, based on the foregoing reasons, it is hereby ORDERED:

The Grievance of James McCluskey is DISMISSED.

Dated this 31st day of December, 1984, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.

James S. Gilson