VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)
) DOCKET NO. 83-26
DAVID BOOCOCK)

MEMORANDUM AND ORDER

On April 15, 1983, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of David Boocock ("Grievant"). The grievance alleged that the adverse performance evaluation Grievant received, covering the period January 1, 1982, to December 31, 1982, violated Article 13 of the collective bargaining agreement between the State of Vermont and VSEA effective for the period July 1, 1982, to June 30, 1984 ("Agreement"), in that Grievant's supervisors did not call purported performance deficiencies to his attention during the rating period and the ratings and comments in the performance evaluation were incorrect.

Hearings were held before the Labor Relations Board on April 12, 1984, and May 3, 1984. VSEA Staff Attorney Michael Zimmerman rep-represented Grievant. Assistant Attorney General Michael Seibert represented the State. Board members William G. Kemsley, Sr., and James S. Gilson were present at the May 3, 1984, hearing; Chairman Kimberly B. Cheney was absent. The full Board was present at the May 3, 1984, hearing. At the May 3 hearing, the Board ruled that Chairman Cheney would review the transcript of the April 12 hearing and the rest of the record if he participated in the decision.

At the May 3 hearing, the Board questioned whether it had juris-

diction to decide the grievance since Grievant had voluntarily resigned from State service and had obtained employment elsewhere. The Board gave the parties the opportunity to submit memoranda on that issue. Grievant filed a Memorandum in Opposition to Board's Motion to Dismiss on May 18, 1984. The State filed a Jurisdictional Memorandum on May 22, 1984. Grievant filed a Supplementary Memorandum In Opposition to Board's Motion to Dismiss and Reply to State's Jurisdictional Memorandum on May 25, 1984.

The pertinent facts are as follows: Grievant was hired as a uniformed member of the Vermont State Police, Department of Public Safety, in December, 1980. In December, 1981, Grievant successfully completed his one year probationary period, thus becoming a permanent classified employee. A performance evaluation covering the period from January 1, 1982, to December 31, 1982, was issued to Grievant. Grievant filed a Step I grievance concerning that performance evaluation, and his grievance was denied. On February 15, 1983, Grievant filed a Step II grievance, and Department of Public Safety Commissioner Paul Philbrook denied that grievance on March 16, 1983. The grievance was filed with the Board on April 15, 1983. On April 23, 1983, Grievant voluntarily resigned from State service. Shortly thereafter, he began working for the United States Government in a Customs and Immigration position and is still employed in that position.

In determining whether the Board has jurisdiction over this grievance, we are mindful that 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, at 570 (1977). The Board's jurisdiction in grievance proceedings is limited by the definition of the term "grievance" in 3 VSA §902(14), In re Grievance of Stacey, 138 Vt. 68, 70 (1980), and by the existence of an actual controversy. In re Grievance of Friel, 141 Vt. 505 (1982). 3 VSA §902(14) provides:

> "Grievance" means an employee's, group of employees', or the employee's collective bargaining representative's expressed dissatisfaction, presented in writing, with aspects of employment or working conditions under collective bargaining agreement or the discriminatory application of a rule or regulation, which has not been resolved to a satisfactory result through informal discussion with immediate supervisors.

The first issue for us to decide is whether Grievant is no longer an "employee" eligible to grieve his adverse performance evaluation to the Board, by virtue of voluntarily severing his employment relationship with the State subsequent to filing this grievance.

Grievant claims he meets the definition of "state employee" since the definition includes a person "whose work has ceased as a consequence of, or in connection with, any current labor dispute". 3 VSA §902(5). Grievant maintains his grievance is a "current labor dispute" and he should be provided the opportunity to present testimony on whether there was a connection between his adverse performance evaluation and his resignation.

The term "labor dispute" is defined in 3 VSA §902(9). This definition is identical to that contained in the National Labor Relations Act, 29 U.S.C.A. §152(9), and is used to confer jurisdiction on the National Labor Relations Board (NLRB). Soft Drink Workers Union, Local 812, IBT v. NLRB, 657 F2d 1252 (D.C. Cir., 1980). NLRB v.

International Longshoremen's Association, 332 F2d 992 (4th Cir., 1964). NLRB v. Twin City Carpenters District Council, 422 F2d 309 (8th Cir., 1970). The NLRB has jurisdiction over unfair labor practice charges, but not grievances. We doubt the use of the term "labor dispute" was interpreted by our legislature to extend beyond our unfair labor practice jurisdiction to encompass our grievance jurisdiction. However, we need not decide that issue given our ultimate conclusion that Grievant meets the definition of "employee" despite his voluntary termination of employment.

Alternatively, Grievant claims he meets the definition of "state employee" since the definition includes a person "whose work has ceased... because of any unfair labor practice", 3 VSA §902(5), and his adverse performance evaluation was an unfair labor practice. Grievant's allegations in this case clearly are a claim that the State violated the provisions of the collective bargaining agreement. Alleged violations of provisions of an agreement should normally be appealed through the grievance procedure, not the unfair labor practice route. No extraordinary circumstances exist in this case to warrant proceeding contrary to the norm. VSEA v. State of Vermont, 7 VLRB 131 (1984). Moreover, Grievant's work ceased as a result of his own voluntary resignation, not due to any conduct of the State.

Nonetheless, we have concluded that Grievant meets the definition of "employee" despite his voluntary termination of employment. The Vermont Supreme Court's decision in Stacey, supra, is the only case which has dealt with the issue of whether a termination of employment strips a State employee of the right to grieve to the Board. In Stacey, the Court determined that an involuntary departure from

employment is an "aspect of employment", leaving the individual as an employee entitled to grieve that involuntary termination to the Board. The Court has never decided whether a voluntary termination deprives the Board of jurisdiction to decide grievances arising independent of the termination but under the applicable collective bargaining contract. We see no distinction in principle between the total loss of a job and the loss of other benefits under a contract, although we grant that there is a difference in degree.

The only distinction is whether a voluntary quit extinguishes rights under a collective bargaining contract. We do not believe a quit is a breach of contract on the part of the employee. Therefore, an employee does not forfeit any monetary rights which accrued under the contract (e.g., insurance claims, back-pay for improper suspension, overtime pay, severance pay). We see no reason other rights under the agreement such as that asserted here should also not survive.

Accordingly, we conclude Grievant meets the definition of "employee" and we have jurisdiction under the terms of the statute. However, there is an additional jurisdictional requirement which must be met. Jurisdiction is conferred on the Board in grievance proceedings under the collective bargaining agreement where an actual controversy between the parties exists. In re Grievance of Friel, supra.

In our view, an "actual controversy" does not exist here. An actual controversy in the context of this case means there must be evidence of real or potential harm to Grievant as a result of the adverse performance evaluation. Friel, supra. The Vermont Supreme Court has recognized the importance of performance evaluations in

assisting employees in finding new jobs, and that without them, an employee may have difficulty obtaining employment, suffering consequential damages as a result. Vermont State Colleges Faculty Federation and Peck v. Vermont State Colleges, 139 Vt. 329, 333-334 (1981). However, the potential harm to Grievant which may have been caused by an adverse performance evaluation has been eliminated since he has obtained satisfactory employment in the Federal service, and there is no indication the evaluation at issue here affected his procuring of employment. Thus, the suffering of consequential damages contemplated in Peck, supra does not exist in this case.

Our ruling in this matter does not violate Grievant's due process rights to clear his "good name, reputation, honor, or integrity", as claimed by Grievant. Where a person's good name, reputation, honor, or integrity is at stake following a termination of a job, notice and an opportunity to be heard are constitutionally essential, Bishop v. Wood, 426 US 341, 350-353 (1976), Board of Regents v. Roth, 408 US 564, 573 (1972), and therefore we construe our statute as encompassing constitutional protections. The situation here does not meet any of the tests of Bishop and Roth. First, this is not a termination case. Second, the adverse performance evaluation Grievant received is confidential and can only be released with his permission.[1] Finally, the harm that could have occurred if a prospective employer saw the evaluation has been eliminated by his hiring by the Federal government.

---

[1] During the April 12, 1984, hearing, the State's attorney stated the Department of Public Safety's position was to release performance evaluations only with the employee's permission. We take this to be a statement of departmental policy upon which employees are entitled to rely.

We are reluctant to pursue this grievance over an adverse performance evaluation given the circumstances of this case, particularly where Grievant no longer has a stake in a healthy, continuing employer-employee relationship.

Furthermore, we are powerless in this matter because we are unable to order any changes in performance evaluation ratings or comments. In Grievance of Janes, ___ Vt. ___ (March 7, 1984), the Court reversed the Board for imposing its own remedy when it found no just cause for dismissal existed. The Court held the Board exceeded its authority and substituted its own judgment for that of the employer in imposing the remedy. To order changes in a performance evaluation would also be to substitute our own judgment for that of the employer. If we were to find the facts as asserted by Grievant and conclude his superiors violated the Agreement when they gave him the adverse performance evaluation, we could not order that the ratings be changed but only that management reconsider its decision. The futility of this task and the lack of an actual controversy cause us to dismiss this grievance.

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

The Grievance of David Boocock is DISMISSED.

Dated this ___ day of June, 1984, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William W. Kemsley, Sr.

James S. Gilson