

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	
WAYNE CALDERARA)	DOCKET NO. 85-46

FINDINGS OF FACT, OPINION AND ORDER

On October 30, 1986, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Wayne Calderara ("Grievant"). The grievance alleged the State of Vermont, Department of Mental Health ("Employer") violated Article 13 of the Contract between the State of Vermont and VSEA for the Non-Management Unit effective for the period July 1, 1982 to June 30, 1984 ("1982-84 Contract") and Article 15 of the Contract in effect from July 1, 1984 to June 30, 1986 ("1984-86 Contract") by giving Grievant an adverse annual performance evaluation, in that Grievant's supervisor did not call his attention to any performance deficiencies during the rating period, and failed to point out ways in which his performance could be improved. The grievance further alleged the performance evaluation violated Article 17 of the 1984-86 Contract in that the State failed to follow the required order of progressive corrective action, and this was not an appropriate case for bypassing it.

A hearing was held before Board Members Charles H. McHugh, Acting Chairman; William G. Kemsley, Sr., and Catherine L. Frank on September 4, 1986. Michael Zimmerman, VSEA Staff Attorney, represented Grievant. Frances Lindemann, Special Assistant Attorney General, represented the Employer. The Employer and Grievant each filed a Memorandum of Law on September 18, 1986, and each filed a Reply Brief on September 25, 1986.

FINDINGS OF FACT

1. At all times relevant, Grievant was a Mental Health Medicaid Programs Coordinator, which position entailed administrative and coordinative work involving the operation of Vermont's Medicaid Program within the Department of Mental Health and in accordance with the State Medicaid Plan. Duties included the development and implementation of policies and procedures to ensure the proper review of services rendered to public assistance clients and ensure receipt of Medicaid funds for eligible clients. Grievant acted as the Department liaison with contractors and other agencies involved in mental health and mental retardation services.

2. On March 11, 1985, Patricia Walton, Mental Health Deputy Commissioner, gave Grievant a performance evaluation covering the period February 3, 1984 to February 3, 1985. The evaluation was signed by Walton and Sutherland Miller, Commissioner of Mental Health.

3. The evaluation gave Grievant an overall rating of "2" ("inconsistently meets job requirements/standards"). The following summary comments were contained in the evaluation:

The position of MH Medicaid Programs Coordinator is a staff position providing technical support to the Department and to Mental Health Clinics in all aspects of Medicaid. Wayne has occupied that position for four years.

During the past five and one-half months, I have supervised Wayne directly. I find Wayne to be a pleasant person who gets along well with people. On routine tasks where deadlines are set, he performs well. On tasks that require independent analysis and problem solving, he is not effective.

I have had a number of complaints from CMHC staff about Wayne's performance. His lack of follow-through has resulted in crisis situations which could have been avoided.

I would strongly recommend that Wayne's next supervisor work out goals and objectives for Wayne which are measurable and time specific. Another performance evaluation should be completed three to six months following the assignment of a supervisor.

Strengths:

Wayne does a good job in arranging for reviews as required and submission of required reports to Feds.

Areas for Improvement:

Need to develop system to respond to requests and inquiries; to be able to follow through in a timely and orderly fashion.

Recommended Developmental Activities:

Improve knowledge of Medicaid rules and regulations.
Improve understanding of KDSF and DSW procedures.

(State's Exhibit A)

4. The evaluation also gave Grievant "2" ratings for each of the following individual rating factors; and included the accompanying comments:

- A.1 Job Knowledge and Skills; and
- B.1 Technical and Professional Knowledge and Ability

For someone who has occupied this position for a number of years, Wayne does not exhibit a depth of knowledge of Medicaid regulations. He relies on people at the Department of Social Welfare and KDS-F for information he should possess.

A.3 Work Habits

Work area is messy. Documents get "lost" on his desk. Excessive time spent in visiting with co-workers both in DMH and other departments. A supervisor in another department has had to ask him to limit visits.

A.5 Learning Ability

Requires high level of supervision to see that assignments are followed through.

A.8 Quantity of Work

Time lost in non-productive activities - visiting. Responsive (sic) to questions is low.

B.2 Planning and Organizing

A number of critical situations have occurred which could have been avoided if Wayne had followed through on assignments in a timely manner.

B.4 Effectiveness in Pursuing Tasks and Achieving Results

Wayne has not shown an ability to define tasks and work toward completion. His work is haphazard and disorganized.

(State's Exhibit A)

5. Grievant received "3" ratings ("consistently meets job requirements/standards") for five individual rating factors, including the following three factors, which factors are set forth and defined and are not accompanied by any comments:

A.2 Quality of Work - Consider the relationship to standards of performance, consistency of quality rendered, neatness, accuracy, thoroughness, need for review and absence of errors.

A.6 Judgment - Consider ability to think clearly and impartially, to utilize available information and experience, to discern the relevant, to make mature, logical and timely decisions.

A.9 Work Under Stress - Consider ability to produce satisfactory work under pressure of heavy volume and/or tight deadlines, to maintain self-control, to cope with the unexpected, to maintain balance and poise.

(State's Exhibit A)

6. Article 13 of the 1982-84 Contract and Article 15, Section 4, of the 1984-86 Contract both provide in part as follows:

During the rating year, the immediate supervisor shall call the employee's attention to work deficiencies which may adversely affect a rating, and, where appropriate, to possible areas of improvement

(Grievant's Exhibits 2 and 3).

7. Article 15, Section 6, of the 1984-86 Contract provides in part as follows:

(A)dverse comments and any subfactor ratings of less than "3" on any evaluation are fully grievable. The Vermont Labor Relations Board shall not have the authority to change any numerical rating, but may remand the rating to the employer for reconsideration consistent with the VLRB ruling on the merits.

8. Article 17 of the 1984-86 Contract provides in part as follows:

- A(1) e. In performance cases, the order of progressive corrective action shall be as follows:
- i. Oral notice of performance deficiency;
 - ii. written performance evaluation, special or annual, with a prescriptive period for remediation specified therein; normally three to six months;
 - iii. warning period of 30 days to six months, extendable for a period of up to six months. Placement on warning status may take place during the prescriptive period if performance has not improved since the evaluation;
 - iv. dismissal.
- A(1) f. The parties agree that there are appropriate cases that may warrant the State:
- i. bypassing progressive discipline or corrective action;
 - ii. applying discipline or corrective action in different degrees;...

as long as it is imposing discipline or corrective action for just cause.

(Grievant's Exhibit 3)

9. During the rating period, Grievant had two different immediate supervisors. From February, 1984, to September, 1984, Jean VanVlandren was his immediate supervisor. From September, 1984, until February, 1985, Walton was his immediate supervisor.

10. During two meetings in April, 1984, VanVlandren spoke to Grievant about his performance deficiencies. The meetings were for the purpose of discussing Grievant's performance evaluation for the past rating period, ending February 3, 1984. She told Grievant during these meetings that he had to be more responsive to issues as they arose. She also told him he had to have a better understanding of Medicaid regulations and that he had to organize his work area better

so materials could be found. VanVlandren did not make it clear to Grievant that these deficiencies were continuing problems during the current rating period.

11. Several times during the rating period, Walton told Grievant she was angry about his performance.

12. Pursuant to his job description, Grievant was expected to have "considerable knowledge of Medicaid/Medicare regulations, policies and procedures". There were several instances during the rating period in question when Walton directed Medicaid questions to Grievant and he did not immediately know the answers but had to research the issue. Walton told Grievant he needed to know this information. Grievant did not view these comments as criticism (Grievant's Exhibit 1, Page 2).

13. At one point during the rating period, Walton went to Grievant's desk in his absence to find materials. She found the desk messy and could not find the materials. She noticed a few letters which Grievant had not timely answered. Walton told Grievant his work area was messy and asked him how he found things. Walton suggested that Grievant clean his work area and told him to respond to the letters.

14. Neither Walton nor VanVlandren told Grievant during the rating period that he was spending an excessive amount of time visiting with other employees in his Department and other departments. Also, neither told him or made him aware that he was not effective on tasks that required independent analysis and problem solving.

15. Walton received several calls during the rating period from the staff of community mental health centers which receive Medicaid funds. They complained of Grievant not timely sending funds to them.

In one instance, Walton received a call on October 23, 1984, from the Director of Washington County Mental Health, who was concerned because he had sent a letter to Grievant on October 5 on rate increases and transportation payments and had received no response. Walton then met with Grievant to discuss the matter and he told her he had sent a letter to rate-setting on the previous day. She expressed her displeasure at Grievant taking so long to respond to the request. At the same time, Grievant asked to take a day off the following day to be charged to his annual leave. Walton denied the leave request until he completed a part of the assignment which still needed to be done. Grievant completed the assignment by the end of the day and she approved the leave. As of January 4, 1985, the entire assignment had not been completed. Walton asked Grievant why it had been "hanging on" for that long and had not been completed. She told Grievant it was his responsibility to complete assignments in a more timely manner.

16. On November 19, 1984, Walton asked Grievant why, as of that point, he had failed to transmit information to the Department of Social Welfare concerning lump sum transportation payments to be made to the community mental health centers even though he had all the necessary information by October 9. Walton expressed her displeasure to Grievant over this incident.

17. On December 5, 1984, Walton spoke to Grievant about an assignment which VanVlandren had given him on September 20 to complete by September 28 and which he had failed to complete. Walton expressed her displeasure to Grievant over this incident.

18. VanVlandren asked Grievant several times during the rating period why it took him so long to complete assignments and counseled

him on his failure to follow through on assignments. She spoke to him several times about completing only portions of assignments, rather than the entire assignment. She mapped out corrective action for him to take to resolve the problems he had created by not completing assignments.

19. Walton made the following suggestions to Grievant during the rating period to improve his performance: 1) to respond more rapidly to assignments and to follow them through to completion; 2) to establish a log to keep track of cases; 3) to establish priorities; and 4) to set deadlines.

20. Walton completed the performance evaluation of Grievant in question. At the time she did the evaluation, she spoke to VanVlandren generally about its contents. VanVlandren, who by that time had misplaced her notes on Grievant's performance, told Walton she had counseled Grievant about his lack of knowledge of Medicaid regulations and the timeliness of responding to inquiries. VanVlandren did not see the completed evaluation itself until well after Walton gave it to Grievant.

OPINION

At issue is whether the Employer violated the following Contract language:

During the rating year, the immediate supervisor shall call the employee's attention to work deficiencies which may adversely affect a rating, and, where appropriate, to possible areas of improvement.

Grievant alleges this Contract provision was violated in that Grievant's supervisor did not call his attention to any performance deficiencies during the rating period, and failed to point out ways in

which his performance could be improved. Thus, Grievant alleges that the overall unsatisfactory rating and unsatisfactory ratings in various rating factors, with accompanying adverse comments, cannot be supported.

Under the Contract language, a supervisor is required to give an employee clear indication of dissatisfaction with that employee's performance. Grievance of Smith, 5 VLRB 272, 277 (1982). The Contract provides an employee be told when his/her work behavior or performance is unacceptable so there will be no "surprises" at evaluation time. Grievance of Claude Rathburn, 5 VLRB 286, 293 (1982).

Our task is to determine whether the cited deficiencies were called to Grievant's attention during the rating period.

We need spend little time on two purported deficiencies cited in the performance evaluation. One comment made on the evaluation is, "(o)n tasks that require independent analysis and problem solving, he is not effective". There is no evidence to indicate this was brought to Grievant's attention during the rating period. In other areas of the evaluation, Grievant is criticized for spending excessive time visiting with other employees and was given unsatisfactory ratings in the individual rating factors of "Work Habits" and "Quantity of Work" partially due to this purported deficiency. The Employer acknowledges now that excessive visiting time was never brought to Grievant's attention by his supervisors. Since neither of these purported deficiencies were discussed with Grievant during the rating period, it was in violation of the Contract for the Employer to include these observations on the performance evaluation.

More specific discussion is warranted on purported deficiencies cited on the evaluation in three other areas: 1) lack of knowledge of Medicaid regulations; 2) messy work area; and 3) lack of follow-through in completing assignments. We will discuss each of these areas in turn.

Grievant received unsatisfactory ratings in the individual rating factors of "Job Knowledge and Skills" and "Technical and Professional Knowledge and Ability". In support of these ratings, Grievant's supervisor noted on the evaluation that "(f)or someone who has occupied this position for a number of years, Wayne does not exhibit a depth of knowledge of Medicaid regulations".

We conclude Grievant's supervisors did not meet their contractual obligation to give Grievant clear indication they were dissatisfied with his performance in this regard. The supervisor who completed the evaluation, Patricia Walton, told Grievant he needed to know information on Medicaid regulations after he was unable on several occasions to immediately come up with answers to her Medicaid questions. However, we do not believe Walton was sufficiently clear in making Grievant aware that this constituted a deficiency. Grievant's job description required him to have "considerable knowledge" of Medicaid regulations. While Walton implied some displeasure to Grievant, Grievant did not perceive it as so. If Walton believed Grievant did not possess "considerable knowledge" of regulations and sought improvement in this area, she should have clearly relayed this expectation to Grievant and unequivocally made him aware his lack of knowledge was unacceptable. In sum, notice must be clear and unequivocal. Walton failed to provide such notice in this area.

Grievant's other supervisor, Jean VanVlandren, told Grievant during the rating period he had to have a better understanding of Medicaid regulations. However, she did this during meetings which were for the purpose of discussing Grievant's performance evaluation for the past rating period. In such a meeting, VanVlandren could have made Grievant aware she viewed such deficiencies as continuing and this would have constituted proper notice. However, this must be done in a clear and unequivocal manner. This was not done. Given these circumstances, it is unclear Grievant was being criticized for his performance during the rating period grieved herein. Thus, these comments made on the performance evaluation did not meet the Employer's contractual obligation of notice and can form no basis for giving Grievant unsatisfactory ratings in the overall rating or in the involved individual rating factors.

We recognize Grievant may have been somewhat slow to "catch on" that his supervisors were dissatisfied with his performance. However, the burden is on management to put an employee clearly on notice of deficiencies. Given the difference in perceptions among people, it is imperative management indicate its dissatisfaction clearly and unequivocally so misconceptions are eliminated.

The next area in dispute is the cited deficiency of a messy work area. Grievant was given an unsatisfactory rating in the individual rating factor of "Work Habits, and a messy work area was cited to partially support this rating. Specifically, the following comment was made on the evaluation: "Work area is messy. Documents get 'lost' on his desk".

We similarly conclude here that Grievant's supervisors did not meet their contractual obligation to clearly indicate to Grievant they were dissatisfied with his performance stemming from a messy work area. Walton told Grievant his work area was messy, asked him how he found things and suggested that he clean the area. We can understand how a messy work area may result in documents being "lost" and thus adversely affect Grievant's performance. However, there was no evidence of Grievant having lost documents. Moreover, we find Walton was not sufficiently clear in letting him know the messy work area constituted a performance deficiency which dissatisfied her. Some people work more efficiently with a messy desk. This is a subjective judgment which lies in the eye of the beholder. If it is to be the basis of a negative judgment, though, the evaluator must be more specific than was Walton. It is apparent that a communication problem existed, with Walton failing to be sufficiently clear in her criticism.

VanVlandren told Grievant he had to organize his work area better so materials could be found but, once again, made this comment during a meeting which was for the purpose of discussing Grievant's performance during the past rating period. It is unclear under such circumstances that Grievant should have concluded he was being criticized and instructed to improve in this area during the rating period grieved herein. While Grievant may not have been sufficiently sensitive to criticism, the burden is on management to place an employee clearly on notice of deficiencies and VanVlandren was not clear enough. Thus, Grievant's supervisors failed to meet their contractual obligation to call his attention to this work deficiency.

We conclude otherwise with respect to the final area in dispute herein, Grievant's lack of follow-through in completing assignments. In summary comments made on the evaluation and in comments made in support of various unsatisfactory individual ratings, Grievant is criticized for lack of follow-through on assignments, resulting in a number of crisis situations which could have been avoided.

Grievant's supervisors brought these deficiencies to his attention during the rating period and made it clear to him they were dissatisfied with his performance in this regard. On at least three specific instances, Walton expressed her displeasure to Grievant at his taking so long to complete assignments. She told Grievant it was his responsibility to complete assignments in a more timely manner. VanVlandren asked Grievant several times during the rating period why it took him so long to complete assignments, counseled him on his failure to complete assignments and mapped out corrective action for him to take to resolve the problems he had created by not completing assignments.

Through these actions, Grievant's supervisors gave him clear indication they were dissatisfied with his performance in the area of timely completing assignments. He should have recognized his supervisors viewed this area as a problem. Grievant demonstrated an insensitivity to clear and unequivocal dissatisfaction in this regard. Accordingly, the criticisms made on the evaluation are warranted.

However, we believe one related comment made on the evaluation should be stricken. Under the individual rating factor of

"Effectiveness in Pursuing Tasks and Achieving Results", the following comment was made: "Wayne has not shown the ability to define tasks and work towards completion. His work is haphazard and disorganized".

We conclude this comment should be stricken for two reasons. First, while Grievant's supervisors criticized his performance in completing certain assignments, they never indicated to him that he did not have the "ability to define tasks" or that his work was "haphazard and disorganized". Second, such a comment is inconsistent with satisfactory ratings Grievant received in the individual rating factors of "Quality of Work", "Judgment" and "Work Under Stress". Areas to be considered under those factors include: "neatness, accuracy, thoroughness" of work; "ability to ...discern the relevant, to make mature, logical and timely decisions"; and "ability to produce satisfactory work under pressure of heavy volume and/or tight deadlines". Satisfactory work and the accompanying higher ratings in these areas is inconsistent with the comment made.

These inconsistencies illustrate deficiencies in the way the performance evaluation was completed herein. It is evident that the lack of coordination between Grievant's two supervisors in developing the final evaluation contributed to its inconsistencies. It is uncertain to the Board how VanVlandren's conclusions from supervising Grievant for over half the rating period were adequately incorporated into the final evaluation; particularly since she did not see the written evaluation until well after it was given to Grievant. In situations where two supervisors oversee the performance of an employee during different stages of a rating period, it would seem to us to be better practice to have better coordination and more attention to detail than was exhibited here.

In sum, we conclude Grievant's supervisors gave him adequate notice of deficiencies pursuant to the Contract in certain cited areas but not in others. It is fair to conclude that Grievant demonstrated insensitivity to clear criticism in some areas, while his supervisors were insufficiently clear in their criticism in other areas.

In such instances, we do not have the authority to change any numerical rating but can only remand to the employer for reconsideration consistent with our ruling on the merits. In remanding, we note that in three individual rating factors - "Job Knowledge and Skills", "Work Habits" and "Technical or Professional Knowledge and Ability" - adverse comments made in support of unsatisfactory individual ratings must be stricken and that no other evidence was presented to support an unsatisfactory rating. In connection with two other factors - "Learning Ability" and "Planning and Organizing" - the comments made met contractual obligations and supported the unsatisfactory individual ratings. In connection with one other factor - "Quantity of Work" - part of the comment made met contractual obligations and part of it must be stricken. The Employer must reconsider whether an unsatisfactory rating is still justified. In connection with the remaining factor - "Effectiveness in Pursuing Tasks and Achieving Results" - the comment made must be stricken but other evidence presented to the Board on his performance in timely completing assignments may be relevant in determining whether an unsatisfactory rating is still justified.

We believe that in reconsidering individual ratings and the overall rating on remand, the Employer is limited to considering those areas of Grievant's performance which formed part of the initial

performance evaluation. It would be inappropriate to consider other incidents or facets of his performance which were not initially considered.

In conclusion, we note that in his grievance filed with the Board, Grievant alleged the performance evaluation violated Article 17 of the Contract in that the State failed to follow the required order of progressive corrective action, and this was not an appropriate case to bypass it. Neither party addressed this issue at the hearing or in their briefs, so we presume it to be waived and do not address it.

ORDER

Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED:

1. The Grievance of Wayne Calderara is ALLOWED to the extent that the following comments on his performance evaluation covering the period February 3, 1984 to February 3, 1985, shall be removed:

Summary Comments

On tasks that require independent analysis and problem-solving, he is not effective.

Recommended Developmental Activities

Improve knowledge of Medicaid rules and regulations.
Improve understanding of EDSF and DSW procedures.

A.1 Job Knowledge and Skills and B.1, Technical and Professional Knowledge and Ability

For someone who has occupied this position for a number of years, Wayne does not exhibit a depth of knowledge of Medicaid regulations. He relies on people at Dept. of Social Welfare and EDS-F for information he should possess.

A.3 Work Habits

Work area is messy. Documents get "lost" on his desk.
Excessive time spent in visiting with co-workers both in DMH

and other departments. A supervisor in another department has had to ask him to limit visits.

A.8 Quantity of Work

Time is lost in non-productive activities - visiting.

B.4 Effectiveness in Pursing Tasks and Achieving Results

Wayne has not shown an ability to define tasks and work towards completion. His work is haphazard and disorganized.

2. The Grievance is DENIED to the extent that the individual ratings given Grievant in the individual rating factors of "Learning Ability" and "Planning and Organizing" are contractually supported and the following comments on the performance evaluation shall be retained:

Summary Comments

I have had a number of complaints from CMHC staff about Wayne's performance. His lack of follow-through has resulted in crisis situations which could have been avoided.

Areas for Improvement

Need to develop system to respond to requests and inquiries; to be able to follow through in a timely and orderly fashion.

A.5 Learning Ability

Requires high level of supervision to see that assignments are followed through.

A.8 Quantity of Work

Response to questions is slow.

B.2 Planning and Organizing

A number of critical situations have occurred which could have been avoided if Wayne had followed through on assignments in a timely manner.

3. The performance evaluation given Grievant is REMANDED to the Department of Mental Health, State of Vermont, for reconsideration of the overall rating given Grievant and the ratings given him in the

following individual rating factors - Job Knowledge and Skills, Work Habits, Quantity of Work, Technical and Professional Knowledge and Ability, Effectiveness in Pursuing Tasks and Achieving Results - consistent with the Findings of Fact, Opinion and Order issued herein.

Dated this 11th day of December, 1986, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD



Charles H. McHugh, Acting Chairman



William C. Hensley, Sr.



Catherine L. Frank