Performance Evaluations

Under the contracts between the State and the Vermont State Employees' Association, the VLRB resolved several grievances during the 1980's concerning 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."

Under this contract language, the VLRB determined that a supervisor was required to give an employee clear indication of dissatisfaction with that employee's performance.[1] The contract provided that an employee be told when his or her performance is unacceptable so there would be no "surprises" at evaluation time.[2] The burden was on management to put an employee clearly on notice of deficiencies.[3] Given the difference in perceptions among people, it was imperative that management indicated its dissatisfaction clearly and unequivocally so misconceptions were eliminated.[4] Management must clearly and unequivocally indicate to an employee that the dissatisfaction with performance was during the present rating period, rather than the past rating period.[5] Also, the Board held that a necessary inference to be drawn from this contract language was that, whenever possible, employees should be given timely notice of deficiencies to afford them an opportunity to improve their performance prior to the end of the rating period.[6] The Board has continued to apply these precedents under this contract language to the present.[7]

---

[1] Grievance of Smith, 5 VLRB 272, 277 (1982).
[2] Grievance of Rathburn, 5 VLRB 286, 293 (1982).
[3] Grievance of Calderara, 9 VLRB 211, 221 (1986).
[4] Id.
[5] Id. , 9 VLRB at 221-222. Grievances of Schmitt, 15 VLRB 454, 487-488 (1992).
[6] Grievance of Barrett, 13 VLRB 310, 332 (1990).
[7] Grievance of Tetrault, 35 VLRB 161 (2019).

In determining whether the contract language was violated, the Board indicated it would review unsatisfactory individual ratings and adverse comments, even though the employee received an overall satisfactory overall rating. The Board reasoned that any work deficiencies noted on an annual performance evaluation adversely affected a rating since their presence could conceivably hinder an employee's opportunities for promotion, transfer or employment outside state government.[8]

Subsequent to the Board so holding, VSEA and the State negotiated changes in the collective bargaining contracts providing that an overall performance evaluation grade of "satisfactory" or better shall not be grievable and that adverse comments shall be grievable up to but not beyond Step II of the grievance procedure. However, the Board determined in a 2015 decision that VSEA and the State did not intend to prohibit employees from filing a grievance alleging that negative comments in a performance evaluation resulted from retaliation for filing complaints against supervisors. The Board stated that "(a)ny other conclusion would frustrate the express statements of the parties that 'neither party shall discriminate against, intimidate, nor harass any employee because of . . . filing a complaint or grievance', and 'the parties agree, subject to applicable law, that every employee may freely institute complaints and/or grievances without threats, reprisal, or harassment by the employer'" contained in other provisions of the collective bargaining contract.[9]

Under the State-VSEA contract, the issuance of a special or annual performance evaluation, coupled with a prescriptive period of remediation, is the contractually prescribed second progressive step (i.e., after oral notice of performance deficiency) in the State's corrective action efforts to address the substandard performance of an employee. Such corrective action may only be

[8] Grievance of Rathburn, 5 VLRB 286, 292 (1982). Grievance of Ewell, 5 VLRB 166 (1982).
[9] Grievance of Edson, 33 VLRB 198, 200 (2015).

imposed for just cause. The Contract provides that an unsatisfactory overall rating is "fully grievable", and that the Board "shall not have the authority to change such grade but may remand the rating to the employer for reconsideration consistent with the VLRB ruling on the merits".

In instances under this contract language where the Board concludes that the employer gave the grievant adequate notice of deficiencies pursuant to the contract in certain cited areas, but not in other areas, the Board has held that it does not have the authority to change any numerical rating, but can only remand to the employer for reconsideration consistent with the merits.[10] In remanding, the areas of deficiency contained in the unsatisfactory performance evaluation for which the employer failed to provide contractually required notice must be stricken from the performance evaluation. Other areas of deficiency mentioned in the evaluation remain in the evaluation because they reflect areas of deficiency in which proper notice was given pursuant to the contract and which are supported by the evidence.[11]

Also, the employer must reconsider placement of the grievant in a prescriptive period of remediation, since such action was in part based on purported performance deficiencies for which proper notice was not given pursuant to the contract.[12] In reconsidering on remand the overall rating and whether to place the grievant in a prescriptive period of remediation, the employer is limited to considering those areas of the grievant's performance which formed part of the initial performance evaluation and for which the grievant was given the contractually required notice of deficiencies.[13] It would be inappropriate to consider other incidents or facets of performance that were not initially considered.[14]

---

[10] Grievance of Tetrault, 35 VLRB at 179-180. Grievance of Barrett, 13 VLRB at 334-35.
[11] Id.
[12] Id.
[13] Id. Grievance of Calderara, 9 VLRB 211 (1986).
[14] Id.

In grievances arising from the State Colleges full-time faculty bargaining unit, the VLRB and the Vermont Supreme Court have recognized that employees may suffer adverse consequences if they do not receive a performance evaluation required by the contract or if they receive an adverse evaluation. In cases where procedural shortcomings, such as failure to do a performance evaluation, exist where faculty members are not reappointed or not tenured, the VLRB determines if the breaches caused the college president to not approve reappointment or tenure of the faculty member.[15]

If so, backpay and/or reconsideration of the decision may be appropriate.[16] If not, conducting a performance evaluation and a monetary award may still be appropriate, since employees may have difficulty obtaining other employment without the evaluation.[17] However, the VLRB and the Vermont Supreme Court have determined that the VLRB lacked jurisdiction to decide a resigned State employee's grievance contesting an adverse performance evaluation, concluding that the grievant's obtaining of satisfactory employment elsewhere meant there was an absence of any injury in fact or threat of injury.[18]

An issue that has arisen where notice of performance deficiencies is given is at what point is a grievance permitted contesting the alleged performance deficiencies. In construing the State-VSEA contracts, the Board has concluded that the parties intended that performance issues be kept out of the grievance procedure until an employee actually receives an adverse performance evaluation.[19] Allowing the filing of grievances at the time an oral or written notice of performance

---

[15] VSCFF and Peck v. Vermont State Colleges, 139 Vt. 329 (1981); *On remand*, 4 VLRB 334 (1981). Grievance of McDonald, 4 VLRB 42, 4 VLRB 280 (1981).
[16] Peck, 139 Vt. at 333-334. McDonald, 4 VLRB at 280-283.
[17] Peck, 139 Vt. at 133; 4 VLRB at 341-42.
[18] Grievance of Boocock, 7 VLRB 265 (1984); *Affirmed*, 150 Vt. 422 (1988).
[19] Grievance of Penka, 19 VLRB 26, 35-38 (1996). Grievances of Sileski, 25 VLRB 285, 315 (2002).

deficiency is issued may impede to some extent the free flow of communication of a supervisor's expectations intended to improve an employee's performance.[20]

If the oral or written notice serves its intended purpose - to improve performance - and the employee does not receive adverse comments or ratings on the performance evaluation, then the employee ultimately has suffered no harm.[21] If performance does not improve, and the employee receives an adverse performance evaluation, the employee has not lost his or her right to grieve the notice and substance of performance deficiencies.[22]

The Board held in a recent decision that, just as an employee may not grieve supervisory feedback unless and until it supports an adverse performance evaluation, an employer may not support an employee's dismissal in reliance on any substantive deficiencies of the employee noted in supervisory feedbacks that were not merged into a performance evaluation. The use the employer may make of the supervisory feedbacks issued to an employee is limited to providing notice to the employee of actions that may result in disciplinary action or an adverse performance evaluation.[23]

The issue of whether an employer can rely on authorized use of sick leave as a basis for any adverse comments on a performance evaluation has been addressed in two cases. In a case arising under the State-VSEA contract, the Board, by a 2-1 majority, determined that the employer violated the contract by relying on an employee's authorized use of sick leave in giving an employee an adverse performance evaluation and placing her in a period of remediation. A period of

---

[20] Penka, 19 VLRB at 36-37.
[21] Id. at 38.
[22] Id.
[23] Grievance of Eroncig, 35 VLRB 430, 451 (2020); *citing* Grievance of Paolillo, 22 VLRB 200, 215 (1999).

remediation is a step in the contract's progressive corrective action procedure that may lead to an employee's dismissal.[24]

However, in a grievance involving a University of Vermont employee, the Board recognized that there are circumstances where extensive and continual use of sick leave can be a legitimate basis for adverse comments on a performance evaluation.[25] If an employee develops a pattern of prolonged maximum use of medical leave, then an employer is entitled to examine the effect on the employee's productivity and the ability to work as a member of a team, and seek to redress the problem.[26] The performance evaluation process provides an appropriate avenue for an employer to address the issue.[27] In the UVM case, the Board determined that the employee's history of medical leave usage justified a comment on a performance evaluation providing notice to an employee that action would be taken against the employee if absenteeism did not improve.[28]

[24] Grievance of Graham, 11 VLRB 49 (1988).
[25] Grievance of UE and Bruley, 22 VLRB 167 (1999).
[26] Id. at 183.
[27] Id.
[28] Id.