

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:  
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)  
LAWRENCE SMITH )

DOCKET NO. 87-33

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On July 1, 1987, Attorney Thomas Kennedy filed a grievance on behalf of Lawrence Smith ("Grievant"). The grievance alleged that the State of Vermont, Department of Corrections ("Employer") violated Articles 16 and 17 of the Agreement between the State of Vermont and the Vermont State Employees' Association ("VSEA") for the Corrections Unit, effective for the period July 1, 1986 - June 30, 1988 ("Contract") by suspending Grievant for four days and through various other actions relating to the suspension.

A hearing was held on December 3, 1987, before Board Members Louis Toepfer, Acting Chairman, William G. Kemsley, Sr., and Catherine Frank. Kennedy represented Grievant. Michael Seibert, Assistant Attorney General, represented the Employer. The Employer filed a brief on December 17, 1987. Grievant filed a brief on December 23, 1987.

FINDINGS OF FACT

1. At all times relevant, Grievant was a Correctional Officer C at the Northwest State Correctional Facility in Swanton, Vermont.

2. At all times relevant, the Facility Personnel Rules and Regulations provided in pertinent part as follows:

... \* 9. No employee shall report to work under the influence of alcohol or any unprescribed drug, to include the odor of alcohol on the breath.

\*10. No employee shall consume any intoxicant or use any non-regulated drug during his work shift, to include lunch and/or dinner break.

... \* Indicates suspension or dismissal may occur at the first offense.

... Suspension: (a) The Appointing Authority or his Authorized Representative may suspend an employee without pay for disciplinary reasons for a period of up to ten workdays.

(Grievant's Exhibit 1)

At all times relevant, Grievant was aware of and understood these Rules and Regulations.

3. On February 3, 1987, Richard Turner, Facility Superintendent, suspended Grievant for one day. Turner gave Grievant a letter of suspension with provided:

As a result of a meeting held in my office on February 2, 1987, I have found you in violation of work rule #10, "No employee shall consume any intoxicant or use any nonregulated drug during his work shift to include lunch or dinner break." Specifically, on January 29, 1987, you reported to work under the influence of alcohol. During the meeting, you admitted that you were under the influence of alcohol. You also admitted that you knew this was your scheduled shift.

... I am suspending you from duty for a period of one day...

You may grieve this action at the Step II level according to the collective bargaining agreement between the State of Vermont and the Vermont State Employees' Association.

(State's Exhibit 8)

4. Grievant filed no grievance concerning this suspension.

5. On March 4, 1987, Grievant was scheduled to work the 7:00 a.m. - 3:30 p.m. shift. Grievant reported to work at 7:00 a.m.

6. At some point before noon on that day, William Finnigan, Facility Shift Supervisor, received a report from an inmate that there was an officer in the pod area where Grievant worked who smelled of alcohol.

7. At approximately noon, Finnigan went down to the pod area where Grievant was behind the desk. Finnigan, standing a couple of feet from Grievant, smelled the odor of alcohol on Grievant's breath.

8. Finnigan then left the pod area and informed Superintendent Turner that he had smelled alcohol on Grievant's breath. Turner directed Finnigan to have another officer verify whether Grievant had alcohol on his breath.

9. Finnigan then asked Edward Lowell, Shift Supervisor, to verify whether Grievant had alcohol on his breath. Lowell went down to the pod area at approximately 12:30 p.m. Lowell spoke to Grievant, standing a couple of feet from him, and smelled the odor of alcohol on Grievant's breath.

10. Lowell reported back to Finnigan and confirmed that Grievant did have alcohol on his breath. Finnigan relayed this information to Turner. Turner instructed Finnigan to give Grievant an alco-sensor test.

11. Lowell then told Grievant to report to an office where Lowell and Finnigan were waiting for him. When Grievant came to the office about 12:45 p.m., Finnigan told Grievant that it had come to their attention that he might be under the influence of alcohol. Neither Lowell nor Finnigan informed Grievant that he had a right to VSEA representation at the meeting. Finnigan informed Grievant that they would like him to take the alco-sensor test, which Grievant consented to do. Grievant then stated that he had about six beers the night before but that he had stopped drinking about 7-8 p.m. Grievant then took the alcohol test which indicated there was .03 percent of alcohol concentration in Grievant's system.

12. Finnigan then spoke to Turner concerning the results of the test. Turner directed Finnigan to send Grievant home for the rest of the day.

13. Finnigan relayed this information to Grievant. Grievant indicated he would like to see Superintendent Turner. Turner was reluctant to speak to Grievant without a VSEA representative present but did agree to see him. Grievant went to Superintendent Turner's office and told him that he had not had any alcohol since 8 p.m. the previous night. While Grievant was in Superintendent Turner's office, Turner smelled the odor of alcohol on Grievant's breath.

14. Grievant then left the facility as ordered by Turner. Grievant was placed on administrative leave with pay for the remainder of the day.

15. On March 7, 8, 9 and 10, Grievant was required to report to work. When he reported to work on those days, he was told that he had to take an alco-sensor test before being allowed to work. On each occasion, Grievant refused to take the test and was sent home with pay.

16. On March 10, 1987, Grievant and VSEA representatives met with Superintendent Turner. At that meeting, Turner gave Grievant the choice of a 30 day suspension without pay or a four-day suspension without pay and a referral to the Employee Assistance Program. Grievant chose the latter option.

17. On March 11, 1987, Turner informed Grievant by letter of the disciplinary action. The letter provided in pertinent part as follows:

On 03-10-87, you met with me in our conference room to discuss circumstances around allegations of misconduct. As a result of this meeting, I gave you an offer to either be suspended without pay for a period of 30 days or to accept an employee assistance referral and be suspended for 4 days without pay. You opted for the latter situation. Your days of suspension will be Wednesday, March 11, 1987; Thursday, March 12, 1987; Monday, March 16, 1987; and Tuesday, March 17, 1987.

Specifically, I have found you in violation of work rule #9, "No employee should report to work under the influence of alcohol or any unprescribed drug to include the odor of alcohol on the breath." On March 4, 1987, at approximately 1200 hours, two shift supervisors and myself smelled the odor of alcohol on you. In response to this, you submitted to a breathalyzer test. The test showed that your system had an alcohol count of .03. On February 3, 1987, I wrote you a letter of suspension for one day for a similar violation. You brought it to my attention on (sic) that letter that I indicated you violated work rule #9 when in fact you really violated work rule #10. I agree with that adjustment and have made note of such in the letter in your file.

In summary, it is clear to me that coming to work on two different occasions with alcohol in your system demonstrates that you have a problem that calls for some type of intervention. I hope you look toward this referral positively and constructively. Further violations of this nature will result in further disciplinary action up to and including dismissal.

Further violations of this nature will result in further disciplinary action up to and including dismissal.

(State's Exhibit 5)

18. Turner views the odor of alcohol on one's breath while on duty as a serious offense. He believes employees have to serve as role models in the deterrence of alcohol or drug abuse since 80 percent of inmates are incarcerated for drug or alcohol-related offenses.

19. In the 15 years he has been employed by the Department of Corrections, Turner has dismissed one employee and suspended a couple of employees for having the odor of alcohol on their breath.

20. Article 16 of the Contract, entitled Disciplinary Action, provides in pertinent part as follows:

1. No permanent or limited status employee covered by this agreement shall be disciplined without just cause. The parties jointly recognize the deterrent value of disciplinary action. Accordingly, the State will:

- ... b. apply discipline... with a view toward uniformity and consistency;
- c. impose a procedure of progressive discipline... in increasing order of severity;
- d. In misconduct cases, the order of progressive discipline shall be:
  - i. oral reprimand;
  - ii. letter of supervisory counseling;
  - iii. written reprimand;
  - iv. suspension without pay;
  - v. dismissal.
- ... f. The parties agree that there are appropriate cases that may warrant the State:
  - i. bypassing progressive discipline...;
- ... as long as it is imposing discipline... for just cause.

... 6. Whenever an employee is required by his/her supervisor or management, to give oral or written statements on an issue involving the employee, which may lead to discipline against the employee, or whenever an employee is called to a meeting with management where discipline is to be imposed on the employee, he/she shall be notified of his/her right to request the presence of a VSEA representative and, upon such request, the VSEA representative shall have the right to accompany the employee to any such meeting.

7. The appointing authority or his authorized representative may suspend an employee without pay for disciplinary reasons for a period not to exceed thirty (30) work-days....

9. In any misconduct case involving a suspension or dismissal, should the Vermont Labor Relations Board find just cause for discipline, but determine that the penalty was inappropriate or excessive, the Vermont Labor Relations Board shall have the authority to impose a lesser form of discipline.

21. The Employer indicated at the hearing in this matter that it was not relying in any way on the alco-sensor test taken by Grievant as a basis for the decision to discipline Grievant.

22. At Step II of the grievance procedure on this grievance, the hearing officer decided that "(t)he Department will not require employees to submit to an alco-sensor test as a condition of reporting to work, absent some other objective facts for cause or belief the employee is under the influence". (State's Exhibit 3).

#### OPINION

At issue is whether the Employer violated the disciplinary provisions of the Contract by suspending Grievant for four days and through various other actions relating to the suspension. Grievant alleges various Employer actions violated the Contract. Each allegation will be discussed in turn.

Grievant contends that the Employer violated his right to be notified that he had a right to VSEA representation prior to requiring him to attend a March 4, 1987, meeting which resulted in discipline. At the meeting, Grievant's supervisors confronted him with the allegation that he might be under the influence of alcohol and required him to submit to an alco-sensor test.

Grievant's supervisors may have violated Article 16, Section 6 of the Contract by failing to inform Grievant of his right to VSEA representation prior to the meeting where they confronted him and required him to take an alco-sensor test. Nonetheless, this does not mean the charge against Grievant has not been proven. The Employer is willing to allow the Board to decide this grievance without reliance on any evidence gathered at the meeting during which Grievant was tested with the alco-sensor. Evidence existing outside of and independent from admissions made by an employee at a

contractually-prohibited meeting, which was considered by the Employer in imposing discipline, is properly before the Board in determining the validity of disciplinary action taken against the employee. Grievance of VSEA and Tatro, 10 VLRB 78, 87 (1987).

The Employer contends that the fact three supervisors smelled the odor of alcohol on Grievant's breath constitutes evidence gathered outside of and independent from the "alco-sensor meeting" sufficient to sustain the discipline imposed. It is evident from a review of the disciplinary letter that the fact three supervisors smelled the odor of alcohol on Grievant was considered by Turner in disciplining Grievant. This evidence is sufficient to establish the charge that Grievant violated Rule #9 of the Facility Rules and Regulations by being on duty with alcohol on his breath. We note that we have not concluded that Grievant was intoxicated or that he had been drinking that day.

Grievant next contends that requiring him to submit to a drug test prior to beginning work on March 7 - 10, 1987, represents a unilateral change in working conditions and conditions of employment. We believe it is unnecessary for us to decide this issue since it was resolved in Grievant's favor at Step II of the grievance procedure.

Grievant contends that Superintendent Turner exceeded his disciplinary authority by his offer to Grievant of a 30 day suspension without pay. Presumably, Grievant takes the position that, since the Facility's rules and regulations limit the possible length of a suspension to 10 days, Turner threatened Grievant with a suspension he did not have the authority to impose. We fail to see how this allegation relates to a grievable offense since the discipline actually



imposed by Turner was not in excess of ten days and no evidence was presented to indicate that Grievant somehow was inhibited from filing a grievance because of such actions.

Finally, Grievant contends that no just cause existed for the disciplinary action taken; that the Employer improperly bypassed progressive discipline and that the suspension imposed was not done uniformly and consistently.

We look to the specific factors enumerated in Grievance of Collieran and Britt, 6 VLRB 235, 268-269 (1983), to determine the legitimacy of the disciplinary action pursuant to the authority granted to the Board by Article 16 of the Contract. The pertinent factors here are the nature and seriousness of the offense in relation to Grievant's position; Grievant's past disciplinary record; consistency of the penalty with those imposed upon other employees for similar offenses and consistency with any applicable agency table of penalties; the impact of the offense upon the reputation of the agency; the clarity with which the employee was on notice of any rules that were violated; and the adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

The application of these factors here leads us to conclude that just cause existed for the four-day suspension of Grievant and referral to the Employee Assistance Program. Grievant's offense was serious in relation to his position as a correctional officer, where he had a responsibility to serve as a role model to further the Employer's goal of rehabilitating inmates, many of whom were incarcerated due to drug or alcohol-related offenses. Grievant served as a poor role model and hindered this goal by having alcohol on his

breath while at work. Inmates who are being encouraged by the Employer to reduce alcohol or drug abuse receive mixed signals if they smell alcohol on the breath of an employee, thus damaging the Employer's credibility.

The Employer did not improperly bypass the terms of progressive discipline here. Grievant had received a one-day suspension one month earlier for an alcohol-related offense. The imposition of a four-day suspension here constituted applying progressively severe discipline for a related offense and, thus, was fully consistent with the tenets of progressive discipline. Moreover, the earlier suspension also served to provide clear notice to Grievant that alcohol-related offenses would not be tolerated.

Grievant presented no evidence to demonstrate the suspension was inconsistent with an agency table of penalties or with discipline imposed on other employees. In fact, the evidence was to the contrary. The Facility Rules and Regulations included the offense of the odor of alcohol on the breath as among those for which suspension or dismissal may occur at first offense. Moreover, Superintendent Turner had in the past suspended and dismissed other employees for the odor of alcohol on the breath.

In sum, the disciplinary action taken against Grievant was neither inappropriate nor excessive. The four-day suspension and referral to the Employee Assistance Program served as an appropriate and effective sanction to deter such conduct in the future.

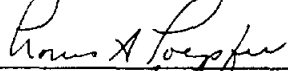
ORDER


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


The Grievance of Lawrence Smith is DISMISSED.

Dated the 14<sup>th</sup> day of January, 1988, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

  
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Louis A. Toepfer, Acting Chairman

  
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William G. Kemsley, Sr.

  
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Catherine L. Frank