VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 90-1
GLENN BOYDE	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On January 5, 1990, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Glenn Boyde ("Grievant"), concerning his dismissal from employment with the State of Vermont, Department of Corrections ("Employer"). Grievant alleged that his dismissal violated Article 16 of the collective bargaining contract between the State and VSEA for the Corrections Unit, effective July 1, 1988 to June 30 1990 ("Contract") in that a) there was no just cause therefore, b) there was no nexus between Grievant's conduct and his job, c) there was no investigation conducted, d) progressive discipline was bypassed without good cause, e) dismissal was an unwarranted increase in the penalty of suspension already imposed, and f) dismissal is so excessive as to constitute an abuse of discretion. Grievant also alleged that his dismissal violated Article 17 of the Contract in that it was in retaliation for his having filed a grievance from his suspension.

A hearing was held before Board Members Charles McHugh, Chairman; William G. Kemsley, Sr., and Catherine Frank on April 19, 1990. An additional hearing was held in Member Kemsley's absence, before Chairman McHugh and Member Frank on May 2, 1990. Michael Zimmerman, VSEA Staff Attorney, represented Grievant. Michael Seibert, Assistant Attorney General, represented the Employer. The parties filed Memoranda of Law on May 9, 1990.

FINDINGS OF FACT

1. Grievant, who is 22 years old, was employed by the Employer as a Correctional Officer B, Pay Grade 15, at the Chittenden Community Correctional Center, South Burlington, Vermont, from mid-1986 until his dismissal on December 6, 1989. His duties involved the custody, treatment and training of inmates confined to the correctional facility (Grievant's Exhibit 1).

2. At all times relevant, the Chittenden Community Correctional Center Institution Work Rules, which Grievant read shortly after he was hired, provided in pertinent part as follows:

> ... 6. No employee or volunteer shall falsify any official document, record, written or oral report.
>
> ... 27. No staff member... shall engage in any employment, activity or enterprise which has been determined by the appointing authority to be inconsistent or incompatible or in conflict with his/her duties, functions or responsibilities to the Chittenden Facility (State's Exhibit 1).

3. At all times relevant, Grievant's performance as a correctional officer was considered by his supervisors and co-workers to be above average. He was considered to be a trustworthy, reliable and diligent employee with the potential for advancement. Prior to the incidents in question herein, Grievant was not disciplined (Grievant's Exhibit 3).

4. At all times relevant, Philip Scripture was Superintendent of the Chittenden Facility, and Joseph Smyrski was Assistant Superintendent. In May, 1988, a conversation occurred between Scripture and Grievant, in the presence of Smyrski, concerning Grievant leaving the facility on his motorcycle the previous day, at the end of his shift, with tires screeching and in a cloud of smoke. Scripture told Grievant that his conduct on the motorcycle was unacceptable and he did not want to see such action repeated.

Scripture, who was angry during the conversation, told Grievant that he would be held accountable for off-duty activities on his motorcycle. Grievant, who was angry, replied, "you can't tell me what to do while I'm off duty; you're not my father", or words to that effect. Scripture informed Grievant that he would be held accountable for on-duty and off-duty conduct.

5. In May or June of 1988, John Murphy, then a casework supervisor at Chittenden, observed Grievant driving a security van in the facility parking lot at an excessive rate of speed. Murphy, along with Wally Mariani, Security and Operations Supervisor, then met with Grievant in a counseling session, and told him that the speed at which he was driving was dangerous and improper, that it would lead to Grievant getting in trouble, and could result in someone getting hurt.

6. In December, 1988, a Chittenden inmate filed a grievance concerning Grievant driving into the facility parking lot in his car at an excessive rate of speed. Mariani told Grievant that he needed to slow down, and that there was a correlation between his driving habits while off duty and his job. Mariani tried to talk to Grievant as a big brother, telling him that, even if he had no concern over his own personal safety, he should think about the effect it would have on his wife and child if he were injured in an accident.

7. On April 20, 1989, while off duty, Grievant was driving his motorcycle, at approximately 4:45 p.m., on Route 100 in Waterbury at a speed above the speed limit. Trooper Bruce Melendy, of the Vermont State Police, activated the blue light and headlights on his cruiser and motioned for Grievant to pull over and stop. Grievant did not stop, accelerated and was able to successfully elude Melendy.

Grievant then left his motorcycle in the driveway of a home off Route 100 where the owners were not home . Grievant then rode to Essex Junction with a friend (State's Exhibit 3).

8. Later on the evening of April 20, 1989, the owner of the home reported to the State Police that the motorcycle had been left in his driveway. At 12:30 a.m. on April 21, 1989, Grievant's wife called the State Police and reported her husband's motorcycle stolen (State's Exhibit 3).

9. On April 21, 1989, Grievant signed a statement, wherein he swore to tell the truth under the penalty of perjury, for the State Police which provided:

> On 4/20/89 at approximately 4:10 p.m. I Glenn Boyde left my motorcycle at my house and left with a friend, Marcy Siegel, were (sic) we proceded (sic) to the rec. field in Waterbury to watch softball. At approximately 8:00 another friend, Tony Lewis, picked myself up at the rec. field and we the (sic) proceded (sic) to his house in Essex to play cards and watch TV. At approximately 11:45 p.m. I received a call from my wife wondering what I had been doing. After I told her she told me that someone had taken my motorcycle and it was at the State Police station. I then told her to report it stolen and to pick me up in the morning to get everything straightened out.
>
> (State's Exhibit 3, pages 8-9)

10. On April 21, 1989, in investigating this incident, Melendy discovered that Grievant was seen purchasing gas in Waterbury on April 20 a few minutes prior to the time his motorcycle was observed speeding. Melendy also spoke with Marcy Siegel that day. Siegel informed Melendy that she had not gone with Grievant on April 20 to the recreation field in Waterbury and had not seen him that day. Siegel further told Melendy that Grievant told her that he had eluded police the previous day on his motorcycle and then "dumped" it, and that he had told police that he was at the recreation field with Siegel at the time his motorcycle was observed speeding (State's Exhibit 3).

11. On April 21, 1989, Melendy issued Grievant a traffic ticket for speeding and citations for careless and negligent driving, attempting to elude, false swearing and false information to a law enforcement officer (State's Exhibit 3).

12. Grievant's statement to the police on April 21, 1989, concerning his actions on April 20, 1989, was false in the following respects:

a. he reported that, at approximately 4:10 p.m. he had left his motorcycle at home and left with Siegel to go to the Waterbury recreation field, when in fact he had left home on his motorcycle at that point to get gas and he did not see Siegel that day;

b. he reported that he was at the Waterbury recreation field from 4:10 p.m. to 8:00 p.m., when in fact he was on Route 100 in Waterbury, at 4:45 p.m., successfully eluding Melendy on his motorcycle; and

c. he had his motorcycle reported stolen, when in fact he had abandoned it in a driveway of a home (State's Exhibit 3).

13. On May 24, 1989, while off duty, Grievant was driving his motorcycle on Interstate 89 in South Burlington at a speed well above the speed limit. South Burlington Police officer Joseph Gaines activated the blue lights, flashing headlights and siren on the police cruiser and pursued Grievant. In the pursuit of 4.5 miles that followed, wherein Grievant successfully eluded Gaines, Grievant went the wrong way on the entrance ramp on Exit 12 of Interstate 89 (State's Exhibit 4).

14. On May 26, 1989, when Gaines went to the Chittenden Community Correctional Center to talk to Grievant concerning the incident, Grievant told Gaines that he thought Gaines was a former inmate, "Yuppie" Mayo, pursuing him on May 24 (State's Exhibit 4).

15. On May 26, 1989, Gaines cited Grievant for attempting to elude concerning the May 24, 1989, incident (State's Exhibit 4).

16. On June 18, 1989, while off duty, Grievant was driving his motorcycle on Route 302 in East Barre, with a group of other motorcyclists, at a speed well above the speed limit and was passing cars on the right and the left at high rates of speed. State Trooper Melendy pursued the motorcyclists, two of whom, including Grievant, were stopped by a roadblock set up by the Barre City Police. Melendy issued Grievant and another cyclist a citation on June 18, 1989, for driving in a careless and negligent manner (State's Exhibit 5).

17. On June 20 and 21, 1989, articles appeared in the Burlington Free Press, a daily newspaper, concerning the April 20, May 24 and June 18 incidents. The articles identified Grievant as a correctional officer at the Chittenden facility (State's Exhibit 6, pages 1-2).

18. Superintendent Scripture read the June 21, 1989, article in the Free Press at or around the time it was published. That article mentioned the April 20, May 24 and June 18 incidents, and indicated that Grievant was being charged with careless and negligent driving, attempting to elude police and giving false information to police (State's Exhibit 6, page 2).

19. Grievant's co-workers and supervisors, through the newspaper articles and conversations, were aware of the charges against Grievant concerning the April 20, May 24 and June 18 incidents. Subsequent to

the newspaper articles, relatives and acquaintances of Grievant's co-workers and supervisors mentioned the charges against Grievant to them.

20. The Chittenden Community Correctional Center receives nine copies of the Free Press daily which are available to inmates. Subsequent to the newspaper articles, inmates were aware of the charges against Grievant concerning the April 20, May 24 and June 18 incidents.

21. On July 17, 1989, while off duty, Grievant was driving his motorcycle along with a driver in another motorcycle on Route 100 in Waitsfield at a speed well above the speed limit, and was passing cars on a curve and with oncoming traffic approaching. State Trooper Melendy pursued Grievant and the other cyclist, and they pulled over when Melendy activated the blue light on his cruiser. Melendy issued Grievant and the other cyclist a citation for driving in a careless and negligent manner (State's Exhibit 7).

22. During and subsequent to the period Grievant's off duty motorcycle incidents were occurring, there was no noticeable change in Grievant's job performance. He continued to be an above-average correctional officer. There is no indication that inmates' knowledge of the off duty charges against Grievant adversely affected Grievant's dealings with inmates.

23. At the Chittenden Facility, disciplinary action may be taken against inmates based on charges against them of wrongdoing. In disciplinary cases against inmates, the statements of a correctional officer may determine whether the charges will be upheld and, thus, the credibility of officers is important. It is not unusual for inmates and officers to give conflicting statements of an incident.

24. In September, 1989, an inmate charged that Grievant made inappropriate statements to him, which Grievant denied. In deciding whether the inmate's claim had merit, Superintendent Scripture had to decide whether the statement of Grievant or the inmate was more worthy of belief. Scripture determined that he could not have confidence in Grievant's credibility due to Grievant making false statements to the police concerning the April 20 off duty motorcycle incident.

25. On September 26, 1989, Grievant entered a plea of guilty to the charge that he attempted to elude a police officer concerning the May 24, 1989, off duty motorcycle incident. He was assessed a $300 fine (State's Exhibit 4).

26. On October 13, 1989, Grievant, represented by Attorney Timothy Shanley, and Terry Trono, the Washington County State's Attorney, entered into a plea agreement concerning the April 20, 1989, June 18, 1989, and July 17, 1989, off duty motorcycle incidents. Therein, Grievant agreed to plead guilty to the attempting to elude charge concerning the April 20, 1989, incident; the careless and negligent driving charge concerning the June 18, 1989, incident; and the careless and negligent driving charge concerning the July 17, 1989, incident. The State's Attorney agreed to drop the false statement charge and the careless and negligent driving charge concerning the April 20, 1989, incident. The parties further agreed that Grievant pay a $200 fine for each of the three offenses, and would serve a nine-day jail sentence for his offenses, to be served on three three-day periods on his days off from work. District Judge David Jenkins accepted the plea agreement. During the hearing before Judge Jenkins concerning the plea agreement, Shanley told Jenkins that

"the more serious charge... of false report to a police officer is one that we do not have a chance of prevailing on" at trial (State's Exhibit 8).

27. The first three-day period for Grievant to serve in jail was October 23-25, 1989, at the St. Johnsbury Correctional Center, for the July 17, 1989, careless and negligent driving offense. These were three days Grievant was not scheduled to work (Joint Exhibit 1).

28. On October 25, 1989, Raymond Pilette, Superintendent of the St. Johnsbury Correctional Center, called Superintendent Scripture and informed him that Grievant was incarcerated in the St. Johnsbury facility. That day, Scripture sent Grievant a letter of suspension which provided in pertinent part as follows:

> This letter is to inform you that effective October 25, 1989, at 2330 hours you are suspended, without pay, for six work days from your duties as Correctional Officer B at the Chittenden Correctional Facility in South Burlington, Vermont. The days of suspension are October 25, 26, 27, 28, 29 and 30...
>
> The reason for this suspension is that you violated Institutional Work Rule 27, no staff member shall engage in any activity... which is determined to be inconsistent, incompatible or in conflict with your duties, functions or responsibilities to the Chittenden facility. To wit
>
> On October 23, 24 and 25, 1989, you served a three-day jail sentence for the crime of Careless and Negligent operation of a motor vehicle, docket number 887-7-89WnCr.
>
> Being incarcerated is unbecoming to a Corrections professional and in conflict with the working relationship and dependency on the Vermont State Police, other criminal justice agencies and the Department of Corrections. You have critically shaken the public's confidence in correctional staff's ability to perform our statutory mandate. Correctional officers have to be trusted to "protect the public" not endanger the public. Correctional employees are expected to be a role model and set the example for offenders, not be one of them. A Correctional officer's "integrity" is the backbone of our profession, without it you are paralyzed. A CO's integrity cannot be tarnished and yours is deeply stained.

> Your fellow officers' and your supervisors' confidence in your ability to supervise offenders which you served time with is highly questioned. Correctional staff statewide wonder if they can depend on you to assist them or carry out your responsibilities in time of crisis. It is yet to be determined if you can appropriately handle the remarks from offenders directed toward you and your incarceration without retaliation.
>
> (Grievant's Exhibit 4)

29. In suspending Grievant for serving time in jail, Scripture was not aware of the details of the underlying careless and negligent driving offense.

30. On October 26, 1989, an article appeared in the Burlington Free Press reporting that Grievant was to spend nine days in jail for his off duty motorcycle offenses. The article identified Grievant as a correctional officer at the Chittenden Community Correctional Center (Grievant's Exhibit 6, page 3).

31. Shortly after suspending Grievant, Superintendent Scripture assigned John Murphy, who was then Agency of Human Services Personnel Administrator assigned to the Employer, to investigate the details of Grievant's offenses concerning the jail sentence he was serving plus any other details on any of the off duty motorcycle incidents.

32. On November 3, 1989, Superintendent Scripture informed Grievant by letter that he was placing him on temporary relief from duty with pay. Scripture informed Grievant that the "reason for this temporary relief of duty is to give me time to investigate the circumstances surrounding incidents of your notorious misconduct on or about April through July of 1989, for which you were detained, cited, arrested, arraigned, or found guilty, to wit: careless and negligent operation of a motor vehicle, attempting to elude a police officer, false swearing and false information to a police officer" (State's Exhibit 9).

33. In the course of the investigation, Murphy examined the police and court records concerning the April 20, 1989, May 24, 1989, June 18, 1989, and July 17, 1989, off duty motorcycle incidents. Scripture reviewed these documents. This was the first time Scripture was aware of the details of these off duty incidents (State's Exhibits 3, 4, 5, 7 and 8).

34. Grievant spent three days incarcerated in the St. Johnsbury Correctional Facility on October 31 through November 2, 1989, for the June 18, 1989, careless and negligent driving offense. He spent the last three days of his sentence in the St. Johnsbury facility on November 8 through 10, 1989, for the April 20, 1989, attempting to elude offense.

35. On November 14, 1989, Grievant and his VSEA Representative, Richard Lednicky, met with Superintendent Scripture and Assistant Superintendent Smyrski. At that meeting, Grievant admitted to the following three charges made against him by Scripture:

> On 4/21/89, you gave false information to Bruce Melendy, State Police Officer, after swearing under the pains and penalty of perjury that you would give a true statement, to wit:
>
> 1. You swore that you left your motorcycle parked at home on 4/20/89 at about 4:10 p.m. until 4/21/89, when in fact you left home riding your motorcycle.
>
> 2. You swore you left home at 4:10 p.m. with Marcy Siegel, when in fact Marcy Siegel was at her own home from 4:00 p.m. until 7:30 p.m.
>
> 3. You swore you were at the Waterbury rec. field watching a softball game between 4:10 or so and 8:00 p.m., when in fact you were seen riding your motorcycle on Route 100 in Duxbury at about 4:45 p.m. and at Champlain Farms at about 4:40 p.m.

Grievant did not admit that he had told his wife to report his motorcycle stolen in that incident (State's Exhibits 11, 12).

36. On November 27, 1989, Superintendent Scripture informed Grievant by letter that he was contemplating his dismissal due to the off duty motorcycle incidents. Scripture provided Grievant with an opportunity to respond either orally or in writing to the allegations against him. Grievant elected to request a pre-termination meeting. Grievant and Lednicky met with Scripture on December 5, 1989, in a pre-termination meeting, which meeting took place immediately prior to the time a grievance meeting on Grievant's suspension was scheduled (State's Exhibits 13, 14).

37. Immediately following the pre-termination meeting, Scripture informed Grievant that he was rescinding the six-day suspension of Grievant. Thus, no grievance meeting on the suspension occurred. On December 6, 1989, Scripture informed Grievant by letter that he was rescinding the suspension (State's Exhibit 16).

38. On December 6, 1989, Scripture informed Grievant by letter that he was dismissing him. The letter provided in pertinent part as follows:

> This letter is to confirm our conversation after our meeting of December 5, 1989, that as a result of your actions explained below, I am dismissing you from the position of Correctional Officer B at the Chittenden Correctional Facility at South Burlington, Vermont, effective December 5, 1989, without two weeks notice or pay in lieu of notice.
>
> The reasons for which I am dismissing you are as follows:
>
> On about May 24, 1989, around 11:30 p.m. you were traveling on your motorcycle on I-89 at approximately 75 mph in a 55 mph zone. You were pursued by and eluded the police, even though they used their emergency lights and ordered you, via their public address system, to stop. In the course of this event, you drove the motorcycle in the wrong direction on an I-89 ramp. You later told a South Burlington police officer, that you believed you were being chased by a former inmate of the Correctional Center. On or about September 26, 1989, you pled guilty to Attempting to Elude in connection with these events, and were ordered to pay a $300 fine.

On June 18, 1989, at about 5:40 p.m. you were driving a motorcycle on Route 302 in East Barre at about 79 mph in a 50 mph zone, as a result of which you were arrested by the State Police, and charged with Careless and Negligent Driving in connection with these actions.

On July 17, 1989, at about 2:00 p.m., you were driving a motorcycle on Route 100 at about 86 mph in a 50 mph zone, and were passing vehicles in a no passing zone, and were charged with Careless and Negligent Driving in connection with these actions.

On April 20, 1989, at about 4:45 p.m. in Duxbury, you were driving a motorcycle on Route 100 at 62 mph in a 50 mph zone. When the State Police attempted to stop you, you eluded them.

On April 21, 1989, you executed a false sworn statement for the State Police in conjunction with their investigation of the events of April 20, 1989. In that statement, which was made "under penalty of perjury", you falsely claimed to have left your motorcycle home on the evening of April 20, 1989, and falsely claimed to have spent time with Marcie Siegel that evening. That statement indicated, further, that you had told your wife to report the motorcycle stolen, even though you knew that to be false.

You were charged with Careless and Negligent Driving and Attempting to Elude a police officer on April 20, 1989, and with providing False Information to a police officer on April 21, 1989.

On October 13, 1989, you entered into a plea agreement which disposed of charges stemming from the events of April 20, 1989, April 21, 1989, July 17, 1989, and June 18, 1989. In conjunction with your guilty plea for the Careless and Negligent charges in relation to your actions on June 18, 1989, and July 17, 1989, and your guilty plea to Attempting to Elude a police officer on April 20, 1989; the charge of False Information from your actions on April 21, 1989, was dismissed by the State. Nonetheless, your attorney stated during the court hearing that the charge of False Information "is one that we do not have a chance of prevailing on". You were sentenced, as a result of each guilty plea, to a $200 fine and three days in jail. You were jailed as a result thereof for the dates October 23 - 25, 1989, October 31 - November 2, 1989, and November 8 - 10, 1989.

On November 16, 1989, we met with Richard Lednicky and Joseph Smyrski present, and you admitted making false statements to State Police Officer Bruce Melendy on April 21, 1989.

I am dismissing you because the cumulative effect of all of your actions has destroyed my faith in your credibility and your ability to use good judgment, qualities which I consider to be central prerequisites for employment as a correctional officer.

Neither I nor other supervisors can trust you in the manner we must if you are to continue serving a a correctional officer. This fundamental fact appears to be ample grounds for bypassing progressive discipline and just cause for your dismissal.

Any professional in the field of law enforcement must be a generally law abiding person, and you do not demonstrate your capability to be one. A correctional officer must be a role model to the offender population, and you have set a very poor example. Your driving offenses and the fact of your incarceration have been publicized in the newspaper and are known to employees of the Department of Corrections, the public, and to offenders in our facilities. Your actions may have damaged the working relationship of this Department and the rest of the law enforcement community. Your actions have probably embarrassed your fellow officers and supervisors as much as they have me, and I believe you have disgraced your profession and brought discredit to the Department of Corrections.

Most importantly, however, your actions have destroyed my confidence in your trustworthiness, credibility and your ability to use sound judgment. While the charge of False Information to a police officer was dismissed as part of a plea agreement, it is clear that you reported the theft of your motorcycle knowing that report was false. You clearly violated the law. That, coupled with your false explanation to the police of your activities of April 20, 1989, and your attempt to obtain a false alibi witness, have utterly destroyed my trust in your word.

In the course of your job, you are called upon to supervise offenders, and to report their misdeeds. The length of their incarceration, and the conditions of their stay in the facility, depends in large part upon the reports I receive from correctional officers. I must have confidence that I can stand behind and trust implicitly the word and the reports of all correctional officers. I must be prepared to have correctional officers serve as witnesses in support of the Department's interests, both in disciplinary and criminal proceedings against offenders. Your credibility with me, and with other supervisors, is now below the level at which you can continue to function in that capacity...

(State's Exhibit 17)

39. Before deciding to dismiss Grievant, Superintendent Scripture did not talk to all of Grievant's supervisors and co-workers concerning whether they could trust Grievant. He did speak to Smyrski, Mariani and Gunther Hetzel, a facility shift supervisor, who all indicated to him that they could not completely rely on Grievant's

credibility due to his false statements to police. Other supervisors of Grievant did not lose trust in Grievant's credibility due to his false statements to police.

40. The Department of Corrections has no explicit written policy concerning off duty conduct. There is an unwritten Department policy that commission of a crime will not automatically bar an individual from employment; that such determinations will be made on a case-by-case basis.

41. There have been a few other correctional officers employed by the Department of Corrections who have been convicted of crimes while they have been employed. These employees were not dismissed subsequent to their convictions. There have been no correctional officers, other than Grievant, who have served time in jail for convictions while being employed by the Department.

42. The crimes for which Grievant was convicted were misdemeanors.

43. The Contract provides in pertinent part as follows:

ARTICLE 16
DISCIPLINARY ACTION

> 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:
>
> a. act promptly to impose discipline... within a reasonable time of the offense;
>
> 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. written reprimand;
> iii. suspension without pay;
> iv. dismissal.

... f. The parties agree that there are appropriate cases that may warrant the State:

i. bypassing progressive discipline...

ii. applying discipline... in different degrees;

iii. applying progressive discipline for an aggregate of dissimilar offenses, except that dissimilar offenses shall not necessarily result in automatic progression; as long as it is imposing discipline... for just cause.

... 2. The appointing authority or his authorized representative may dismiss an employee for just cause with two weeks' notice or two weeks' pay in lieu of notice...

3. Notwithstanding the provisions of Paragraph 2 above, an employee may be dismissed immediately without two weeks notice or two weeks pay in lieu of notice for any of the following reasons:

a. gross neglect of duty;

b. gross misconduct;

c. refusal to obey lawful and reasonable orders given by supervisors;

d. conviction of a felony;

e. conduct which places in jeopardy the life or health of a co-worker or of a person under the employee's care.

... 8. The appointing authority or his authorized representative may suspend an employee without pay for disciplinary reasons for a period not to exceed 30 workdays...

9. An appointing authority may relieve employees from duty temporarily with pay for a period of up to 30 workdays to permit the appointing authority to investigate or make inquiries into charges and allegations made by or concerning the employee, or if in the judgment of the appointing authority the employee's continued presence at work during the period of investigation is detrimental to the best interests of the State, the public, the ability of the office to perform its work in the most efficient manner possible, or well being or morale of persons under his care...

10. 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.

ARTICLE 17
GRIEVANCE PROCEDURE

... SECTION 7.

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.

OPINION

There are various issues which need to be addressed for the Board to determine whether the Employer was justified in dismissing Grievant from his position as a Correctional Officer B. We will discuss each of these in turn.

Grievant contends that his dismissal constituted an improper increase in a penalty (i.e. suspension) already imposed for the same conduct. Grievant contends that it was improper for two reasons: 1) the suspension was imposed without any investigation, and disallowance of the dismissal by the Board would discourage the State from future precipitous disciplinary action absent a proper investigation; and 2) dismissal was substituted for a suspension only after Grievant grieved his suspension and, as a result, smacks of retaliation for grievance activity.

We disagree that Grievant's dismissal constituted an improper increase in a penalty already imposed for the same conduct. The dismissal was not imposed for the same conduct as the suspension. The suspension was imposed because Grievant was incarcerated for three days for a single off duty careless and negligent driving offense, the details of which offense Superintendent Scripture was unaware of at the time he imposed the suspension. On the other hand, the dismissal of Grievant resulted due to the details of an additional off duty careless and negligent driving offense, two offenses concerning attempting to elude police officers pursuing Grievant for his manner of driving his motorcycle while off duty, as well as the details of the offense which led to his incarceration and suspension, and making false statements to the police concerning one of the off duty incidents.

We are concerned that Grievant was suspended without any investigation, although Superintendent Scripture contends no investigation was needed because Grievant was suspended due to his incarceration and not the details of the underlying offense. The fact that Grievant was dismissed once a post-suspension investigation uncovered more details of Grievant's off duty conduct on his motorcycle indicates that it would have been a better practice for Superintendent Scripture, before suspending Grievant, to place Grievant on temporary relief from duty with pay, pursuant to Article 16, section 9, of the Contract pending investigation. However, placement on temporary relief from duty with pay is not required by the Contract in such circumstances, and we are not inclined to disallow the dismissal due to the lack of investigation preceding the suspension, particularly given that the suspension was rescinded.

We also conclude that the fact dismissal was substituted for suspension only after Grievant grieved his suspension was not as a result of retaliation for grievance activity. We are convinced by the evidence that Grievant was dismissed because the investigation subsequent to Grievant's suspension revealed many more details of Grievant's off duty motorcycle incidents than were previously known by Superintendent Scripture, and that he was not dismissed in retaliation for grieving his suspension.

Grievant also contends that no just cause for any discipline exists because there is no nexus between Grievant's job and his off duty conduct.

There must be a nexus between off duty conduct and employment for an employer to be justified in taking any disciplinary action against an employee for such conduct. Grievance of Earley and Ibey, 6 VLRB 72, 81 (1983). Grievance of Jamieson, 10 VLRB 239, 243-244 (1987). Management has the inherent right to punish the commission of a criminal offense where there is a nexus between the activity and the employment. Earley and Ibey, Supra, at 81.

We conclude that a nexus does exist between Grievant's job as a correctional officer and his off duty motorcycle incidents. Grievant pled guilty to, and was convicted of four misdemeanors (i.e. attempting to elude a police officer on April 20, 1989, and May 24, 1989, and careless and negligent driving on June 18, 1989, and July 17, 1989), which occurred while he was driving his motorcycle during off duty hours. Three of the misdemeanors resulted in his incarceration for nine days. In addition, although no conviction of a crime resulted since the charge was dismissed by the State as a result of a plea bargain, Grievant made false statements to the police concerning the April 20, 1989, incident. As a correctional officer, Grievant's duties involve the custody, treatment and training of inmates who have violated the law. Grievant's conduct concerning the off duty motorcycle incidents demonstrated a disregard for the law and a disrespect for, and dishonesty to, law enforcement officers sufficient for the Employer to reasonably draw a connection between the off duty conduct and Grievant's ability to supervise individuals incarcerated because they have violated the law.

The central issue remaining is whether the Employer had just cause to impose the maximum disciplinary sanction of dismissal due to

Grievant's off duty conduct. Grievant contends that dismissal was an unreasonable penalty; that dismissal was excessive and progressive discipline should not have been bypassed.

The ultimate criterion of just cause is whether the employer acted reasonably in discharging an employee for misconduct. In re Grievance of Brooks, 135 Vt. 563, 568 (1977). There are two requisite elements which establish just cause for dismissal: 1) that it is reasonable to discharge an employee because of certain conduct, Id, and 2) the employee had fair notice, express or fairly implied, that such conduct would be grounds for discharge. Id. In re Grievance of Yashko, 138 Vt. 364 (1980). On the issue of fair notice, the ultimate question for the Board is whether the conduct was or should have been known to the employee to be prohibited by the employer. Brooks, supra.

The nexus between Grievant's off duty offenses and his employment having been established, we look to the specific factors articulated in Grievance of Colleran and Britt, 6 VLRB 235, 268-269 (1983), to determine the reasonableness of the dismissal imposed based on the off duty conduct.

Grievant's offenses were serious. Through his off duty offenses of careless and negligent motorcycle driving, attempting to elude police officers and giving false statements to police, Grievant demonstrated a disregard for motor vehicle laws, a serious disrespect for law enforcement officers and an ability to be dishonest in giving sworn statements to law enforcement officers.

These offenses related to his duties as a correctional officer. Disrespect for the law, disrespect for law enforcement officers and

dishonesty are characteristics contrary to those needed by correctional officers to adequately perform their duties. Given these exhibited characteristics which were known to his supervisors, and to those he worked with and the inmates he supervised, it was reasonable for Grievant's supervisors to consider his ability to perform assigned duties in a correctional facility and call into question his credibility.

The fact that Grievant was incarcerated for nine days and that his offenses were well-publicized in the newspaper exacerbates the seriousness of his offenses. As a correctional officer, Grievant had the responsibility to serve as a role model to further the Employer's goal of rehabilitating inmates. Grievance of Smith, 11 VLRB 35, 46 (1986). Through his offenses and incarceration which were known to inmates, Grievant served as a poor role model. Also, the notoriety of Grievant's offenses generated by the newspaper coverage brought discredit to the Employer and the correctional facility generally and adversely impacted their reputation.

Also, Grievant had fair notice that his off duty conduct was, or should have been, known to Grievant to be prohibited by the Employer. In May, 1988, Superintendent Scripture expressly told Grievant that he would be held accountable for off duty activities on his motorcycle. Further, in December, 1988, the facility security and operations supervisor told Grievant that there was a correlation between his driving habits while off duty and his job. Through these discussions, Grievant had express notice that the off duty conduct he engaged in at issue herein concerning his motorcycle driving was prohibited by the Employer. Even assuming that Grievant did not have express notice

that his conduct was prohibited, he had at least implied notice that his off duty conduct was prohibited by the Employer. Common sense would dictate that his behavior of carelessly riding his motorcycle at illegal high rates of speed, eluding police, and making false sworn statements were prohibited by the Employer.

However, analysis of the total circumstances of this case leads us to conclude that the Employer acted unreasonably in bypassing progressive discipline and imposing the maximum penalty of dismissal for Grievant's offenses.

A central element in the Employer's justification for bypassing progressive discipline and dismissing Grievant was that his false sworn statement to the police concerning the April 20, 1989, off duty motorcycle incident destroyed supervisors' faith in his credibility. The Employer cites the Vermont Supreme Court decision, In re Carlson, 140 Vt. 555, 560 (1982), and the Board decision, Grievance of Johnson, 9 VLRB 94 (1986), to support the view that employees clearly have notice that dishonesty can lead to their dismissal from employment. However, these cases and others decided by the Board and Court concerning employee dishonesty all involve employees who were dishonest to the State in its capacity as employer, and none of the cases extend this obligation of honesty beyond the employment relationship. This is not to say that the Employer was prohibited from considering Grievant's off duty false statements in deciding what disciplinary action to take against him. However, it does not necessarily follow that off duty dishonesty translates into lack of credibility while on duty. An employer must look to an employee's "track record" while on duty for any indication that the employee's

off duty dishonesty destroys his on duty credibility. Here, the Employer has presented no evidence to indicate that Grievant has exhibited dishonesty while on duty. Under these circumstances, we conclude it was unreasonable for Superintendent Scripture to determine that he could no longer trust Grievant's credibility at work.

Grievant's past work record and disciplinary record during his three and one-half years of employment weigh in favor of his retaining his job. Prior to the incidents at question herein, Grievant was not disciplined. He was considered to be a trustworthy, reliable and diligent employee with the potential for advancement. There is no evidence that his off duty misconduct affected his performance on the job. While his off duty activities adversely impacted his relations with co-workers, supervisors and inmates somewhat, it is apparent that the offenses have not completely compromised his ability to adequately perform his job.

Under the circumstances, we conclude the Employer acted unreasonably in completely bypassing progressive discipline. A stiff suspension was an adequate and effective alternative sanction to impose on Grievant to deter such conduct by him or others in the future. A lengthy suspension would have served effective notice to Grievant that similar off duty conduct in the future would have resulted in his dismissal. A lengthy suspension also would have ameliorated the negative publicity for the Employer generated by Grievant's off duty derelictions, and would have shown inmates that Grievant's offenses were not condoned by the Employer.

Thus, while we conclude that Grievant's repeated off duty disregard for traffic laws, and particularly his attempts to elude law enforcement officials and, in one incidence, make a false statement to the State Police, are adequate reasons for his supervisor to question Grievant's ability to adequately perform his job, we feel bypassing progressive discipline is inappropriate. Clearly, Grievant's behavior warrants serious discipline and while a 30 day suspension, the maximum suspension allowed by the Contract, might not seem to be adequate, we believe that dismissal is unwarranted.

Grievant's off duty conduct, while serious and not to be condoned, does not negate the fact that he was a good employee with much potential. To summarily dismiss him under the circumstances was an excessive penalty. We will impose the maximum penalty short of dismissal allowed by the Contract - a 30-day suspension.

ORDER

Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the Grievance of Glenn Boyde is SUSTAINED; and

1. Grievant shall be reinstated to his position as Correctional Officer B at the Chittenden Community Correctional Center;

2. Grievant shall be awarded back pay and benefits from the date commencing 30 working days from the date of his discharge until his reinstatement for all hours of his regularly assigned shift, minus any income (including unemployment compensation received and not paid back) received by Grievant in the interim;

3. The interest due Grievant on back pay shall be computed on gross pay and shall be at the rate of 12 percent per annum and shall run from the date each paycheck was due during the period commencing 30 working days from Grievant's dismissal, and ending on the date of his reinstatement; such interest for each paycheck date shall be computed from the amount of each paycheck minus

unemployment compensation received by Grievant during the payroll period; and

4. The parties shall submit to the Board by September 24, 1990, a proposed order indicating the specific amount of back pay and other benefits due Grievant; and if they are unable to agree on such proposed order, shall notify the Board in writing that date of specific facts agreed to by the parties, specific areas of factual disagreement and a statement of issues which need to be decided by the Board.

Dated this 10th day of September, 1990, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh, Chairman

William G. Kemsley, Sr.

Catherine L. Frank