

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF)	
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MAUDELINE LIGHTBURN)	DOCKET NO. 91-45
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FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On July 23, 1991, Maudeline A. Lightburn ("Grievant") filed a grievance against the University of Vermont ("Employer") concerning her dismissal from employment. Grievant alleged that the Employer violated its rules by (1) failing to provide her with due process before the Employer's Grievance Panel, (2) retaliating against her after she complained about a supervisor's physical assault, and (3) failing to immediately pay her two weeks pay upon notice of termination.

A hearing was held on March 5, 1992 before Board members Charles H. McHugh, Chairman, Louis A. Tcepfier, and Catherine L. Frank. Attorney David Cowles represented Grievant. Thomas Mercurio, Assistant General Counsel for the Employer, represented the Employer. The Employer filed Proposed Findings of Fact and Conclusions of Law on March 13, 1992. Grievant filed Proposed Findings of Fact and Conclusions of Law on March 16, 1992.

FINDINGS OF FACT

1. At all times relevant, the Employer set forth staff employees' rights and responsibilities in a Staff Handbook, which it provides to newly hired staff. The Staff Handbook is binding on employees and the Employer (Employer Exhibit C).

2. Section III, Subsection K, of the Staff Handbook states in pertinent part:

The principle underlying all discipline of employees at the University of Vermont is correction, not punishment. Consequently, discipline should be administered primarily to help employees correct behavior that has caused problems, thus enabling them to continue effectively as university employees.

. . .

. . . (C)orrective discipline must take into account the right of the employee to challenge actions through the staff grievance procedure (outlined on p. 98) and in certain instances through civil courts. For this reason, corrective discipline, if it is to be effective, must be administered thoughtfully and by following certain standards or guidelines, so that when action is taken, it will be able to withstand a challenge from the appeals procedure or from the courts.

A detailed guide to corrective discipline, including exceptions and ramifications, is contained in the supervisors' handbook entitled "Corrective Discipline", available to supervisory staff through the Employee Relations Office (Employer Exhibit C, p. 90).

3. Section III, Subsection L, of the Personnel Policies section of the Staff Handbook states in pertinent part:

...

2. Involuntary termination: For Cause

Occasionally a staff member's employment may be terminated because of poor job performance, improper attitude...or for other appropriate reasons . . .

a. Notice. Staff members whose employment is terminated for cause will usually be given either two weeks' notice or two week's pay, to be determined by the supervisor...

b. Appeal. Staff members who have completed the probationary period may appeal termination for cause through the Staff Grievance Procedure....The appeal must be filed within ten days of the employee's receipt of the written notice of termination for cause (Employer Exhibit C, p. 91).

4. Section III, Subsection P, of the Staff Handbook sets forth a detailed appeal procedure for staff employees (Employer Exhibit C, p. 98 - 104).

5. Section III, Subsection P(7) of the Staff Handbook states in pertinent part:

The grievant shall bear the burden of proof that the alleged incident occurred and was, in fact, a violation of the grievant's rights or privileges as enumerated in these procedures...

(Employer Exhibit C, p. 103)

6. The Constructive Discipline Handbook for Management, referenced in the Staff Handbook, was prepared by the Employee Relations Office of the Employer and is distributed to management. It states in pertinent part in the preface:

The concepts and process of constructive discipline as outlined in this booklet are presented for the purpose of guiding supervisors towards positive and effective resolutions of employee relations problems.

This booklet does not outline a statutory process and is not intended as an organizationally mandated process and mechanism for solving employee problems (Employer Exhibits C, p. 90; D, p. 1).

7. The Constructive Discipline Handbook provides that "the principle underlying all constructive discipline is correction . . . (c)onstructive discipline should assist employees to correct difficulties or faults that have caused problems and enable them to continue being effective University employees." The handbook provides that, whenever possible, the following elements are included in the process of constructive discipline in a progressive manner: oral counseling, written counseling, suspension and dismissal. The handbook states that "suspension and discharge are more severe forms of correction,

and must be used only as a last resort when other methods of resolving the problem have not been effective" (Employer Exhibit D, p. 1-2).

8. The Constructive Discipline Handbook sets forth the standard of "just cause" in disciplinary cases and provides in pertinent part:

Management has the burden to prove just cause, particularly in dismissal appeals . . . Management has just cause for constructive discipline when the following provisions are met . . . :

a) Whenever possible, the employee should have been given advance notification that the particular behavior would result in constructive discipline. In certain instances, it is the employee's responsibility to know that actions are or are not in violation of University policy or practice. For example, an employee would be expected to know that stealing and drunkenness are serious offenses possibly leading directly to discharge, and not necessarily subject to progressive discipline. Physical attacks on others in the workplace warrant more advanced disciplinary actions than an oral counseling.

Thus, discipline does not necessarily progress uniformly in all applications, but as appropriate.

. . .

e) . . . The degree of constructive discipline must be related to the seriousness and nature of the offense, and to the employee's record (previous conduct, length of service, etc.). Minor offenses should result in lesser constructive discipline. Stronger corrective action should be reserved for truly serious offenses or cases of continued problems, where progressive levels of corrective discipline have been applied but have failed to correct the situation . . . (Employer Exhibit D, p. 2-3).

9. The Constructive Discipline Handbook provides as follows with respect to progressive discipline:

The "concept of progressive discipline is a key one in employer-employee relations. One of the most succinct and accurate definitions of the meaning of progressive discipline . . . describes the process as one designed to improve employee performance, not a punitive device... and moving from verbal warnings to written documentation so as not to have the employee surprised by the degree of discipline invoked"(citation omitted).

a) To meet this standard, the action that is taken to resolve a discipline or work performance problem should be the minimal level of constructive discipline that can be reasonably expected to resolve the problem.

b) When, despite minor constructive action, a problem persists, the proper course of action to take is to be progressive and to increase gradually the level of constructive action administered, in the hope of bringing about a positive effect on the employee. An offense that by itself would justify no more than written counseling may merit a suspension without pay or even dismissal if the employee has a history of similar offenses and has not responded to previous constructive discipline (Employer Exhibit D, page 3-4).

10. The Constructive Discipline Handbook further provides

in pertinent part:

DIRECTIONS FOR APPLYING PROGRESSIVE DISCIPLINE

The following is one example of how Constructive Discipline would proceed. The process described, however, is not intended as a definition for handling constructive action.

Constructive discipline does not have to be progressive. Mitigating factors may include: the nature of the offense, including non-criminal versus criminal misconduct; previous conduct of the employee; previous work record; employee's length of employment; and the nature of the job.

I. Step One: Oral Counseling

. . .

II. Step Two: Formal Written Counseling

III. Step Three: Suspension Without Pay

1. As a general rule, if an employee who has already received a written counseling is involved in another incident requiring constructive action within a year of receipt of that written counseling, he/she should be put on a suspension without pay for a reasonable period to match the severity of the problem. If an employee's problem is poor work performance and not a violation of work rules, policy or work practice, another written counseling may be issued in lieu of suspension without pay.

. . .

IV. Step Four: Dismissal for Cause

1. As a general rule, if an employee continues to violate rules, policies, or accepted practices, and a violation

occurs within one year from the time an employee has been suspended, the employee could be dismissed from her/his job.

2. In certain instances, dismissal could be justified without first having issued oral/written counselings or suspension without pay. For example, an employee may be automatically terminated for theft, fighting, fraud, or other serious offenses.

. . .

(Employer Exhibit D, p. 9-12).

11. The Constructive Discipline Handbook also provides in pertinent part:

Correcting Difficult Problems: Insubordination and Absenteeism
...

I. Insubordination

1. Give clear instructions. To make a case for insubordination, it must be clear that the employee was told to do something, not just asked. A supervisor who customarily puts instructions in the form of requests should not necessarily change, but when it appears there is a problem with getting a particular instruction obeyed, put instructions in the form of specific requirements.

2. State that noncompliance will result in constructive discipline. Tell the employee that refusal to fulfill a specific job requirement can lead to constructive discipline that may include dismissal. Each time the specific job requirement is not fulfilled, the offense is made worse.

3. Merely protesting a duty is not insubordination. An employee can generally say why he/she thinks a job requirement is a bad idea; such feedback may be corrective and should not necessarily be discouraged. Insubordination occurs when the employee actually refuses to do the job as specified.

The degree and manner of insubordination involved should be carefully considered before administering discipline . . . Abusive behavior toward management is a form of insubordination, even if a duty is not being disputed.

. . .

(Employer Exhibit D, page 5).

12. Grievant, originally from Nicaragua, is of black and Hispanic descent and is a temporary resident of the United States. She has a Bachelor of Arts degree in political science and during all times relevant was taking biological science courses from the Employer.

13. Grievant started working for the Employer in the Housekeeping Department in September, 1989. Her responsibilities included cleaning dormitories and offices. Grievant subsequently injured her ribs and was unable to perform many of her housekeeping duties. On or about May 1, 1990, Grievant transferred to the Pathology Department, where she worked in the dishwashing room as a Laboratory Assistant until her termination on March 11, 1991. Grievant did not have to complete a probationary period in the Department of Pathology.

14. Laboratory Assistants sterilize laboratory waste and keep laboratory glassware and instruments sterile and clean. Daily duties require Laboratory Assistants to pick up dirty glassware and instruments with a cart from various Pathology laboratories, clean and sterilize these items, and deliver them back to the laboratories. Attention to detail is extremely important. Experiments depend on clean and sterile equipment; glassware also must be thoroughly dried because moisture can contaminate and ruin experiments.

15. Occasionally a Laboratory Assistant will be asked to perform a specific duty for a Professor, Technician, or Associate in the Department of Pathology. However, generally these individuals are not aware of which employee in the dishwashing room has cleaned their glassware or equipment.

16. The dishwashing room is approximately 20 feet by 20 feet. There are two autoclaves used for sterilizing, two sinks, many shelves, and a large glassware drying oven.

17. Tom Teel, who hired Grievant, is the Facilities Manager in the Givens Building, where the dishwashing room is located. Teel is the immediate supervisor of the supervisor of the dishwashing room. During all times relevant, Teel did not have the current Constructive Discipline Handbook, but did have an older edition.

18. Grievant was initially trained as a Laboratory Assistant by Ann Mungeon, who supervised the dishwashing room at the time of Grievant's transfer. There were no written standard operating procedures and Mungeon orally instructed Grievant in the department's established procedures. During this time, Grievant also worked with, and was sometimes instructed by, Linda Allen. Mungeon and Allen's instructions may have varied slightly. Grievant, Mungeon and Allen constituted the entire staff of the dishwashing room.

19. Two or three weeks after Grievant started working in the Pathology Department, Mungeon began working on a part time basis, and Linda Allen became Grievant's supervisor. Allen had been working in the Department of Pathology for many years, but prior to this time had not performed supervisory duties. Allen had many years of experience in the dishwashing room and had learned the importance of attending to details and working carefully and slowly. Allen observed Grievant's work and thought that Grievant frequently worked too fast and did not always use established procedures. Allen initially hesitated to approach Grievant about these problems.

20. Allen started correcting Grievant's performance after she became her supervisor. Grievant resisted Allen's instructions, sometimes claiming that Allen's instructions were inconsistent with Mungeon's instructions, and other times suggesting that her own way of performing certain tasks was better than Allen's and Allen should do it Grievant's way. At some point during May 1990, Allen spoke to Teel about Grievant resisting Allen's instructions. At some point prior to June 4, 1990, Teel asked Allen to keep a record of incidents with Grievant.

21. On June 4, 1990, Allen asked Grievant to pick up certain glassware or plastic from one of the laboratories. There is little storage room in the dishwashing room and Allen had specifically asked Grievant to pick up a limited number of items. Grievant returned to the dishwashing room with more items than Allen had requested. Allen became angry that Grievant had not followed her instructions.

22. Allen told Grievant that she did not listen or obey her instructions. As they were arguing, Allen decided to take the cart back herself and grabbed the cart from Grievant. Grievant resisted, and Allen grabbed Grievant's arm.

23. Grievant went immediately to Teel's office to complain that Allen had assaulted her. Allen followed Grievant because she wanted to tell Teel her side of the story. The two women's stories differed greatly. Grievant told Teel that Allen had shaken her, while Allen told Teel that she had grabbed Grievant's arm to make a point. Teel told Allen that she should not touch another employee in any circumstances, not even to make a point.

24. Grievant requested that Teel speak with a graduate student, Dan Goldhaber, who had witnessed the incident. Teel did talk with Goldhaber within approximately 15 minutes of the incident. Goldhaber generally supported Allen's version of the incident. Teel determined that Allen did not intend to harm Grievant.

25. Teel asked Goldhaber to write an account of the incident that he witnessed. Goldhaber's statement provided in pertinent part:

...When I entered the room, Maude and Linda were arguing about something, I'm not sure what it was. The argument lasted for several minutes while I was in the room, and during the course of this argument, Linda grabbed Maude's lower forearm. Although this is conjecture, I must subjectively state that Linda did not intend to hurt Maude, rather she was trying to emphasize her point. Maude told Linda not to get "physical" with her....Linda removed her hand...(Employer Exhibit B-12).

26. After this June 4, 1990 incident, the relationship between Grievant and Allen deteriorated. Grievant remained angry because she believed that Teel had not adequately investigated the June 4th incident. She complained to Teel the day after the incident that she was confused about who was supposed to supervise her. Teel made it clear to Grievant that Allen was her supervisor and she should follow Allen's instructions.

27. Grievant continued to resist Allen's supervision by questioning Allen's instructions and performing some duties her own way. Grievant also was argumentative with Allen. Grievant's behavior caused increasing friction and tension in the dishwashing room.

28. The specific violations of instructions and general procedures that Allen observed with Grievant's performance included: failure to tape pans before they went into the autoclave, soaking certain types of instruments in bleach overnight, leaving bleach and soap residue on equipment and glassware, not completely drying glassware before delivering it back to the laboratories and leaving the sink and work area messy.

29. In early July, 1990, Allen consulted with Diane Freiheit, who was employed in the Employer's Employee Assistance Program ("EAP"). The EAP staff provide counseling to employees who are having personal or work related problems (University Exhibit C, p. 18).

30. Freiheit copied a page of the Staff Handbook and underlined a portion under the "Involuntary/Termination: For Cause" subsection which states, "Occasionally a staff member's employment may be terminated because of poor job performance, improper attitude...or for other appropriate reasons." On July 9, 1990, Allen wrote a note to Teel and attached the page from the Staff Handbook. The note stated in pertinent part:

...

Would it be alright with you if I find out if Maude was hired with a probationary period?

When Maude gets a verbal warning I'd like to suggest that she be advised to seek counseling. I would be willing to go to employee assistance with or without her (Employer Exhibit A-7).

31. By mid July, 1990, Grievant's relationship with Mongeon had also deteriorated. Grievant was argumentative with Mongeon at times and Grievant's behavior continued to be disruptive to the

operation of the dishwashing room.

32. On July 23, 1990, Teel gave Grievant a letter of counseling, after first consulting with Leon Lawrence and Susan Bristol of the Employee Relations Office of the University. The letter stated in pertinent part:

During our meeting on June 5, 1990...you expressed confusion regarding who was actually in charge of [the glassware preparation area]. You were informed that Ms. Allen was your immediate supervisor and that your responsibility was to take directions regarding the performance of your work from her. Since that time, Ms. Allen has reported to me regarding continued problems both with your actual job performance and with your apparent attitude towards both Mrs. Mongeon and her. At my request Mrs. Allen started documenting incidents where you failed to follow her direction. Again by my request, she started leaving written instructions for you to follow. She informed me you resented this form of direction and basically told her to stop leaving you notes. Mrs. Mongeon has reported much the same ...and both have reported that your attitude towards them is combative, argumentative and totally lacking in common courtesy. Your attitude has created much tension and stress in your co-workers and this cannot help but affect their work.

This Letter of Written Counseling is to inform you that your performance...is unsatisfactory and that we must see immediate and continuous improvement in your performance or further constructive disciplinary action such as suspension without pay or termination of your employment may result . . . (Employer Exhibit B-11).

33. Teel identified the specific areas of concern in this letter as: 1) Grievant's repeated and consistent attitude that quality work and attention to detail is not important coupled with a constant resistance to supervision, and 2) discourteous and/or disruptive behavior towards other employees. Teel provided Grievant with a list of various employees with whom she could seek assistance, including himself and Allen, as well as Diane Freiheit and Joel Shapiro from EAP and Leon Lawrence from Employee Relations (Employer Exhibit B-11).

34. Grievant responded to Teel's July 23rd letter on August 21, 1990. In her response, Grievant complained that Allen and Mongeon's instructions were inconsistent and confusing. She also accused Teel of "downplay(ing) the (June 4th incident) and look(ing) the other way", and stated that Teel had "unfairly and wrongfully written (Grievant) up documenting poor job performance and attitude problems" (Employer Exhibit A-15).

35. Allen received complaints from various individuals in the Department of Pathology that glassware was not delivered when it was needed, or that there were missing and broken instruments. She determined that Grievant was primarily responsible because she and Mongeon had not received this many complaints prior to Grievant's tenure in the Pathology Department. Grievant received no direct complaints from the individuals, and Allen did not relay specific complaints to Grievant.

36. Grievant complained throughout the Summer and Fall of 1990 that Allen's instructions were confusing. Teel advised Allen to write notes of instruction for Grievant. Grievant felt singled out and resented these notes, often claiming that they were confusing (Employer Exhibits A-2, A-3, A-5, A-8, A-9, A-16, A-25, A-34, A-38, A-39).

37. Grievant consulted several times with Dr. Jackson Clemons, a black Professor who frequently counseled minority students and employees. Clemons talked to the Chair of the Pathology Department on Grievant's behalf. Grievant later talked with the Chair, who advised her to concentrate more on her studies.

38. Grievant consulted with Lawrence of the Employee Relations Office, who suggested that Grievant, Allen and Mongeon become involved in counseling. Both Lawrence and Clemons perceived that one of the issues between Grievant and Allen was Grievant's belief that she was smarter than Allen and could not understand why Allen did not accept her suggestions. Lawrence tried to make Grievant understand that it is management's prerogative whether to accept or reject suggestions. Lawrence met separately with Grievant approximately a dozen times.

39. On one occasion, Lawrence met with Grievant and Allen. Grievant walked out of this meeting several times, saying that nothing was being accomplished. On another occasion, Lawrence met with Grievant, Allen and Mongeon. Lawrence talked to them as a group and showed them a video about teamwork. Lawrence believed that Grievant would benefit from EAP and suggested to Grievant that she meet with EAP staff. Grievant only attended one meeting with EAP, and later told Lawrence that she did not agree with the way the EAP counselor was conducting the meeting. In his dealings with Allen, Lawrence concluded that Allen was cooperative and was trying to work through the problems she was having with Grievant.

40. Grievant continued to be argumentative with Allen and to resist her supervision. Grievant also was argumentative with Mongeon. Grievant's behavior continued to be disruptive to the operation of the dishwashing room. On November 2, 1990, Allen requested to be transferred to a new facility in Colchester. Allen did subsequently transfer after Grievant's dismissal.

Mongeon, who was also unhappy with Grievant's behavior, requested that the Employer initiate her retirement action. Mongeon did subsequently retire prior to Grievant's dismissal (Employer Exhibits A-19, A-23, A-26).

41. During the Fall of 1990, it was arranged that another employee, Marilyn Chates, would attempt to resolve the issues in the dishwashing room and act as a mediator between Grievant and Allen. Chates met in early November, 1990, with the various individuals who had been involved in trying to resolve the situation between Allen and Grievant, including Freiheit, Lawrence, Ron Frey, and Susan Bristol. Subsequent to this meeting, Teel sent a memorandum to Grievant, Allen, and Mongeon. Teel set forth his expectations and requirements, namely that everyone treat everyone else in a civil manner, and that everyone recognize that Allen is the supervisor. Failure to meet his expectations, Teel warned, would result in a verbal warning, a written warning, and, finally, dismissal, as outlined in the Staff Handbook. Grievant felt very threatened when she received this memorandum (Employer Exhibit A-20).

42. Throughout November and December, 1990, Chates arranged several meetings with Grievant, Teel and Allen. The meetings generally were not productive in resolving problems. For example, at one meeting Grievant called Allen a "liar" and told Allen to "shut up". Teel gave Grievant a verbal warning as a result of this behavior. Teel kept minutes of all these meetings with Chates. The last meeting with Chates was on or about December 13, 1990, when Chates asked everyone to shake hands (Employer Exhibits A-21, A-32, A-35, A-36, A-41, A-42).

43. Grievant has an allergy condition that manifests itself as body odor. On or about December 27, 1990, Grievant heard a remark by a secretary which Grievant believed concerned her odor. Grievant believed the remark was racially motivated and confronted the person. Grievant yelled that she was tired of her harassing remarks. The woman called security. Grievant left and also called security (Employer Exhibits B-21, B-22, B-23, B-28).

44. Shortly after this incident on the same day, Teel gave Grievant another letter of counseling. This letter was unrelated to the incident with the secretary. The letter, which had been reviewed by Lawrence, stated in pertinent part:

...You persist in taking it upon yourself to do things your own way, despite the presence of a procedures handbook, and specific written and verbal instructions from Linda. This behavior will no longer be tolerated.

The next instance of your failure to follow the procedures outlined in the handbook, or Ms. Allen's specific instructions, or of your communicating with her or any other person in the Department of Pathology in a less than civil manner, your employment in the Department of Pathology will be immediately terminated . . . You have had ample training to allow you to correctly perform the tasks included in this position; your failure to do so will be judged as continued insubordination and, as such, cause for your dismissal. Similarly, you have been warned on numerous occasions that uncivil or threatening communications would no longer be tolerated, yet this has not resulted in termination of this behavior (Employer Exhibit A-43).

45. Grievant experienced difficulties outside of work with federal immigration officials during January and February, 1991. She needed to take time off from work and attend to these matters. On February 25, 1991, Grievant completed an annual leave form to take annual leave beginning February 28. Teel was not immediately available and Grievant carried the form around in her pocket, where it became wet and ripped. Grievant later asked

Teel if she could take six days off. Teel did not object to Grievant taking six days off (Employer Exhibit A-50).

46. Grievant made out a new form to replace the ripped one, and gave it to Teel. However, the days she requested on the form were from February 28 through March 6, 1991, which constituted only five days off. Teel signed the annual leave form, indicating his approval for the time off requested by Grievant.

47. When Grievant did not return to work on March 7, Teel concluded that Grievant was on unauthorized leave. Teel left a note in Grievant's mail box on March 8, informing her that her vacation had ended on Wednesday, March 6, and she had not called in on Thursday, March 7. He further informed her that there would be a support staff meeting the following Monday, March 11 (Employer Exhibit A-52).

48. When Grievant found the note from Teel on March 8, she was upset and went into Teel's office with the note and, in an angry manner, asked Teel why he had given her the note since he had said she could take six days off. Teel mentioned to Grievant that the leave form she had submitted requested leave time through March 6. Grievant became extremely agitated and called Teel a "liar" and said he had been "lying all along". Teel also raised his voice and, after Grievant pointed her finger at him, told Grievant to leave his office.

49. Teel considered Grievant's actions to be insubordinate, and he immediately contacted Lawrence. After speaking to Lawrence, Teel wrote Grievant a letter of termination, which was reviewed by Lawrence. Teel gave the letter to Grievant on March

11, 1991, in the presence of Lawrence. The letter stated in pertinent part:

Since early in your employment as a Lab Assistant in the Department of Pathology it has been necessary to correct your work performance and behavior on several occasions. One of my primary problems with your behavior has been your continued failure to respond responsibly either to the supervision of Linda Allen or myself. This failure has had a negative effect on your own work and created an atmosphere of tension within the Department.

The incident which occurred on March 8, 1991, at approximately 2:15 p.m. in which you called me a "liar" and stated that I "had been lying all along" coupled with your history of corrections in the Department, indicates that no appreciable improvement has been made in you[r] attitude and necessitates your dismissal from University employment.

...In lieu of notice, you will receive two weeks pay...

Please be advised this action is subject to the University of Vermont appeals procedure for classified staff, as outlined in the Staff Handbook (Employer Exhibit A-53).

50. Grievant followed the appeal procedures outlined in the Staff Handbook. She met with Richard Cooley, Staff Advisor for the Grievance Committee, on March 11, 1991. On March 23, 1991, Grievant requested a formal hearing before the Staff Grievance Panel (Employer Exhibits A-54, A-56).

51. The Staff Grievance Panel received and reviewed a report prepared by Cooley, Grievant's formal request for a hearing, a written response to this request from Teel, and numerous letters, memoranda, and reports involving Grievant since July, 1990, including Teel's minutes of the meetings with Chates during the Fall of 1990. The Panel met on April 23, 1991, and received oral testimony. The panel reviewed the entire record and issued its decision on April 29, 1991 (Employer Exhibit B-1).

52. The Panel unanimously found that that Grievant "did not meet the standard of proof required" under the hearing procedure provisions of the Staff Handbook (Employer Exhibit B-1).

53. On June 17, 1991, Interim Provost Gerald Francis approved the Panel's recommendations, thereby affirming Grievant's termination by the Department of Pathology (Employer Exhibits B-43, B-44).

54. Grievant and Attorney Rick Hayes sent Francis a letter appealing the affirmation of the Panel's recommendation on June 28, 1991. Vice Provost Constance M. McGovern responded to this document and upheld the Panel's recommendation (Employer Exhibits B-45, B-46).

55. There is no applicable collective bargaining agreement in this matter.

OPINION

At issue is whether we should grant this grievance contesting Grievant's dismissal from employment with the University of Vermont. At the outset, we discuss our jurisdiction to decide this case. The Board has such adjudicatory jurisdiction as is conferred on it by statute. In re Grievance of Brooks, 135 Vt. 563, 570 (1977). In deciding grievances, the Board is limited by the statutory definition of grievance, Bovnton v. Snelling, 147 Vt. 564, 565 (1987), which statutory definition provides:

'Grievance' means an employee's, group of employees' or the employee's collective bargaining representative's expressed dissatisfaction, presented in writing, with aspects of employment or working conditions under collective bargaining agreement or the discriminatory application of a rule or regulation, which has not been resolved to a satisfactory result through informal discussion with immediate supervisors. 3 VSA §902(14).

Since there is no applicable collective bargaining agreement here, Grievant must allege and prove the discriminatory application of a rule or regulation. In re Grievance of Gobin, ___ Vt. ___, slip op. at 3 (May 15, 1992). Failure of an employer to follow a binding rule constitutes an actionable grievance. Id.

Grievant alleges that the Employer violated University rules by: 1) failing to provide her with due process before the Employer's grievance panel, 2) failing to immediately pay her two week's pay upon notice of dismissal, and 3) dismissing her without just cause.

The first two allegations by Grievant can be summarily addressed. Grievant has presented insufficient evidence by which we can conclude that the Employer failed to provide her with due process before the Employer's grievance panel. Grievant also has presented no evidence with respect to receipt of pay upon notice of dismissal. Thus, we conclude that Grievant has not established a discriminatory application of a rule or regulation with respect to these allegations.

The central, and remaining, issue is whether just cause existed for Grievant's dismissal. The Employer's Staff Handbook provides that employees may be "terminated for cause" due to "poor job performance, improper attitude... or for other appropriate reasons". The Staff Handbook is supplemented by the Constructive Discipline Handbook for Management, which is prepared by the Employee Relations Office of the Employer. This provides a detailed guide to the corrective discipline of employees, and sets forth the standard of just cause in disciplining employees. In determining whether the Employer failed to follow the binding rule of dismissing employees only for just cause, we consider the provisions of the Staff Handbook and the Constructive Discipline Handbook for Management, which relevant provisions are set forth in the Findings of Fact, and also case law in Vermont concerning just cause for the dismissal of an employee.

The Vermont Supreme Court has defined just cause for dismissal as some substantial shortcoming detrimental to the employer's interests which the law and a sound public opinion

recognize as a good cause for dismissal. In re Grievance of Brooks, 135 Vt. 563, 568 (1977). The ultimate criterion of just cause is whether the employer acted reasonably in discharging the employee because of misconduct. Id. A discharge may be upheld only if it meets two criteria of reasonableness: one, that it is reasonable to discharge employees because of certain conduct and the other, that the employee had fair notice, express or implied, that such conduct would be ground for discharge. Id.

The Employer contends that just cause exists for Grievant's dismissal due to her unacceptable work performance, poor attitude, and disruptive and combative behavior. Grievant contends that the evidence clearly reveals that she was terminated as a result of her supervisor, Linda Allen, resenting and disliking her, and not for her poor job performance. Moreover, Grievant claims that, in any event, the evidence does not support a termination for just cause.

We conclude by a preponderance of the evidence that the Employer has sustained the charges against Grievant of unacceptable work performance, poor attitude and disruptive and combative behavior. This is demonstrated by: Grievant resisting Allen's supervision and doing things her own way over a lengthy period despite being repeatedly warned about this behavior by Tom Teel, the supervisor of Allen and Grievant, as detailed in our findings of fact; Grievant continually being argumentative with Allen and co-worker Ann Mungeon, which was disruptive to the operation of the dishwashing room; and finally by Grievant inappropriately accusing Teel of being a liar with respect to a reasonable misunderstanding over Grievant taking days off from work.

Further, it is evident that these proven charges against Grievant motivated her dismissal rather than, as Grievant alleges, Allen's resentment and dislike of her. It is noteworthy in this regard that the preponderance of the evidence indicates that Allen was attempting to constructively resolve the problems she was having with Grievant. Also, Allen was not the only person exhibiting dissatisfaction with Grievant. Mongeon was unhappy with Grievant's behavior over a lengthy period of time, and Teel repeatedly expressed concern to Grievant over her performance and attitude. Moreover, Teel was the person who made the decision to dismiss Grievant, not Allen.

The charges against Grievant having been established, we look to the specific factors articulated in Grievance of Collieran and Britt, 6 VLRB 235, 268-69 (1983), to determine the reasonableness of the dismissal imposed based on the proven charges. The pertinent factors here are the nature and seriousness of the offenses and their relation to Grievant's duties, whether Grievant had fair notice that such conduct would be grounds for discharge, the effect of the offenses upon Grievant's ability to perform at a satisfactory level and upon supervisors' confidence in Grievant's ability to perform assigned duties, Grievant's past disciplinary and work record, the potential for Grievant's rehabilitation, and the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by Grievant and others.

Grievant's offenses were serious. Her resistance to supervision, insistence on doing things her way, and her

argumentative and combative behavior caused substantial detriment to the operation of the dishwashing room for a lengthy period of time. The event precipitating her dismissal - inappropriately calling Teel a liar - demonstrated that her attitude and behavior remained a very serious problem.

Grievant had fair notice that her actions could be grounds for discharge. Teel repeatedly counseled Grievant on her resistance to supervision, poor attitude, doing things her own way, and disruptive and combative behavior, and specifically warned her that such conduct could result in her dismissal.

Grievant's pattern of conduct resulted in her being unable to satisfactorily perform her duties. Her work record, when taken together with the constructive and varied attempts by management to resolve the problems Grievant was having with other employees reasonably caused management to lack confidence that Grievant could satisfactorily perform her duties.


Under the circumstances, it was reasonable for the Employer to bypass progressive discipline by dismissing, rather than suspending, Grievant upon her final offense of inappropriately calling Teel a liar. This "last straw" offense compounded the cumulative effect of all of Grievant's previous offenses and reflected a persistent unwillingness to improve her behavior despite repeated corrective attempts by the Employer. Grievant demonstrated substantial shortcomings detrimental to the Employer's interests and it was reasonable for the Employer to conclude that suspending her would not be an adequate and effective alternative sanction. Grievant demonstrated that she was not a good candidate for rehabilitation.

ORDER

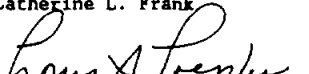
Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the Grievance of Maudeline Lightburn is DISMISSED.

Dated this 3rd day of September, 1992, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Charles H. McHugh, Chairman


Catherine L. Frank


Louis A. Toepfer