VERMONT LABOR RELATIONS BOARD

GRIEVANCES OF:	)	
	)	
GARY ACKERSON	)	DOCKET NO. 93-27
	)	DOCKET NO. 93-28
	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

Involved herein are two grievances consolidated for the purposes of hearing and decision concerning actions taken by the Vermont State Colleges ("Colleges") against Gary Ackerson ("Grievant").

On April 22, 1993, the Vermont State Colleges Staff Federation ("VSCSF") filed two grievances on behalf of Grievant. The grievances, filed as Docket No. 93-27 and Docket. No. 93-28, alleged violations of Article 12, Section 1, of the collective bargaining agreement between the Colleges and the VSCSF ("Contract"). Specifically, the grievance filed as Docket No. 93-27 alleged that the Colleges suspended Grievant in September, 1992, without just cause. The grievance filed as Docket No. 93-28 alleged that the Colleges indefinitely, then permanently, suspended Grievant in November, 1992, without just cause.

On December 1, 1993, the Vermont State Employees' Association, Inc. ("VSEA"), the new collective bargaining representative for employees in the bargaining unit in which Grievant was employed, filed a Motion to Amend the grievance filed as Docket No. 93-28. Therein, VSEA alleged that the Colleges violated Article 12 of the Contract when it terminated Grievant on December 18, 1992, and there was no just cause for such termination. The Motion to Amend also raised a claim that

the Colleges did not provide Grievant an opportunity for a pre-termination hearing before it terminated him.

Hearings were held before Board Members Louis Toepfer, Acting Chair, Leslie Seaver and Carroll Comstock. Hearings occurred on December 16, 1993, and January 13 and 14, 1994, in the Board hearing room in Montpelier. Acting Chair Toepfer and Member Seaver attended all hearings. Member Comtock attended all hearings except January 13, and he has reviewed the portion of the hearing which he missed. Attorney Benjamin Smith represented the Colleges. Jonathan Sokolow, VSEA Legal Counsel, represented Grievant.

At the December 16, 1993, hearing, the Colleges responded to Grievant's Motion to Amend by not objecting to the motion. Accordingly, the Board granted the motion. The parties filed post-hearing briefs. In his post-hearing brief, Grievant withdrew his claim that he had not had an opportunity for a pre-termination hearing prior to his dismissal.

FINDINGS OF FACT

1. Johnson State College ("JSC") is part of the Colleges system and is located in Johnson, Vermont.

2. Grievant worked in the Department of Security and Safety as a security officer on the JSC campus. Grievant worked the night shift, from midnight to 8:00 a.m.

3. The Security and Safety Department is responsible for enforcing JSC's security and safety rules. One of the minimum qualifications for security officers is to hold a valid Vermont driver's license. Security officers are required to operate an automobile to regularly check on all JSC property, including property not adjacent to the main campus (Colleges' Exhibit 28).

4. Grievant worked under the supervision of Dan Cotter, Director of Security and Safety. Cotter lived on the JSC campus and worked the day shift, but was "on call" 24 hours per day. Cotter reported to the Dean of Administration, Robert Chamberlain, who reported to JSC President Robert Hahn.

5. During two performance rating periods covering the dates January 1, 1991, to May 1992, Grievant received overall performance evaluation ratings of "frequently exceeds standards" (Grievant's Exhibits 2,3).

6. During all relevant time periods, Cotter had two other full-time security officers under his supervision, Michael Laflin and David Griswold. In addition to these security officers, part-time officer Robert Gentle was employed. There are also 15 to 30 student security officers who work in the Department of Security and Safety each year.

7. In April, 1992, Grievant became friends with Maria Pray. Pray was neither a JSC student nor an employee. Pray and her young son lived near the JSC campus.

8. Pray was involved in a car accident in June, 1992, and received several serious injuries which limited her mobility. For the next several months Grievant regularly stopped by Pray's apartment to assist her in taking care of herself and recovering from her injuries.

9. During the Spring of 1992, Grievant had been under investigation for a sexual harassment complaint which had been made against him by a student, Correna Dezotelle. On July 6, 1992, President Hahn sent Grievant a memorandum in connection

with the sexual harassment complaint and investigation. In the memorandum, President Hahn informed Grievant that he had determined that Grievant had not violated JSC's sexual harassment policy. However, President Hahn issued Grievant a written reprimand for conducting himself in an unprofessional manner during the investigation of the complaint, including contacting Dezotelle during the investigation despite being warned by his supervisor not to contact Dezotelle. Grievant filed a grievance over this written reprimand. On July 1, 1993, the Labor Relations Board denied the grievance. Grievance of Ackerson, 16 VLRB 262 (1993).

10. On July 11, 1992, Cotter met with Grievant shortly after he came on duty. During this meeting, Grievant initiated a discussion with Cotter about the sexual harassment complaint and investigation. Grievant later asked to have another employee at the meeting. Cotter denied the request and Grievant left the meeting. The Colleges took no disciplinary action against Grievant at the time. On August 18, 1992, the Federation filed an unfair labor practice charge alleging that Grievant had been denied the right to have a Federation representative present after he had requested that one be present. On July 1, 1993, after a hearing, the Board determined that no unfair labor practice had been committed by the Colleges. Vermont State Colleges Staff Federation v. Vermont State Colleges, 16 VLRB 255 (1993).

11. On September 16, 1992, Cotter left a note in Grievant's mail box requesting to meet with him in his office at 7:30 a.m. that day.

12. Just prior to the meeting, Grievant asked Judy Cleary, President of the Federation's local chapter, to attend the meeting with him. Cleary was aware of Grievant's grievance over the written reprimand and the unfair labor practice charge that the Federation had filed.

13. Grievant entered Cotter's office and Cleary stood in the doorway. Grievant told Cotter that he had asked Cleary to be present. Cotter replied, "Are you saying that you and I cannot have a meeting alone as supervisor and employee", or words to that effect. Grievant told Cotter that he had to be more specific about the meeting. Cotter asked Grievant what he meant. Grievant stated that every time they met, Cotter brought up Correna Dezotelle, and he was sick and tired of having that incident constantly brought up every time he had a meeting with management. Cotter replied that he did not intend to bring up the name of Correna Dezotelle and "if we can't meet one-on-one, there are other ways to handle the situation. This meeting is now cancelled . . . Gary, put up the flag," or words to that effect. Cotter never asked Cleary to leave the room (Grievant's Exhibit 16).

14. On September 17, 1992, Chamberlain issued Grievant a letter of discipline, which stated in pertinent part:

> This is to inform you that you are hereby suspended from your duties as a Johnson State College Security Officer for five days without pay.
>
> This suspension results from your refusal to remain in a meeting with your supervisor on July 11, 1992 and your refusal to meet with your supervisor on September 16, 1992. On both occasions your supervisor indicated he wished to discuss departmental and/or college business with you. Neither meeting was disciplinary in nature, yet you told

> your supervisor that you would only meet with him with either your lawyer or your union representative present. While you have the right to representation at meetings which may lead to discipline or in which discipline may be imposed, no such right exists outside of that context.
>
> Clearly, college administrators/supervisors must and do have the right to meet with college employees to discuss college/departmental business without a third party presence. This is an inherent and retained right of JSC/VSC management. It is essential for management to be able to meet with employees to assure proper supervision and the orderly functioning of the institution.
>
> . . . (A)ny further violation of college rules, regulations, policies or practices will result in immediate further discipline, up to and including termination . . . (Colleges' Exhibit 6).

15. Grievant returned from the five day suspension on or about September 25, 1992.

16. Cotter was on leave from JSC from October 9 to November 10, 1992, as he assisted his mother in her move to Florida.

17. A "bong" is a type of drug paraphernalia used for smoking marijuana. Two bongs were confiscated from students on or about September 27, 1992. Grievant confiscated at least one of the bongs. He left it in the security office and wrote an incident report about the confiscation. Gentle stopped by the security office to check on some paperwork. He found the bong in a brown paper bag and was told that Grievant and Michael Laflin had confiscated it from a student the previous night. Gentle took the bong to the local Sheriff's Office for drug testing. The bong was later put in a gun locker in the security closet which is in the same building that houses the security office. The gun locker, also called the security locker, also holds firearms that students bring to school to use during hunting season (Colleges' Exhibit 8).

18. On November 3, 1992, a resident of Morristown, Kenny Martin, called the Morristown Police Department to complain about an individual driving around his apartment house several times. Martin also complained that the individual had run into his car, which was parked in the driveway (Colleges Exhibit 17).

19. Eric Dodge of the Morristown Police Department responded to the call and arrested Grievant. Dodge charged Grievant with Driving While Intoxicated ("DWI"), DWI-Refusal, Possession of Marijuana, and Disturbance by Phone. Dodge stated on an affidavit the following with respect to his observations of Grievant which resulted in his arrest on a DWI charge:

> . . . The defendant got out of his car, as I approached from mine. He had no difficulty getting out of the car, but was unsteady while walking; occasionally sidestepping to maintain his balance. His eyes were bloodshot and watery, and there was a heavy odor of intoxicants on his breath. I asked him if he had been drinking, and he said he had a couple of beers. I asked how long it had been since his last drink, and he said about 45 minutes ago. It was a cold and very rainy night, so no dexterity tests were performed. The defendant submitted to an alco sensor test, the result of which indicated that his BAC was .145% . . . (Colleges' Exhibit 17).

20. Dodge further indicated on his affidavit that Grievant had refused Dodge's request to submit to additional tests after Dodge read Grievant his legal rights from a standard DWI processing form (Colleges' Exhibit 17).

21. After releasing Grievant, Dodge returned to Martin's apartment house to take pictures of the tire tracks and to take statements from the tenants of the building. Dodge met with Martin, Charles Bruce and Maria Pray. Dodge reported on an affidavit the following with respect to this meeting:

> ...Charles and Kenny live in the same apartment building. Marie is Charles' girlfriend, and she had spent the night at his apartment. Marie explained that she had known the defendant since April of this year. The defendant has become infatuated with her, leaving her sexually explicit notes in her car, following her around, etc. She denied having any kind of intimate relationship with the defendant. Charles advised me that at approximately 07:10 hours, he had received a call from the defendant. In the hour to follow, the defendant would call Charles three more times. Each time he called he told Charles and Marie that they had three days to leave the state or they were dead. The defendant was mad because he had been "...busted real bad". I advised Marie that she should get a restraining order against the defendant...(Colleges' Exhibit 17).

22. Grievant did not return to work at JSC after his November 3, 1992, arrest. He requested sick leave due to "physical exhaustion and stress". Grievant requested 22 days of advanced sick leave on November 10, 1992, and later submitted two reports from his doctor. One doctor's note dated November 10, 1992, stated: "Please arrange for time off from work because of emotional stress. He'll need at least two wks. and may require more". The second doctor's note, dated November 19, 1992, stated: "Gary is responding to treatment and should be ready to return to work 12/1/92" (Colleges' Exhibits 8a, 8b).

23. While Grievant was out on sick leave, Gentle discovered that Grievant had been arrested and told Chamberlain about the arrest. Cotter was still on leave during this time period.

24. Chamberlain called the Morristown Police Department and spoke with Dodge and the Chief of Police. Dodge told Chamberlain that Grievant was arrested for DWI, that he had refused to take a breath test, that he was arrested for marijuana possession, and that Grievant had been accused of driving recklessly around the apartment of Martin. Martin also told Chamberlain that he and

Pray had subsequently complained of Grievant threatening them. Chamberlain asked the police department and the district court to send him documentation setting forth all the details of Grievant's arrest. He was initially told that Dodge's affidavit on the charges against Grievant would be sent to him; someone from the police department later called to inform Chamberlain it would be sent to him after Grievant's arraignment.

25. Chamberlain called the District Court Clerk and the State's Attorney, Joel Page. Page explained to Chamberlain the general legal procedures in DWI and DWI-Refusal charges. Page said that because Grievant refused to take the breath test, the DWI-Refusal charge carried an automatic six month suspension unless the arresting officer did not have good cause to make the arrest. Page indicated that, if Grievant changed his plea to guilty for DWI, the probable consequences were that the other charges against Grievant would be dropped and Grievant would receive a suspension of his license.

26. Chamberlain met with President Hahn and legal counsel for the Colleges, and they discussed Grievant's arrest and the information Chamberlain had received from the Morristown Police Department and the State's Attorney. They decided not to take any immediate action against Grievant. They expected Grievant to be out on sick leave until December 1, 1992, based on the doctor's notes provided by Grievant's doctor. They understood from Chamberlain's conversation with the State's Attorney that Grievant would lose his Vermont driver's license for a period of time between three and six months. They concluded that a plea by

Grievant or a guilty verdict to any of the charges against Grievant would result in Grievant's dismissal.

27. Sometime between November 9 and November 16, 1992, Grievant called Chamberlain. Grievant told Chamberlain that the College would be receiving a call from a woman who would be trying to get him in trouble. Grievant told Chamberlain, "I don't know what she's going to say, but it will be a lie", or words to that effect. Chamberlain told Cotter, who was back from leave, that he may be receiving a call about Grievant from a woman.

28. On November 16 or 17, 1993, Pray called Cotter. Cotter had met Pray previously when she was with Grievant at a student function. Pray told Cotter that she had some information regarding Grievant. Cotter told her to come to his office.

29. Pray met with Cotter on November 17, 1992. She informed him of certain information about Grievant. Cotter asked Pray to write a report, which she wrote in Cotter's presence in his office. The report stated in pertinent part:

> April 1992 Gary Ackerson and I became friends. Gary would come to my apt. at 2:00 AM through 8:00 AM every morning to have coffee and smoke pot (while in JC uniform). This stopped in September, 1992.
>
> Several nights while Gary was on duty he would ask me to go with him around campus. Gary took me, or showed me every room, every building. Gary took me around in the security car. During these times Gary repeatedly smoked pot. I remember many times on top of Bentley roof where he smoked a few bowls.
>
> I remember a couple of times in a dark hallway or rooms, Gary would pull me close and try to kiss me.
>
> Gary gave me a broom, bathroom cleaners for my move from the apt. I asked where they came from he said "the college". He also gave me a bong he took from a student.
>
> I also have sexual letters from Gary that contain step by step instructions what he would like to do to me. The Morrisville P.D. have copies. Gary also gave me a

faculty/staff ID card with fall and spring 92, 93 stickers. Gary said I could use this ID card to use the facilities free on campus (Colleges' Exhibit 9).

30. Cotter also wrote a report, which stated in pertinent part:

> Maria Pray stated that Security Officer Gary Ackerson gave her a "bong" for smoking marijuana that he said he had confiscated at the college from a student. Also, Maria states that Officer Ackerson has given her approximately "20" tours of the entire campus between the hours of midnight and 4:00 am. During these tours Maria has also stated that she has seen and been with Gary while he smoked marijuana.
>
> Maria provided a blank ID card, validation sticker and bar code that Officer Ackerson was going to make into an ID card for her. Maria is not a student at Johnson State College (Colleges' Exhibit 10).

31. Pray gave Cotter the bong the next day, November 18, 1992. Cotter wrote a report in which he stated that Pray told him that Grievant had given her the bong "approximately three weeks back from the date of this report" (Colleges' Exhibit 11).

32. At some point, Pray also gave the Colleges a letter which she said she had received from Ackerson. The letter was to "Princess" from "Gar Phantom" and described sexual acts which Grievant wished to perform with Pray (Colleges' Exhibit 16).

33. In late October or early November, 1992, Chamberlain had need to retrieve the bong as part of a student judicial proceeding. The bong was in the gun locker. Cotter was still on leave at the time.

34. In order to gain access to the gun locker, four keys are needed: keys to the outer security office, Cotter's inner office, the security closet and the gun locker. There are master keys that open the outer security office, Cotter's inner office

and the security closet which is located in Cotter's inner office. Several employees have these master keys including Cotter, all the security officers, employees in the Maintenance Department, Chamberlain and the College President. Student security officers are also given a set of keys when they come on duty.

35. During this period of time, there were two keys to the gun locker. There was no master key. Cotter kept one of the keys on his key chain and he kept the other key in one of two places. He either kept it on a hook on the wall in his office, or in his desk, which was sometimes locked.

36. On the day that Chamberlain needed the bong for the student judicial proceedings, it was not on a hook in Cotter's office. Cotter's desk was locked. Chamberlain asked the dispatcher and student security officer to open the gun locker and they were unable to do so. Chamberlain believed the gun locker key was in Cotter's desk. Chamberlain asked Gentle to get the bong for him. Gentle obtained the bong for Chamberlain. Chamberlain did not see how Gentle retrieved the bong.

37. During the relevant time period, there were as many as 15 to 20 students in and out of the security office each day. At times, master keys were left on desks.

38. Students, staff and faculty are issued College identification ("ID") cards to attend JSC functions. There are three basic materials used to make these cards: dated validation stickers, bar codes and white labels. A photograph of the individual, taken in the security office, is also needed to complete the ID card.

39. Materials for ID cards are kept in the outer security office and in Cotter's office. The white labels are in the outer security office. Cotter keeps the validation stickers in an envelope in his desk drawer. He keeps the bar codes in an envelope behind his desk. Bar codes are on 8"x10" sheets and are peeled off as needed. None of the ID materials are numbered (Colleges' Exhibit 29).

40. ID cards are made in the outer security office, usually by the Student Manager, Irene Harvey. There is a service window at the security office and students come to the window to request services, including ID cards. Approximately 25 to 50 ID cards are requested and issued each week.

41. Unauthorized persons have obtained materials for making ID cards.

42. Students, employees and the public are all entitled to take out books from the JSC library if they hold a library card. During the relevant time period, there were sheets of bar codes, like those used for making ID cards, kept in a manila folder on a desk in the library.

43. After Pray came to Cotter's office with information and the materials she claimed she received from Grievant, Cotter made a report to Chamberlain. It was decided that Grievant would be suspended without pay, and that no immediate action would be taken to dismiss Grievant. Cotter sent Grievant a letter on November 20, 1992, which stated in pertinent part:

> This is to inform you that you are hereby suspended from your duties as a Johnson State College Security Officer without pay until further notice.

This suspension is the result of a complaint that was recently filed (copy attached) and your recent arrest on charges of DWI, possession of marijuana and telephone harassment. Specifically, the complaint alleges that you:

1. Spent time away from campus while you were supposed to be on duty;

2. That while on duty and on campus you smoked marijuana on the roof of Bentley Hall;

3. That you supplied materials to make a College I.D. to an individual with no connection as an employee or student to the College;

4. That you used your access to Security to remove a confiscated "bong" from the Security locker;

5. That you then gave the "bong" to a person off-campus;

6. That you used your access to College facilities to take cleaning supplies.

Additionally, your arrest, for the reasons cited above, brings ill repute to the College. This is especially egregious because of your position as a Security Officer at Johnson State College. As a Security Officer you are expected to uphold the law and College rules and regulations and your ability to do this in an effective way has been seriously diminished.

These are all serious violations of College policy and/or state laws and/or federal regulations, and, if corroborated, will result in termination of your employment at Johnson State College.

This suspension is effective immediately, and will remain in effect until the College concludes its investigation into these charges. At such time, a decision will then be made . . . (Colleges' Exhibit 12).

44. If Pray had not come forward with her allegations against Grievant, the Colleges would not have suspended Grievant on November 20 based on his arrest alone.

45. On or about November 22, 1992, Chamberlain received four written reports, all written on a standard JSC "incident

report" form. Chamberlain assumed that Grievant had sent these reports (Grievant's Exhibits 9, 10, 11, 12).

46. Pamela Godin, Pray's roommate for several months, submitted one of the reports. Godin claimed that Pray had been obsessed with Grievant. Godin reported that Pray sometimes went sneaking on to the campus without Grievant's knowledge, at times dressed in black like a "cat burglar", and would return to the apartment with several items. Godin stated in this report that Pray is a "habitual liar and would not know the truth if it hit her in the face" (Grievant's Exhibit 9).

47. Grievant's mother submitted two incident reports. She stated that Pray had called her and told her that she was going to go to JSC and get Grievant in trouble because he had reported her to Social Welfare. Mrs. Ackerson also complained that she had been harassed by a number of hang-up calls. Mrs. Ackerson asked to be left alone by the Colleges. This latter request was subsequent to Cotter stopping by her house looking for Grievant (Grievant's Exhibits 10, 11).

48. Grievant wrote the fourth incident report. He stated that he had seen Cotter sleeping on duty (Grievant's Exhibit 12).

49. Chamberlain showed the four reports to President Hahn. They did not contact Godin or Mrs. Ackerson, nor did they conduct an investigation of any of the allegations made in these four incident reports.

50. Chamberlain wrote to Grievant On December 1, 1992. His letter stated in pertinent part:

> I have received the information you sent which, I assume, is in answer to the letter of suspension and

specifications alleged in the complaint.

> If you would like to meet with me and answer the allegations, please call me in the next five (5) days, so that we can arrange a time. You are, of course, welcome to have a Federation representative present. If you prefer to supply further information in writing, please so do within the same time frame (Colleges' Exhibit 13).

51. On December 14, 1992, Grievant was arraigned and pleaded not guilty to the DWI charge (Colleges' Exhibit 18).

52. Chamberlain met with Grievant and his Federation representative on December 15, 1992. At this meeting, Grievant denied that he gave Pray the bong and ID materials and stated that ID materials are easy to steal. He said that others had keys to the gun locker. Grievant denied smoking marijuana on campus with Pray. He acknowledged that Pray sometimes came to the campus while Grievant was on duty and would go on patrol with him and with Laflin. He claimed that he only went to Pray's apartment while he was on break. He claimed that Pray was infatuated with him and kept following him around; he claimed that at one point he had asked Pray not to come to the campus anymore. Grievant told Chamberlain that Pray was mad at him because he had turned her in to the Department of Social Welfare for not spending enough time with her son. At the end of the meeting Grievant said he was "not through with her yet" or words to that effect.

53. Grievant also was provided the opportunity to respond to his November 3, 1992, arrest at this December 15, 1992, meeting. He said it was "a long way from an arrest to a conviction", or words to that effect.

54. Grievant did not have Godin attend the December 15, 1992, meeting. He also did not have any other witnesses attend the meeting to support his position against the charges the College had made against him.

55. On December 15, 1992, Chamberlain asked Gentle if the bong Pray had given Cotter was the same bong as the one that had been confiscated from the residence halls and locked in the security locker. Gentle positively identified it as the same bong and wrote an incident report to that effect (Colleges' Exhibit 13a)

56. Shortly after Grievant's December 14, 1992, arraignment, Chamberlain received a copy of arresting Officer Dodge's affidavit. At some point between December 15, 1992 and December 18, 1992, Chamberlain, for the first time, reviewed the affidavit. He noted the consistencies between Pray's November 3, 1992, statement to the arresting officer and her statements to Cotter on November 17, 1992. Such consistencies included Pray's claim that Grievant sent her letters, Grievant's use of marijuana, and Grievant's threatening conduct towards Pray and her boyfriend. Chamberlain had also heard Grievant make a threatening comment at the end of the December 15, 1992, meeting. In addition, Chamberlain was aware that there had been allegations that Grievant had used his vehicle to intimidate people during the investigation of Correna Dezotelle's sexual harassment complaint, similar to Grievant's alleged conduct on November 3, 1992, according to Dodge's affidavit (Colleges Exhibit 16). 16 VLRB at 262.

57. Chamberlain consulted with President Hahn and the Colleges' attorney. They decided to terminate Grievant on December 18, 1992, because of two of the charges made by Pray: that Grievant had given her a bong and materials for a College ID. Pray's statements, the bong and the ID materials were the only evidence the College relied on. Chamberlain wrote Grievant a letter on December 18, 1992, which stated in pertinent part:

> In your suspension letter dated September 17, 1992, you were informed that any subsequent violation of college rules, policy, or accepted work practices would result in immediate further discipline, up to and including termination of your employment.
>
> In November, Maria Pray turned over, to College officials, a "bong" and materials to make a College I.D. She stated that the items were given to her by you. Ms. Pray's support, of her statements, is the physical evidence, i.e., the "bong" which was previously confiscated from a student room by you and subsequently locked in the JSC Security locker, and the materials to make a College I.D. This has persuaded us that you, in fact, removed the "bong" without authority or permission, from the JSC Security locker and also provided Ms. Pray the materials from which she could produce a College I.D. These current violations of College rules and your history of past violations of College policy necessitate the immediate termination of your employment at Johnson State College. Thus your employment is terminated effective today, December 18, 1992. You will receive pay for vacation earned but not used (Colleges' Exhibit 14).

58. Chamberlain decided to dismiss Grievant as a result of charges concerning the "bong" and college I.D. because he concluded that the evidence of Grievant's improprieties was sufficient to result in his dismissal. Chamberlain concluded that there was no reason to prolong the investigation to await the result of the charges brought against Grievant stemming from his arrest.

59. On December 28, 1992, Grievant pleaded nolo contendere to the DWI charge, and the plea was accepted by the court. Under

Vermont statutes, a plea of nolo contendere which is accepted by the court, on a charge relating to operation of motor vehicles, is a conviction. 23 V.S.A. §4(60). The State dismissed the other charges. Grievant's license was suspended effective January 16, 1993, until June 29, 1993 (Colleges' Exhibits 18, 19, 20, 21, 22).

60. After Grievant's termination, Laflin and Griswold submitted reports to Chamberlain which stated that they had observed keys lying around unattended in the security office (Grievant's Exhibits 13, 14).

61. Approximately one month prior to the first day of hearing in this matter, Grievant went to Pray's house to discuss the allegations she had made against Grievant. Cotter was there at the time. Shortly after Grievant's visit to Pray, Pray and Grievant went together to the office of Grievant's attorney where Pray signed an affidavit containing statements inconsistent with, and a recanting of, the statements she gave the Colleges on November 17, 1992 (See Finding of Fact #29). In the affidavit, Pray stated that she had not received the bong and I.D. materials from Grievant, but had received them from students (Grievant's Exhibit 8).

62. Pray provided sworn statements by affidavit, deposition and before the Board. Such statements were inconsistent with, and a recanting of, the statements she gave to the Colleges on November 17, 1992.

63. The Colleges have not established by a preponderance of the evidence that Grievant gave Pray a bong and materials for a College ID.

OPINION

At issue is whether the Board should uphold the disciplinary actions of a five-day suspension, an indefinite suspension and a dismissal taken against Grievant. We will discuss each of the disciplinary actions in turn.

Docket No. 93-27

Grievant contends that the Colleges violated Article 12, Section 1, of the Contract by imposing a five day suspension on September 17, 1992.

Article 12, Section 1 of the Contract provides that "no employee shall be disciplined without just cause." "Just cause" is established upon a showing that: 1) the employee's conduct was sufficiently egregious to justify discipline, and 2) the employee was on fair notice that his or her conduct could be grounds for the discipline imposed. Grievance of Griswold, 16 VLRB 359, 370 (1993). The ultimate criterion of just cause is whether the employer acted reasonably in disciplining the employee because of misconduct. In re Brooks, 135 Vt. 563, 568 (1977).

The burden of proof on all issues of fact required to establish just cause is on the employer, and that burden must be met by a preponderance of the evidence. Griswold, 16 VLRB at 370. Once the underlying facts have been proven, we must determine whether the discipline imposed by the employer is within the range of its discretion given the proven misconduct. Id. at 370-71. Having determined that just cause for discipline has been established, we can overturn the employer's choice of discipline only if it was so unreasonable as to amount to an abuse of discretion. Id.

We conclude that the Employer has not sustained the burden of proof with respect to the five day suspension of Grievant. Grievant was suspended for his "refusal to remain in a meeting" with his supervisor, Daniel Cotter, on July 11, 1992, and his "refusal to meet" with Cotter on September 16, 1992.

The evidence is insufficient for us to conclude that Grievant refused to remain in a meeting with his supervisor on July 11. A "refusal" to remain in a meeting with a supervisor implies declining to submit to a command by a supervisor to remain in the meeting. The evidence does not indicate any such command by Cotter which Grievant failed ~~to heed~~. Further, the fact that the Colleges delayed more than two months to discipline Grievant over an incident which needed no further investigation demonstrates that the Colleges themselves did not view Grievant's conduct to be particularly egregious.

The Colleges also have failed to produce sufficient evidence for us to conclude that Grievant refused to meet with Cotter on September 16, 1992. After Grievant informed Cotter that he wished to have a union representative present at the meeting, Cotter abruptly cancelled the meeting. In so acting, Cotter did not provide Grievant with an adequate opportunity to meet with him without a union representative present. The reasonable way for Cotter to have proceeded was to inform Grievant that no disciplinary action was being contemplated, and then telling Grievant that he wanted to meet with him in the absence of a union representative. By failing to do so and abruptly cancelling the meeting, Cotter inappropriately disciplined Grievant for refusing to meet with him.

Grievant contends that his suspension "without pay until further notice" by letter dated November 20, 1993, lacked just cause. We conclude that the suspension was without just cause.

The suspension was based on two grounds: 1) that Maria Pray had made various allegations against Grievant, and 2) that Grievant's arrest for driving while intoxicated ("DWI"), possession of marijuana and telephone harassment brought ill repute on the College. The Colleges would not have suspended Grievant on November 20 on the basis of his arrest alone. If Pray had not come forward with her allegations, Grievant would not have been suspended at that time.

We conclude that Pray's allegations provided no basis to suspend Grievant. The fact that allegations are made against an employee does not warrant suspending an employee without pay absent a determination by management that the allegations are substantiated. An employer must determine misconduct has been committed, not just alleged, before disciplining an employee. Brooks, 135 Vt. at 568. Management may impose a disciplinary penalty based only on the facts of the underlying incident as determined by management, and may not impose discipline based on allegations which management has yet to conclude are substantiated. Grievance of Colleran and Britt, 6 VLRB 235, 265, 269 (1983).

Here, Grievant was suspended without pay before the Employer determined that Pray's allegations against Grievant had merit. Given the serious nature of Pray's allegations, which called into

question Grievant's integrity in carrying out his security functions, the Colleges understandably were concerned about Grievant returning to work pending the outcome of their investigation.

However, the appropriate way for the Colleges to have proceeded if they did not want Grievant to return to work pending investigation was to relieve Grievant from duty with pay pending the outcome of the investigation into the allegations. This would have allowed the Employer to proceed with its investigation without having Grievant return to work, and would have protected Grievant from being disciplined before a determination actually had been made that he had committed misconduct.

We conclude similarly with respect to the second basis for suspension of Grievant; that his arrest for driving while intoxicated, possession of marijuana and telephone harassment brought ill repute to the College. The Colleges suspended Grievant, in part, for this arrest without sufficient evidence on the underlying facts leading to the arrest. At the time Grievant was suspended, the Colleges were aware of the nature of the charges but did not have knowledge of the underlying factual basis upon which the arrest was made. These were set forth in the arresting officer's affidavit, which the Colleges did not have at the time of the suspension decision.

Also, the Colleges suspended Grievant without determining that he actually had committed misconduct. A minimal essential of due process under applicable precedents is that management makes a determination that misconduct has actually been committed by

the employee before disciplinary action is imposed. Brooks, 135 Vt. at 568. Colleran and Britt, 6 VLRB at 265, 269. Such minimal due process standards were not met here.

Again, the appropriate way for the Colleges to have proceeded given their concern about the College suffering ill repute if Grievant returned to work pending investigation was to relieve Grievant from duty with pay pending a sufficient investigation into the underlying basis for the arrest.

In the suspension letter, the Colleges expressed a clear recognition that no determination had been made as to the extent of Grievant's misconduct by stating that "these . . serious violations . . . if corroborated, will result in termination of your employment". The Colleges needed to corroborate the allegations against Grievant before disciplining him. Their failure to do so resulted in a premature disciplinary action. The letter of discipline can appropriately serve as notice to Grievant of potential disciplinary action, but the suspension itself must be rescinded.

The final issue is whether just cause existed for the dismissal of Grievant. Grievant contends that the Colleges have not established the two charges against Grievant set forth in the December 18, 1992, dismissal letter: that Grievant gave Maria Pray a "bong" which he had previously confiscated in his role as a security officer from a student; and that Grievant gave Pray the materials with which to make a college identification card. Grievant contends that the Board's review in dismissal letters does not go beyond the reasons given by the employer in the

dismissal letter for the action taken, and thus the dismissal must be reversed. The Colleges contend that the Board should look to the allegations set forth in the November 20 suspension letter, as well as the reasons set forth in the dismissal letter, to determine whether just cause for dismissal exists.

As indicated in our findings of fact, we have concluded that the Colleges have not established by a preponderance of the evidence that Grievant gave Pray the bong and materials for a college identification card. Thus, the scope of our review of the reasons for Grievant's dismissal is of crucial importance in this matter.

As previously discussed, our review of whether just cause exists for disciplinary action imposed by management must be based on the factual determinations of an employee's misconduct made by management at the time the disciplinary action was imposed. In carrying out this function, our job is to determine de novo and finally the facts of a particular dispute, and whether the penalty imposed on the basis of those facts is within the law and the contract. Colleran and Britt, 6 VLRB at 265. Here, the Employer has failed to meet its burden of proving the charges (i.e., that Grievant gave Pray the bong and materials for a college identification card) made at the time the disciplinary action of dismissal was imposed on December 18, 1992. Thus, we conclude that no just cause existed for Grievant's dismissal at the time the Colleges dismissed him.

However, this determination does not mean that we will require at this point that the Colleges reinstate Grievant. For

us to so order would be to ignore the realities of this very unusual case. At the time of Grievant's dismissal, he was on clear notice that the charges against him in connection with his arrest would form a basis for his dismissal to the extent such allegations were corroborated. This notice was provided by the letter of suspension, which informed Grievant that, if the allegations against him were "corroborated", his "termination of employment" would "result".

At the time of Grievant's dismissal, the charges against him stemming from his arrest were still pending. However, 10 days after his dismissal, Grievant pleaded nolo contendere to the charge that he was driving while intoxicated. Grievant's driver's license was suspended as a result for approximately five and one-half months.

This conviction, based on off-duty conduct, impacted Grievant's employment. The suspension of his driver's license for five and one-half months meant he could not perform a job function of driving a motor vehicle during that period. Also, Grievant's duties as a security officer involved enforcing adherence to security and safety rules on campus. Off-duty misconduct of violating laws of safe conduct while driving justifiably calls into question Grievant's ability to enforce campus rules and regulations relating to safety and security. Grievant should have been very aware that he could be disciplined for his unsafe driving conduct since he justly had been disciplined months earlier for, among other things, driving a car directly at a person who had made a sexual harassment complaint against him. 16 VLRB at 270-74.

We conclude that the Colleges should be allowed an opportunity to decide whether to impose disciplinary action on Grievant as a result of circumstances surrounding his arrest and DWI conviction. This is because the Colleges had clearly indicated in the November 20, 1992 suspension letter that, if charges against Grievant were corroborated, it would result in Grievant's dismissal. Also, for us to conclude otherwise would be to ignore the practical realities of the effect of the circumstances surrounding Grievant's arrest and DW conviction, and license suspension, on his ability to perform his job.

This is not a situation where management gathers evidence after a discharge to add an entirely new offense, which is clearly inappropriate. Grievance of Boucher, 9 VLRB 50, 57 (1986). Instead, the Colleges had provided clear notice to Grievant prior to his discharge that disciplinary action would result if charges against him were corroborated. There is certainly sound reason to question the approach of the Colleges in handling the charges made against Grievant. However, to reinstate Grievant at this point as a result of the clumsy way in which the Colleges proceeded would not serve the ends of justice. Grievant will not be unfairly prejudiced by having the Colleges evaluate the circumstances surrounding his arrest and DWI conviction, when considered against his whole record, on his employment status. He simply will be made to answer for his conduct prior to his dismissal, including conduct about which he was warned prior to his dismissal would result in disciplinary action if corroborated.

In sum, we remand this matter to the Colleges to determine whether to impose disciplinary action on Grievant as a result of circumstances surrounding his arrest and DWI conviction, when considered in light of Grievant's entire work record. The Colleges should look to the factors articulated in Colleran and Britt, 6 VLRB at 268-69, to determine the reasonableness of any disciplinary action. Also, if the Colleges contemplate dismissing Grievant, Grievant is entitled to a pretermination hearing under the standards set forth in Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985). These standards are applicable to public sector employees in Vermont. Grievance of Johnson, 9 VLRB 94 (1986). We note that an employer acts in compliance with the constitutional requirements of a pre-termination hearing only by keeping an open mind and allowing the possibility of not dismissing an employee if the employee presents convincing points of disagreement with the facts or persuasive argument at the pre-termination meeting. Grievance of Taylor, 15 VLRB 275, 280 (1992).

Finally, we conclude that the effective date of any disciplinary action to be imposed by the Colleges may be as early as the date of Grievant's DWI conviction, December 28, 1992. This means that Grievant is entitled to back pay as a result of the improperly imposed indefinite suspension and dismissal only up to this date, and the Colleges can use the conviction as the governing date for any disciplinary action to be imposed. Under the unusual circumstances of this case, this places Grievant in the position he would have been in had he not been improperly dismissed on December 18, 1992.

ORDER

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

1. The Grievance of Gary Ackerson ("Grievant") in Docket No. 93-27 is SUSTAINED; and

   a. The Vermont State Colleges ("Employer") shall RESCIND the five day suspension imposed on Grievant on September 17, 1992;

   b. The Employer shall remove all references to the suspension from Grievant's personnel files and other official records; and

   c. Grievant shall be awarded back pay, plus interest at the rate of 12 percent per annum, for the five days in which he was suspended. Such payment shall be made within 30 days of the date of this Order.

2. The Grievance of Grievant in Docket No. 93-28 is SUSTAINED IN PART; and

   a. The Employer shall RESCIND the indefinite suspension imposed on Grievant on November 20, 1992, and the dismissal of Grievant on December 18, 1992;

   b. The Employer shall remove all references to the indefinite suspension and the dismissal from Grievant's personnel files and other official records;

   c. Grievant shall be awarded back pay, plus interest at the rate of 12 percent per annum, for all hours of his regularly assigned shift from November 20, 1992, through December 28, 1992, for which he already has not been compensated through paid sick leave. Such payment shall be made within 30 days of the date of this Order; and

   d. This matter is REMANDED to the Employer to determine whether disciplinary action should be imposed on Grievant as a result of circumstances surrounding his arrest and DWI conviction, when considered in light of Grievant's entire work record. The Colleges shall determine what disciplinary action to impose on Grievant within 30 days of the date of this Order. The effective date of any disciplinary action to be imposed may be as early as December 28, 1992.

3. The Labor Relations Board retains jurisdiction in this matter to adjudicate any contentions by Grievant that any disciplinary action imposed by the Employer is without just cause, and to adjudicate any disagreements as to any additional back pay and benefits to which Grievant may be entitled as a result of the Employer's decision as to imposition of any disciplinary action. Grievant shall notify the Board within 30 days of receipt of notice of final decision of the Employer of any contentions and disagreements with respect to these issues.

Dated this 2nd day of June, 1994, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Louis A. Toepfer, Acting Chair

Leslie G. Seaver

Carroll P. Comstock