VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 92-3
DAVID TOWLE	)	

FINDINGS OF FACT, OPINION AND ORDER

On January 15, 1992, David Towle ("Grievant") filed a grievance over his dismissal from employment as a Field Supervision Officer with the State of Vermont, Department of Corrections, Probation and Parole ("Employer"). In support of his contention that his dismissal was without just cause in violation of Article 14 of the collective bargaining agreement between the State and the Vermont State Employees' Association for the Corrections Bargaining Unit, effective July 1, 1990 - June 30, 1992 ("Contract"), Grievant contends that the Employer: 1) denied Grievant an adequate opportunity prior to his dismissal to present disagreement with the facts, identify supporting witnesses or mitigating circumstances and offer other appropriate argument in his defense by refusing him access to relevant evidence upon which the Department's position was based despite Grievant's request for such evidence; 2) inappropriately bypassed progressive discipline in dismissing Grievant for engaging in sexual activities with co-worker J.P., and 3) failed to apply discipline in a uniform and consistent manner by dismissing Grievant and taking no disciplinary action against J.P.

Prior to the conducting of evidentiary hearings, there were an unusually high number of pre-hearing motions, discovery issues and conducting of depositions which substantially delayed the conducting of hearings. On December 10, 1992, the Board issued a

Memorandum and Order on various motions for protective orders. 15 VLRB 506. On March 4, 1993, the Board denied a Motion in Limine filed by the Employer to exclude Grievant from introducing evidence from any medical experts, therapists or consultants on which the Employer did not rely in its decision to dismiss Grievant and not discipline J.P. On May 6, 1993, the Board issued a Memorandum and Order granting Grievant's motion to compel the depositions of Dr. James Bailey, Michael Watson and Tonya Howard. 16 VLRB 203. On August 12, 1993, the Board issued an Order: 1) denying Grievant's Motion to Compel Testimony, Motion to Order Attorney for J.P. to Show Cause Why He Should Not Be Held in Contempt, and Motion for Sanctions; 2) denying the Employer's Motion to Compel J.P. to Produce Documents; and 3) denying J.P.'s requests for sanctions and attorney's fees. Other motions concerning compelling the deposition of J.P., quashing a subpoena for deposition of J.P, compelling the production of documents, and conducting a mental examination of J.P. required active intervention by the Board, but were ultimately withdrawn after the parties informally resolved underlying issues. The parties also filed motions for continuance of the hearing, which were granted by the Board due to discovery not being completed.

Evidentiary hearings were held on November 12, 18 and 19, 1993 before Board Members Charles McHugh, Chairman; Catherine Frank and Louis Toepfer in the Board hearing room in Montpelier. Attorney David Sleigh represented Grievant. Assistant Attorney General Mary Lang represented the Employer.

The parties filed Proposed Findings of Fact and Memoranda of Law on December 6, 1993.

FINDINGS OF FACT

1. Grievant was employed by the State of Vermont, Department of Corrections from May 12, 1986, until he was dismissed effective December 17, 1991. Grievant was a correctional officer at the St. Johnsbury Correctional Facility from May, 1986, until January 1990. In January, 1990, Grievant was moved into the position of Correctional Officer for the Field Supervision Unit (FSU) for the St. Johnsbury Probation and Parole Office of the Department of Corrections. Grievant remained a FSU Officer until his dismissal.

2. During his employment by the Department of Corrections, Grievant was not disciplined prior to his dismissal. The performance evaluations which Grievant received rated his performance as satisfactory. Grievant received various letters of commendation for his performance (Grievant's Exhibit 1).

3. At all times relevant, J.P., a woman, was a Probation and Parole Officer in the St. Johnsbury Probation and Parole Office. Probation and Parole Officers perform much of their work in the office, and do some field visits.

4. During the period from the Fall of 1990 through March of 1991, Grievant generally worked a shift beginning at 3:00 p.m. and ending 11:00 p.m. to midnight. A FSU Officer spends much time on field checks visiting paroled offenders under the Officer's supervision. This constitutes going to the residence of the offender to do such things as alcosensor checks, urinanalysis, surveillance and curfew checks. FSU Officers have a great deal of

independence in performing duties, and perform duties with little direct supervision.

5. During the period from the Fall of 1990 until the end of March, 1991, there were occasions, when J.P. worked into the evening hours, where Grievant and J.P. were the only employees in the St. Johnsbury Probation and Parole Office on duty.

6. There were five occasions during this period when Grievant and J.P. engaged in the sexual act of fellatio, in a state office or in a state vehicle, while Grievant was on duty.

7. The first incident of Grievant and J.P. engaging in fellatio while on duty occurred in the Fairbanks building around October of 1990. The Fairbanks building was a warehouse in which several State offices were housed, including Probation and Parole offices, while the state offices on Pearl Street were renovated after being damaged by fire. In November of 1990, the Probation and Parole office returned to Pearl Street.

8. Another incident of Grievant and J.P. engaging in fellatio while on duty occurred in the Fall of 1990 or the early Winter of 1990-91, while they were in a state vehicle for the purpose of Grievant performing field checks. This incident took place under the Bay Street bridge in St. Johnsbury.

9. A third incident of fellatio occurred in a state vehicle sometime during the 1990-91 Winter while Grievant was on his way to Danville to perform a field check, and was giving J.P. a ride home.

10. A further incident of Grievant and J.P. engaging in fellatio while on duty occurred in the Probation and Parole office on Pearl Street in January or February 1991.

11. A fifth incident of fellatio occurred in a state vehicle, sometime in the late winter of 1991, while Grievant was on his way with J.P. to perform a field check in Newport.

12. Grievant was aware that participating in fellatio while on duty, in a state office or in a state vehicle, was misconduct and that he could be disciplined for such behavior.

13. Management of the Department of Corrections first became aware of sexual relations between Grievant and J.P. on August 27, 1991, when J.P. made a claim of sexual harassment against Grievant to Greg MacDonald, District Director of the St. Johnsbury Probation and Parole Office. J.P. told MacDonald that Grievant had physically forced J.P. to perform fellatio on him, and masturbate him, while Grievant drove J.P. and her two children to a doctor's appointment at Dartmouth-Hitchcock Medical Center in Hanover, New Hampshire on August 22, 1991. Both Grievant and J.P. were off-duty at the time of the August 22 events.

14. MacDonald reported J.P.'s sexual harassment complaint to his supervisor, Jim Spinelli, Probation and Parole Area Manager. Spinelli and MacDonald then conducted an investigation.

15. Spinelli and MacDonald went to J.P.'s home on August 29, 1991, and obtained a written statement from her as to her sexual harassment allegations. J.P. detailed the August 22 incident and also claimed that Grievant sexually harassed her at

work, including fondling and kissing her. J.P. expressed to Spinelli and MacDonald that she had fear of Grievant.

16. Grievant then was temporarily relieved from duty with pay on August 29, 1991. MacDonald told Grievant that he was being relieved from duty with pay pending investigation of J.P.'s claim of sexual harassment. Grievant attempted to tell MacDonald his version of events, but MacDonald advised him not to say anything at that time.

17. MacDonald and Spinelli then questioned each person who worked in the Probation and Parole office as to the extent of their knowledge of the relationship between Towle and J.P. or of any evidence of sexual harassment within the office.

18. Spinelli and MacDonald interviewed Grievant on September 13, 1991. Grievant admitted that J.P. had performed fellatio on him, and masturbated him, on the trip to Hanover on August 22. However, Grievant told Spinelli and MacDonald that J.P. had initiated the contact. Grievant also told them that he had engaged in the acts of fellatio with J.P. stated in Findings of Fact 7-11. Grievant told them that he had not sexually harassed J.P. He characterized their relationship as a mutual affair from the Fall of 1990 until August 22, 1991 (Grievant's Exhibit 7).

19. Spinelli and MacDonald decided to interview J.P. after this interview with Grievant. J.P. requested that her therapist, Michael Watson, be present. J.P. had been in therapy with Watson since the late summer of 1989.

20. The interview occurred on September 25, 1991. J.P. indicated that there was a short period of time beginning in September 1990 when she had a physical relationship with Grievant which may be considered consensual because, while she was intimidated, she did not fight Grievant off. Grievant indicated that she engaged in fellatio with Grievant three or four times, and that she felt pressured to perform fellatio on those occasions. J.P. reaffirmed her allegation that Grievant had physically forced her to perform fellatio on him, and masturbate him, while Grievant drove J.P. and her two children to a doctor's appointment in Hanover ~~on August~~ 22, 1991. (Grievant's Exhibit

21. Watson indicated to Spinelli and MacDonald during the September 25 interview that at the end of September, 1990, J.P. had told Watson that there was a male coworker with whom she had struck up a friendship and who made her feel attractive. Watson further indicated that, within six weeks or so, J.P. reported being scared of the coworker, being harassed by him, and being confused on how to set limits. Watson indicated that J.P. was consistent from November 1990 on with respect to wanting to stop the coworker but not knowing how to do so. Watson told Spinelli and MacDonald at this interview that J.P. had post-traumatic stress disorder ("PTSD") as a result of childhood sexual abuse, and that J.P.'s inability to set limits when she was being pushed was consistent with PTSD (Grievant's Exhibit 4).

22. Spinelli and MacDonald interviewed Grievant again on October 4, 1991. During this interview, among other things discussed was the chronology of sexual contact with J.P. (Grievant's Exhibit 7).

23. Spinelli and MacDonald interviewed J.P. again on October 7, 1991. Watson was present during this interview. J.P. indicated that she had engaged in sexual contact with Grievant five or less times but was unable to recall the details of the events. She further indicated to Spinelli and MacDonald that there was never a time in which she had sexual relations with Grievant that it was consensual; that she believed that Grievant was forcing her or coercing her to engage in sexual relations. (Grievant's Exhibit 5).

24. During this October 7 interview, Watson indicated that, in addition to PTSD, J.P. suffered from dissociative disorder. Watson indicated to Spinelli and MacDonald that, as a result of her PTSD and dissociative disorder, J.P. likely would experience the original trauma that resulted in her disorders if she believed she was being harassed. Watson indicated that, under stress, it would be typical for J.P. to disassociate herself from what was happening and not be mentally present to the sexual events; that J.P. may acquiesce but mentally disassociate herself from the act. Watson indicated that this explained why J.P. could not remember details of her sexual relations with Grievant. Watson also indicated that it was likely that J.P. entered an altered ego state when engaging in fellatio with Grievant which would effectively render her unable to consent to the act. Watson

indicated that it was within the realm of possibility that Grievant could have thought that J.P. was voluntarily consenting to the sexual relations (Grievant's Exhibit 5).

25. Watson is a clinical mental health counselor, certified in the State of Vermont. As such he is qualified to treat PTSD and dissociative disorders.

26. In addition to participating in the September 25 and October 7 interviews, Watson wrote a letter to Spinelli and MacDonald dated October 6, 1991. The letter provided in pertinent part as follows:

> I have provided outpatient counseling and psychotherapy to J.P. for the past two years. I am a Certified Clinical Mental Health Counselor specializing in the treatment of adults who suffered severe trauma in childhood, especially [illegible] sexual abuse. It is in this capacity that J.P. consulted me.
>
> J.P. suffered severe physical and sexual abuse from age five to age eighteen. Several times her life was in imminent danger. I have diagnosed J.P. as suffering from Post Traumatic Stress Disorder (DSM IIIR 309.89) with Dissociative Disorder (300.15). In Post Traumatic Stress Disorder the patient persistently reexperiences the traumatic events and may: 1) suddenly act or feel as if the traumatic events were recurring, and may 2) experience intense psychological distress at exposure to events that "symbolize or resemble" an aspect of the traumatic events. Further, the patient: 1) may attempt to avoid stimuli associated with the trauma, 2) may demonstrate numbing of general responsiveness, 3) and may be unable to recall important aspects of the trauma (psychogenic amnesia).
>
> J.P. demonstrates all of the above aspects of Post Traumatic Stress Disorder. Her Dissociative Disorder serves to amplify the severity of her symptoms. While J.P. can function well when not subject to related stressors, when exposed to stressors including "prolonged or intense coercive persuasion," J.P. is likely to demonstrate trance states with psychogenic amnesia, and a shift in personality states in which her dominant personality is subsumed by a childlike personality who is incapable of enforcing "no" and is incapable of mutual consent.
>
> It is my belief that J.P. was incapable of refusing the repeated advances of her colleague, was incapable of mutual

consent, was incapable of requesting appropriate aid from her superiors, and does not remember details of the events related to the sexual harassment. In this regard, it is important to consider that the courts and various legislatures have suggested that individuals suffering from Post Traumatic Stress Disorder and from Dissociative Disorders have special needs and protections.

(State's Exhibit 1)

27. Section 309.89 of the Diagnostic and Statistical Manual for Mental Disorders, Volume III Revised, referenced by Watson in his October 6 letter, provides with respect to PTSD that the "essential feature of this disorder is the development of characteristic symptoms following a psychologically distressing event that is outside the range of usual human experience . . ., would be markedly distressing to almost anyone, and is usually experienced with intense fear, terror and helplessness". The characteristic symptoms "involve reexperiencing the traumatic event, avoidance of stimuli associated with the event or numbing of general responsiveness, and increased arousal." Symptoms are "often intensified or precipitated when the person is exposed to situations or activities that resemble or symbolize the original trauma" (State's Exhibit 2).

28. Section 300.15, entitled Dissociative Disorder Not Otherwise Specified, of the Diagnostic and Statistical Manual for Mental Disorders, Volume III Revised, referenced by Watson in his October 6 letter, includes among the examples of such dissociative disorders the following: 1) cases in which there is more than one personality state capable of assuming executive control of the individual, 2) trance states, i.e., altered states of consciousness with markedly diminished or selectively focused

responsiveness to environmental stimuli, and 3) dissociated states that may occur in people who have been subjected to periods of prolonged and intense coercive persuasion (State's Exhibit 2).

29. On October 16, 1991, Spinelli presented a 13 page investigation report to his superior, Richard Turner, Director of Corrections Services. In the report, Spinelli set forth Grievant's and J.P.'s characterization of events and their relationship, specific allegations and events, information from corroborating witnesses, and conclusions. Spinelli made the following conclusions: 1) Grievant engaged in sexual activity on state property while on duty; 2) Grievant and J.P. did not have a mutual affair as Grievant claimed; 3) Grievant sexually harassed J.P.; and 4) the diagnosis of J.P. having PTSD and Dissociative Disorder constituted a plausible explanation why J.P. found it difficult to rebuff Grievant's persistent advances successfully (State's Exhibit 5).

30. The Employer sought an independent review of the conclusions reached by Watson that J.P. suffered from PTSD and Dissociative Disorder. The Employer contacted Dr. Susan Abraham, a psychiatrist at the Brattleboro Retreat, who specializes in treating victims of sexual abuse and those suffering from PTSD and Dissociative Disorder. In a November 26, 1991, letter to Dr. Abraham, Spinelli stated "because (Watson) is employed by J.P. we feel it's appropriate to have an independent review of the assessment to verify the plausibility of the diagnosis as an explanation for the actions of J.P." (State's Exhibit 3).

31. Spinelli provided Dr. Abraham the October 6, 1993, letter from Watson (State's Exhibit 1), and Spinelli's investigation report dated October 16, 1991 (State's Exhibit 5).

32. After reviewing these materials, Dr. Abraham wrote a letter to Spinelli dated December 16, 1991, which provided in pertinent part as follows:

> In response to your request that I review the material on J.P., I am sending you this letter.
>
> There were three questions that you asked me to answer.
>
> Question #1:
> Are J.P.'s actions described in the report consistent with those of others suffering from PTSD as a result of childhood sexual abuse, when they are placed under the kind of stress described J.P.?
>
> Yes, her responses are very consistent with a history of sexual abuse as a child. Specifically, her difficulty in disclosing the abuse and her inability to retaliate when she was being pressured are often seen in survivors of sexual abuse.
>
> Question #2:
> Is a lack of memory about the details of some of the incidents involving sexual relations consistent with someone suffering from dissociative disorder and being placed under the type of stress described by J.P.?
>
> Yes, amnesia is a very common symptom in survivors of sexual abuse, especially when they are in a stressful situation.
>
> Question #3:
> Is Dr. Watson's explanation of J.P.'s stream of mind during these incidents consistent with your views of the effects of PTSD and dissociative disorder?
>
> Yes they are.
>
> In summary, I found this a very coherent and logical report of the incidents described and I believe that the conclusions are very consistent with a diagnosis of post-traumatic stress disorder as a result of childhood sexual abuse.
>
> (State's Exhibit 4)

33. On December 4, 1991, after Turner had informed Grievant that he was contemplating dismissing him, Grievant and his attorney, David Sleigh, met with Turner. At the meeting, Grievant was provided an opportunity to present his version of the facts and to bring to Turner's attention any mitigating circumstances. Turner did not provide Grievant or his attorney with access to information concerning J.P.'s mental health diagnosis prior to the December 4 meeting or at the meeting.

34. By letter of December 16, 1991, Turner informed Grievant that he was dismissing him. The letter provided in pertinent part as follows:

> My decision to terminate your employment is based upon the following findings.
>
> 1. You engaged in sexual acts, and/or sexually inappropriate behavior with a female Department of Corrections employee, during the period from about October 1990 to August of 1991, while either in a state office or a state vehicle.
>
> 2. You made unwelcome sexual advances to another woman while on duty in January or February 1991.
>
> I consider such actions by a Corrections employee to be acts of gross misconduct and sufficient cause to warrant your dismissal.
>
> (State's Exhibit 6)

35. The Employer has withdrawn its charge of Grievant making "unwelcome sexual advances to another woman while on duty in January or February 1991" as a basis supporting Grievant's dismissal.

36. Although Spinelli had concluded in his investigation report that Grievant had sexually harassed Grievant, Turner did not reach such a conclusion. He decided that there was not clear

evidence on the unwelcome and unwarranted nature of the activity; that the evidence was not clear that J.P. had given Grievant the message that the sexual relations were not consensual. In deciding to dismiss Grievant, Turner placed heavy reliance on the fact that there were five separate incidents of sexual activity while on duty, in a state building or state vehicle, and also relied heavily on the violation of the trust accorded to FSU Officers. This led Turner to conclude that Grievant was not a good candidate for rehabilitation; that the repetition and breach of trust indicated that Grievant would commit future breaches of trust. Turner reviewed Grievant's past work record, but decided that his good record was not a sufficient mitigating circumstance to warrant his retention. Turner concluded that Grievant's offenses constituted gross misconduct.

37. Turner considered discipline against J.P. However, Turner considered J.P.'s assertions that she did not voluntarily perform fellatio on Grievant; and Watson's diagnosis, supported by Dr. Abraham, that J.P. was suffering from PTSD and Dissociative Disorder, affecting her ability to consent to the sexual relations with Grievant. Turner considered these mitigating circumstances and decided to not discipline J.P. Turner concluded that J.P. had presented sufficient mitigating circumstances so that she should not be disciplined (State's Exhibit 7).

OPINION

Grievant contends that he was dismissed without just cause in violation of Article 14 of the Contract. Grievant raises various issues, each of which will be discussed in turn.

Motion to Strike Hearsay

Before discussing the merits, we first address Grievant's Motion to Strike Hearsay. Grievant made such a motion during the first day of hearing, which the Employer opposed. The Board denied the motion. Grievant renewed the motion after the hearing, by making such motion in writing on December 6, 1993. Grievant moves the Board to strike from the record any and all hearsay evidence, including, but not limited to, any description of the sexual conduct between Grievant and J.P. and the circumstances thereof which is purported to be that of J.P.

In support of his motion, Grievant relies on V.R.C.P. 43(a). This provides that "(i)n all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules, the Vermont Rules of Evidence, or other rules adopted by the Supreme Court. Grievant contends that, by adopting this rule in Section 12.1 of Board Rules of Practice, the Board adopted a general rule against the admission of hearsay evidence.

We believe that Grievant's reliance on V.R.C.P. 43(a) to argue against admission of hearsay evidence is misplaced. V.R.C.P. 43(a) is not directed toward the exclusion of hearsay evidence, but simply sets forth the general rule that during hearings testimony of witnesses will be taken orally in open

session. This is the general rule followed by the Board in hearings, and was the general rule followed in this case.

Grievant essentially is seeking to have us apply the formalities of admissibility of hearsay evidence as set forth in the rules of evidence. This we decline to do. 3 V.S.A. §928(b)(3) provides, with respect to Board grievance hearings, that "unless both parties concerned request that it be formal, hearings shall be informal and not subject to the rules of . . . evidence of the courts of the state." 3 V.S.A. §928(a) provides the Board "shall make . . . regulations consistent with this chapter."

These provisions, when read together, mean that the Board may not promulgate rules making the rules of evidence applicable to Board proceedings. The Board recognized this when adopting V.R.C.P. 43(a) through promulgation of Section 12.1 of the Board Rules of Practice. Section 12.1 explicitly states that the Board was adopting "so much" of V.R.C.P. 43(a) as was "not inconsistent with the laws of the State of Vermont". We have never construed V.R.C.P. 43(a), and are not going to construe it in this case, to categorically prohibit the admission of hearsay evidence. This is what Grievant is requesting that we do by his motion. To grant Grievant's motion would be contrary to the dictates of the Vermont General Assembly that our hearings be informal and not subject to the rules of evidence.

Loudermill Rights of Grievant

Grievant contends that the Employer violated Article 14, Section 4, of the Contract. This section is in compliance with the constitutional requirements of a pre-termination meeting set forth by the U.S. Supreme Court in Cleveland Board of Education

v. Loudermill, 105 S.Ct. 1487 (1985). Article 14, Section 4, of the Contract provides in pertinent part:

> Whenever an appointing authority contemplates dismissing an employee the employee will be notified in writing of the reason(s) for such action, and will be given the opportunity to respond either orally or in writing . . . At such meeting the employee will be given an opportunity to present points of disagreement with the facts, to identify supporting witnesses or mitigating circumstances, or to offer any other appropriate argument in his or her defense.

Grievant contends that his right to defend himself under this contract provision was violated because the Employer refused to provide him, prior to his Loudermill meeting, with documentation on J.P.'s mental health diagnosis. Specifically, Grievant contends that he was denied the opportunity to challenge the reliability of J.P.'s diagnosis and the credibility of her therapist. Grievant contends that denying him that opportunity in this case was tantamount to denying his right to defend himself.

In making this argument, Grievant has elevated the Loudermill proceedings beyond that required by the Contract and the U.S. Supreme Court. There must be "some kind of a hearing" prior to the discharge of an employee who has a constitutionally protected property interest in employment. Loudermill, 105 S.Ct. 1493. Some opportunity for the employee to present his or her side of the case is of obvious value in the employer reaching an accurate decision. Id. at 1494. The pre-termination hearing need not be elaborate. Id. at 1495. In general, "something less" than a full evidentiary hearing is sufficient. Id. The pretermination hearing need not definitively resolve the propriety of the discharge. Id. It should be an initial check

against mistaken decisions; essentially a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. Id. The employee is entitled to oral or written notice of the charges against him or her, an explanation of the employer's evidence, and an opportunity to present his or her side of the story. Id.

These due process requirements were met in this case. Grievant was made aware of the charges against him of engaging in fellatio with J.P. on several occasions, in a state office and in a state vehicle, while he was on duty. He also was made aware of J.P.'s allegations that he had sexually harassed her and that she was not a willing participant in sexual activities. He was provided with an opportunity to present his side of the story in detail on specific incidents during two extensive interviews with management investigators prior to the Loudermill meeting, and at the December 4 Loudermill meeting itself. This opportunity to present his side of the story and present arguments evidently was of some value to him, as the conclusion of the management investigator that Grievant had sexually harassed J.P. was not adopted by the management official, Richard Turner, who ultimately made the decision to dismiss Grievant.

The inability of Grievant during Loudermill proceedings to challenge the reliability of J.P.'s diagnosis and the credibility of her therapist does not change our conclusion that due process requirements were met. Grievant had the opportunity, once he appealed his dismissal, to explore those areas through discovery and at the evidentiary hearing before the Board. The Loudermill

process is not designed to replace the full evidentiary hearing before the Board, but simply serve as a check against mistaken decisions and to allow a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. The pre-termination proceedings here sufficiently met those purposes.

Just Cause for Dismissal

On the merits, Grievant contends that just cause did not exist for his dismissal. Grievant contends that having sex on the job is not gross misconduct per se and, absent other dereliction of duty, dismissal for such offense constitutes inappropriate bypassing of progressive discipline under Article 14 of the Contract. Further, Grievant contends that, even if having sex on the job constitutes misconduct warranting dismissal, the Employer's disparate treatment of Grievant and J.P. was not reasonable and thus constituted failure to apply discipline in a uniform and consistent manner in violation of the Contract.

Just cause is defined as some substantial shortcoming detrimental to the employer's interest which the law and 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. On the issue of fair notice, the ultimate question is whether the conduct was or should have been known to the employee to be prohibited by the employer. Id.

The Employer charges that Grievant engaged in misconduct by engaging in the sexual act of fellatio with J.P. during his shift on five separate occasions, while either in a state vehicle or in a state office. The Employer has proven these charges.

The charges against Grievant having been established, we look to the specific factors articulated in Grievance of Colleran and Britt, 6 VLRB 235, 268-69 (1983), to determine the reasonableness of the disciplinary action imposed based on the proven charges. The pertinent factors here are: 1) the nature and seriousness of the offense, and its relation to the employee's duties, position and responsibilities, including whether the offense was frequently repeated; 2) the effect of the offense upon supervisors' confidence in the employee's ability to perform assigned duties; 3) the clarity with which the employee was on notice that the conduct was prohibited by the employer; 4) the consistency of the penalty with those imposed upon other employees for the same or similar offenses; 5) mitigating circumstances surrounding the offense; 6) the employee's past disciplinary and work record; 7) the potential for the employee's rehabilitation; and 8) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

Grievant's offenses of participating in the act of fellatio on repeated occasions while he was on duty were serious. The

nature of the offenses themselves, engaging in the sexual act of fellatio, obviously constitute inappropriate activities for an employee while on duty given accepted workplace norms. Grievant himself concedes that these activities were inappropriate as he testified that he knew his conduct was wrong and that he could be disciplined for it. The fact that it was done repeatedly amplifies its seriousness, as it demonstrates an ongoing and serious deficiency in Grievant's judgment.

Management needs to have a high level of trust in employees, such as Grievant, serving as FSU officers. A FSU Officer spends much time on field checks visiting paroled offenders under their supervision. This meant Grievant had a great deal of autonomy in performing his duties, and performed those duties with little direct supervision. Management needs to rely on employees to devote themselves to work independently, and not to engage in such behavior as sexual activity while on duty. Richard Turner, who dismissed Grievant, determined that Grievant had breached the trust bestowed on him as an FSU Officer by engaging in such sexual acts. This conclusion was warranted given the nature of Grievant's position. Turner understandably lost confidence in Grievant's ability to perform assigned duties.

Also, Grievant had fair notice that his offenses could result in dismissal. There is at least implied notice to employees that engaging in sexual activity while on duty, especially in state offices or state vehicles, is prohibited by the employer. This conduct clearly should be known by an employee to be prohibited by an employer. In fact, Grievant was aware that participating in fellatio while on duty, in a state office or in a state vehicle, was misconduct and that he could be disciplined

for such behavior. Grievant should have been aware that engaging in such conduct on repeated occasions could result in his dismissal.

The nature and seriousness of Grievant's offenses, the serious breach of trust he committed given his position, and the fair notice he had that his conduct could result in his dismissal weigh heavily towards justifying his dismissal.

Nonetheless, a serious question exists in this case as to the consistency of the discipline imposed on him with that imposed on J.P. Article 14, Section 1(b) of the Contract provides that the "State will . . . apply discipline . . . with a view toward uniformity and consistency". Grievant contends that the Employer violated this contract provision when it dismissed him, and failed to discipline J.P., the other participant in the acts of fellatio for which Grievant was dismissed. The Employer contends that there was a reasonable basis for treating Grievant and J.P. differently. The State relies on the diagnosis of J.P. suffering from Post-Traumatic Stress Disorder (PTSD) and Dissociative Disorder, rendering her incapable of truly consenting to the sexual acts in which she engaged with Grievant, as the basis for the difference in treatment.

We conclude that the Employer did have a reasonable basis for the difference in treatment accorded Grievant and J.P. The Employer was reasonably justified in not disciplining J.P. based on what was reported to them by J.P., the diagnosis of J.P.'s mental health disorders by Michael Watson, J.P.'s therapist, and the independent assessment of that diagnosis by Dr. Abraham.

The Employer was presented with a very difficult set of circumstances. Two employees engaged in sexual acts on duty on repeated occasions. Normally, serious disciplinary action against both employees would be warranted. Yet, one of the employees contended that she was not a willing participant in the sexual activities, and her therapist diagnosed her as suffering from mental health disorders resulting from childhood sexual abuse which rendered her incapable of consenting to the sexual acts.

If the Employer had not taken reasonable steps to verify the validity of the conclusions of J.P.'s therapist, the Employer would be hard pressed under all the circumstances of this case to justify the difference in treatment accorded Grievant and J.P. However, the Employer did take reasonable steps to verify the validity of the conclusions of J.P.'s therapist by employing an independent psychiatrist, Dr. Abraham, to review the investigation report completed on the sexual activities and relationship of Grievant and J.P., and the conclusions reached by J.P.'s therapist. Dr. Abraham specializes in treating victims of sexual abuse and those suffering from PTSD and Dissociative Disorder. Dr. Abraham concluded that the diagnosis of J.P. suffering from PTSD and Dissociative Disorder was consistent with the materials she had reviewed.

Grievant is critical of the Employer for not having an independent psychiatrist actually examine J.P. This is an action the Employer could have taken, but the failure to do so was not unreasonable. We conclude that the independent assessment which was done by Dr. Abraham constituted a sufficient basis upon which to make an opinion about the diagnosis of J.P.

Grievant also is critical of the delay by the Employer in employing Dr. Abraham; and asserts that the Employer apparently decided to dismiss one of the two offenders and then engaged in a posthoc attempt to justify the disparity. The Employer was presented with a complicated set of circumstances, and we conclude that the delay in retaining Dr. Abraham resulted only from an attempt by the Employer to conduct a detailed investigation of a matter involving a number of factual discrepancies and a complicated medical claim.

We note that that the Contract does not require the Employer to discipline with absolute consistency. Its terms require only that the Employer proceed with "a view toward uniformity and consistency" (Article 14, Section 1.b.). We believe in this case that the Employer acted reasonably, and met the terms of the Contract.

In reviewing the remaining applicable Colleran and Britt factors in combination with the factors previously discussed, we conclude that the Employer had just cause to bypass progressive discipline and dismiss Grievant for his offenses. Turner reasonably concluded that Grievant's good past work record, and no previous disciplinary actions, were not sufficient to warrant his retention. Turner reasonably concluded that the repetitious offenses of Grievant and the breaches of trust by him meant he would commit future breaches of trust, and thus was not a good candidate for rehabilitation. Turner's ultimate conclusions that sanctions other than dismissal were inadequate and that Grievant's offenses constituted gross misconduct also were reasonable.

ORDER

NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, it is hereby **ORDERED** that the Grievance of David Towle is **DISMISSED**.

Dated this 10th day of March, 1994, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Charles H. McHugh
Charles H. McHugh, Chairman

/s/ Catherine L. Frank
Catherine L. Frank

/s/ Louis A. Toepfer
Louis A. Toepfer