VERMONT LABOR RELATIONS BOARD

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| GRIEVANCE OF: | ) | |
| | ) | |
| MARY JO SCOTT | ) | DOCKET NO. 93-16 |
| | ) | DOCKET NO. 93-50 |

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 State of Vermont, Department of Corrections ("Employer"), against Mary Jo Scott ("Grievant").

On May 10, 1993, Grievant filed a grievance, which was docketed as 93-16. Therein, Grievant contends that the Employer violated Articles 14 and 15 of the collective bargaining agreement between the State and the Vermont State Employees' Association ("VSEA") for the Corrections Bargaining Unit, effective for the period July 1, 1992 to June 30, 1994 ("Contract"). Specifically, the grievance alleges that the Employer disciplined Grievant without just cause by suspending her for one day and that such suspension inappropriately bypassed progressive discipline.

On August 2, 1993, Grievant filed a grievance, which was docketed as 93-50. Therein, Grievant contends that the Employer violated Articles 5 and 14 of the Contract. Specifically, Grievant alleges that the Employer failed to comply with the contractual requirements of Article 14 when it relieved her from duty, and further, that there was no basis to place her on a relief from duty status. Grievant also alleges that the placement of her in a temporary relief from duty status reflected a pattern of harassment based upon her filing of grievances.

On October 20, 1993, the Employer filed a motion to dismiss Docket Number 93-50. On October 26, 1993, Grievant filed several motions: Motion for Arbitration/Meditation, Motion of Joint Exhibits, Motion for Joint Hearings or Consolidation of Grievances, Motion for Postponement, Motion for Protection of Records, and Motion to Amend and Combine Grievances. The Request to Amend was accompanied by a Step IV grievance that alleged violations of the Preamble of the Contract and Articles 5, 10, 11, 12, 14, 15, 25, 34, 36 and 68.

Hearings were held on November 2, 16, 30, 1993, and December 9, 1993, in the Board hearing room in Montpelier before Board Members Charles McHugh, Chairman; Leslie Seaver and Carroll Comstock. Assistant Attorney General Mary Lang represented the Employer. Grievant represented herself.

At the November 2, 1993, hearing, Attorney Lang represented that the Employer had rescinded the temporary relief from duty, which was the subject of Docket No. 93-50, and removed all documentation from Grievant's personnel file with respect to the temporary relief from duty. The Board accepted Lang's representations, eliminating the need for the Board to rule on whether the action placing Grievant in a temporary relief from duty status should be rescinded. However, this did not result in the granting of the Employer's Motion to Dismiss with respect to Docket No. 93-50, as an issue remained as to whether the placement of Grievant in a temporary relief from duty status reflected a pattern of harassment based upon her filing of grievances.

On November 2, 1993, the Board denied Grievant's Request for Arbitration/Mediation; granted Grievant's Motion for Joint

Exhibits; granted Grievant's motion to consolidate Docket No. 93-16 and Docket No. 93-50 for the purposes of hearing; and denied Grievant's Motion for Protective Order. The Board indicated that it would reconsider its ruling on the Motion for Protective Order during the offering of testimony.

On November 16, 1993, the Board granted, in part, Grievant's Motion for a Protective Order and ordered four documents sealed. On November 30, 1993, the Board denied Grievant's Motion to Amend.

The parties filed briefs on December 31, 1993.

FINDINGS OF FACT

1. Grievant is a teacher for the Department of Corrections ("Department") and works at the Northwest State Correctional Facility ("NWSCF"). She has been employed in that capacity for over twelve years.

2. Robert Lucenti is the Superintendent of Education for the Department and is the professional supervisor of all teachers in the Department at each of the Department's correctional facilities. He is Grievant's professional supervisor.

3. Inmates of the Department who are under the age of 21 without a high school diploma have first priority to participate in the Department's education program. Such students are called caseplan students. Inmates who have a high school diploma are given no priority and are called elective students.

4. Since 1988 the Department has been trying to change from a one-on-one style of education - one teacher to one student - to a classroom based system with classes ranging in size from 5 - 15. There are several reasons that the Department

has been moving in the direction of a classroom structured program. The legislature funds the Department's education program on a per student basis; the more students the Department educates, the more funding it receives. Also, classroom settings provide an opportunity for inmates to develop personal skills in learning to work together. Further, classroom settings avoid appearances of favoritism and provide a more secure setting for teachers.

5. All teachers at the correctional facilities in St. Johnsbury, Rutland, and NWSCF have been required to move to a classroom based system and to develop curricula accordingly.

6. During April, 1990, Grievant heard that an inmate, Ed Johnson, who was scheduled to be released in July, 1990, had told other inmates that he was going to go to Grievant's house and rape her. Grievant complained to Superintendent Heinz Arenz.

7. It was not clear to Arenz how the Department could be involved once the inmate was released from the facility. Arenz responded by asking Grievant to review the Department's policies and to get back in touch with him. During this meeting Arenz also made a comment to the effect that maybe she "should get a gun", or "do you have a gun?"

8. Grievant did not feel that Arenz had been responsive to her request. In June, 1990, Grievant complained to Dixie Fowler, NWSCF Assistant Superintendent and Grievant's "nonprofessional" supervisor, and to the Chief of Security just prior to the inmate's release, scheduled for July, 1990. Assistant Attorney General Thomas Rushford assisted Grievant in obtaining a

temporary restraining order against Johnson. Grievant did not file a grievance over this action.

9. In August, 1990, Fowler sent Grievant home because she believed that the slacks Grievant had worn to work were too tight. Fowler and Grievant met several times during August and discussed Grievant's behavior at work. Fowler followed up these meetings with a letter on August 15, 1990, in which she outlined three concerns:

> 1. Clothing: Please do not wear tight clothing to work...
>
> 2. Physical contact: Try...not to work closely side by side with your students...
>
> 3. Personal Issues: If you have been discussing personal issues with inmates, please cease doing it immediately ...(State's Exhibit 31).

10. Fowler also suggested that Grievant seek professional counseling assistance. Grievant responded to Fowler's letter and indicated that she felt Fowler's actions, including her August 15, 1990, letter were a "backlash" from Grievant's efforts to get a restraining order against inmate Johnson. Grievant did not file a grievance over this matter (Grievant's Exhibit 4).

11. During January, 1991, Grievant asked Fowler three times for permission to use a computer for volunteer work she was performing relative to the war in the Persian Gulf. Each time Fowler turned down her request. Grievant then requested permission from a higher level administrator, Commissioner Joseph Patrissi. Patrissi's office instructed Grievant to draft a memorandum with respect to her request. Grievant wrote a request

which was forwarded to Lucenti and he granted Grievant permission to use the computer at NWSCF for her volunteer project. Fowler then discovered that Grievant had gone over her head in seeking approval to use the computer. Lucenti discovered for the first time that Grievant had already been denied permission by Fowler. Lucenti withdrew permission because Grievant had received permission inappropriately by circumventing authority. Grievant did not file a grievance over this matter.

12. In early 1991, the Department constructed a classroom building at its NWSCF site, called the Silva Building. The construction of this building enabled NWSCF to move forward in seeking to establish a classroom based system. Prior to the construction of the Silva Building, students primarily received their education one-on-one in the facility's library.

13. Grievant has resisted moving to a classroom based system and has raised various objections with Lucenti. Grievant became most resistant after the completion of the Silva Building. Grievant's objections have included, but are not limited to: students are less motivated in a classroom setting, there are conflicts in teaching schedules, setting up classroom instruction is more labor intensive and time consuming than one-on-one teaching.

14. Grievant also complained of lack of adequate security measures in the Silva Building. Security guards regularly patrol the Silva Building. Despite this, Grievant requested that the Department take further measures to ensure her safety while she worked in the Silva Building. She requested surveillance cameras, a "mandown" personal safety system, and an "action plan"

for when she was working alone in the Silva Building. In 1992 or 1993, the Department approved the purchase of surveillance cameras. The "mandown" personal safety system has not been approved for purchase because of the expense of retrofitting the system. Grievant was given her own radio in June, 1993. At no time did Grievant file a grievance over this issue.

15. Grievant has also complained that another teacher at NWSCF, Clayton Harmon, received more favorable assignments and better treatment by the administration.

16. All four teachers at NWSCF have different assignments and schedules, as do all the teachers in the Department's educational system. Harmon is required to develop curricula and deliver a classroom based system, as are all other teachers in the correctional educational system.

17. Harmon's teaching assignments include responsibility for the education of all students in the "closed units". Inmates in these units, D and E Wings, are not permitted to leave their units. Harmon is also responsible for ensuring that inmates under age 21 receive the education they are entitled to under state law.

18. In August, 1991, Fowler sent Grievant home again because she believed Grievant's slacks were too tight.

19. Grievant solicited the opinion of co-workers about the way she was dressed and also went to the State's Attorney's office and sought an investigator's opinion. The investigator

wrote an affidavit to the effect that he did not did not think that Grievant's clothing was offensive or revealing. Grievant was later heard in the cafeteria discussing the way she was dressed and making comments about whether people could guess the color of her underclothing. A co-worker complained to Fowler about Grievant's behavior in the cafeteria and Fowler issued a negative "supervisory feedback" memorandum to Grievant. In that memorandum Fowler asked Grievant to cease from trying to involve co-workers in issues that were between the two of them. Grievant did not file a grievance over this matter (State's Exhibit 31; Grievant's Exhibit 26).

20. During early fall, 1991, Grievant worked with an inmate, Tomal Davis. Davis was an elective student because he already had his high school diploma. Grievant had been working with Davis since May, 1991. Grievant was assisting Davis in applying to colleges and obtaining financial assistance to attend college.

21. On or about September 6, 1991, Fowler sent Grievant a memorandum and questioned Grievant generally about her Fall teaching schedule. In this memorandum, Fowler asked why Grievant had Davis scheduled for class five hours per day (Grievant's Exhibit 1).

22. Grievant responded to Fowler's memorandum and, with respect to inmate Davis, indicated that "(i)ndependent" students were "welcome to study here as long as they are not disruptive" (Grievant's Exhibit 2).

23. During this same time period, there were rumors at the facility that Grievant and Davis were having an affair.

24. On or about September 25, 1991, Davis was transferred to D Wing, a "close custody" unit, because of misconduct. Another teacher told Grievant about Davis' transfer and also indicated that Davis was Grievant's "favorite student". On or about that same day, Grievant received an evaluation from Lucenti which disturbed her, believing that it was negative. She became very emotional and started crying while trying to carry on a conversation with a co-worker. Grievant signed herself out for the day because she was so upset.

25. Grievant's co-workers expressed concern over her emotional well being because she cried and made incoherent statements at work. Superintendent Arenz decided to relieve Grievant from duty because of expressions of concerns for Grievant's mental health by co-workers. Arenz informed Grievant of this decision in a letter dated September 26, 1991, which stated in pertinent part:

> This action to place you on a relief from duty with pay is to remain in effect until after we receive a professional assessment, which will be arranged and paid for by the State, regarding your fitness for duty . . .(State's Exhibit 15).

26. Grievant did not grieve this action.

27. Dr. Ursel Danielson evaluated Grievant as a result of this action. Danielson concluded that the "acute upset" which occurred on September 25th had run its course. Danielson believed that Grievant misunderstood what Lucenti was asking of her in the evaluation which she received from him on September

25, 1991. He believed, from his own reading of Lucenti's evaluation, that Grievant had focused incorrectly on the evaluation. He suggested that Grievant and her supervisor discuss the situation further, indicating that the discrepancy in understanding of what needs to change in Grievant's job may be eliminated by further discussion between Grievant and her supervisor. Danielson concluded by indicating that he could not state at this point that Grievant was unfit for duty for emotional reasons (State's Exhibit 18).

28. Grievant returned to work on or about October 15, 1991, and met with Fowler. Fowler told Grievant there had been rumors in the facility that she had had an affair with Inmate Davis. Fowler told Grievant that the rumor had been investigated and found to be not true.

29. Davis had been scheduled to take a college admissions test during the time Grievant was on administrative leave. He had not taken the test during Grievant's absence because she had not been able to make the necessary arrangements for him.

30. Davis requested through the facility mail that Grievant meet with him, and Grievant did so on October 28, 1991. Davis had several questions with respect to college admissions that Grievant needed to research for him. On November 1, 1991, Grievant left a note for Davis answering his questions.

31. Grievant did not work on the following Monday and Tuesday. When she returned to work on Wednesday, November 6, 1991, she found a note from Davis. Grievant asked correctional

officer Charles Hatin, Unit Coordinator, if she could meet with Davis. Hatin told Grievant that Davis was on "DR" (disciplinary) status.

32. During this discussion with Hatin, Grievant asked Hatin if he had heard the rumors about Grievant and Davis. Hatin told Grievant he had not heard the rumors.

33. Grievant had a performance review with Fowler two days later, November 8, 1991. At this review Grievant discussed many on-going concerns she had as a teacher in the facility. Such concerns included, but were not limited to: Grievant's continued displeasure with actions Fowler had taken against her in August, 1990 and August, 1991 by sending Grievant home because of the clothes Grievant was wearing; Grievant's job assignment; Grievant's concern for safety in the building and lack of equity on the job site among teachers in NWSCF. Fowler recommended that Grievant discuss her safety concerns with Superintendent Arenz. Grievant sent Arenz a letter on November 15, 1991, and outlined these concerns.

34. Inmate Davis was also discussed at this November 8, 1991, meeting. Grievant asked Fowler if she could meet with Davis and another inmate. Fowler questioned why Grievant had to meet with Davis. Grievant explained she was assisting Davis with college applications.

35. Fowler told Grievant at the November 8, 1991, meeting that she would be issuing a written directive to all teachers who needed to meet with students in close custody. There had been such a directive in September, 1991, which changed the times

during which inmates in close custody could be met and the nature of the meetings. Grievant understood from the earlier memorandum and this meeting that she would have to talk with one of four staff members before she could meet with an inmate in close custody.

36. Fowler's memorandum, "Education for Close Custody Inmates", dated November 8, 1991, stated in pertinent part:

> With revised unit schedules/programs in place for close custody units, I think it is time to review priorities/procedures for working with close custody inmates.
>
> 1. No close custody inmate is to be provided services (including an interview) until the teacher has discussed the inmate with either Steve Andrews, Kevin Robtoy, Bob Bissonette or Chuck Hatin to ensure the inmate is behaving properly. This is for your safety. Even if you have worked with an inmate in the past in medium custody, this conversation must occur, as obviously there has been some behavior change that has put him in higher custody.
>
> 2. Your first priority is educational work with caseplan students, whether in medium or close custody...
>
> 3. Because of severe space constraints in D Unit, a room is available only from 1130 to 1230 hours, Monday through Friday...(State's Exhibit 1).

37. Davis left a note for Grievant on November 15, 1991, asking to meet with her.

38. Grievant asked Unit Coordinator Chuck Hatin on November 19, 1991, if she could see Davis. Grievant knew that Hatin was one of the four staff members with whom she would have to talk before she could meet with an inmate in close custody. Hatin told Grievant that Davis was on "DR" status, and that she could not see him because of his recent behavior. Davis had been acting inappropriately and had "trashed" his cell.

39. Grievant went to D Wing that same day and asked a temporary Corrections Officer who was in the office, Brian Reed, if she could see Davis. Reed told Grievant she could not see Davis.

40. Correctional Officer Riopel, who was temporarily filling in on D Wing, came into the office and Grievant asked him if she could see Davis. Riopel told Grievant he had not received authorization for Grievant to meet with Davis.

41. An entry on D Wing's log at 1139 on November 19, 1991, by Correctional Officer Myron Messick noted:

> Per Kevin Robtoy, Mary Jo Scott has no reason to meet with Tomal Davis or to give him anything, she is not his teacher. If for any reason they need to meet with each other, they must go through Dixie Fowler (Grievant's Exhibit 3).

42. On November 20, 1991, Grievant saw Unit Coordinator Charles Hatin in the cafeteria and again asked if she could meet with Davis. Hatin told her she could not see Davis. Grievant became insistent that she needed to see Davis because of some college courses. Due to Grievant's persistence, Hatin told Grievant she should check with Kevin Robtoy, Hatin's supervisor. Hatin did not give Grievant permission to meet with Davis.

43. Just before noon that same day, Grievant went to the D Wing office. Temporary officer Reed was in the office and Grievant asked him if she could see Davis. Reed told her no.

44. Correctional Officer Peter Machia, who was in charge of D Wing, then came into the office. Grievant asked Machia if she could see Davis. Machia told Grievant she could not see Davis. Grievant claimed that Hatin had given her permission to see Davis. An unsuccessful attempt was made to reach Hatin by telephone. Grievant insisted that Davis had a legal right to an

education and Machia argued that Davis' behavior did not warrant such a right. Grievant left the office without seeing Davis.

45. Hatin came into the D Wing office shortly after Grievant left. Machia asked him if he had given Grievant permission to see Davis. Hatin told him he had not given Grievant such permission. Machia told Hatin that Grievant had said that he had given her permission to see Davis.

46. Superintendent Arenz became aware of the incident through Fowler. He requested that Correctional Officer Honzinger conduct an investigation of the incident, and also investigate whether there was any evidence that Grievant and Davis had engaged in an improper relationship.

47. Machia wrote an incident report and set forth Grievant's actions with respect to her efforts to see Davis. Honzinger asked Machia to put the incidents in chronological order as they happened, and Machia wrote a second report. Machia's report was later put in affidavit form (State's Exhibit 6, 7).

48. Hatin wrote a report the next day, setting forth Grievant's efforts to see Davis on November 19th and 20th, as well as his understanding of what Grievant told Machia on November 20, 1991. Hatin's report was later put into affidavit form (State's Exhibit 2, 3).

49. Grievant worked on November 21, 1991, and saw Hatin at lunch. She complained to him about not being able to see Davis and having to go through Robtoy. She also told him she felt she was being harassed by Arenz, Fowler and Lucenti: by Arenz because

he had put her on leave and had required that she receive a psychological examination; by Fowler because she had complained about Grievant's clothes; and by Lucenti because of complaints regarding her teaching. At the end of the day, Fowler handed Grievant a letter from Arenz, which stated in pertinent part:

> This is to inform you that, effective immediately, you are being temporarily relieved from duty with pay pending an investigation into allegations of gross misconduct.
>
> It has been reported that you attempted to gain access to an inmate in D Unit by fabricating that you had authorization to do so. If true, this would be a serious breach of security as well as gross misconduct on your part.
>
> ...
>
> This action to place you on temporary relief from duty with pay is not disciplinary action, nor should it be construed as such (State's Exhibit 9).

50. As part of the investigation into Grievant's actions, Fowler wrote an affidavit, dated December 3, 1991. Such affidavit set forth her conversation with Grievant on November 8, 1991 (State's Exhibit 8).

51. Honzinger interviewed Machia, Hatin, Fowler, Davis and two other facility employees. He concluded that the relationship between Grievant and Davis was a professional relationship. He also concluded that Grievant had attempted to gain access to Davis by deceiving the officers in charge (State's Exhibit 12).

52. Arenz sent Grievant a letter, dated December 4, 1991, which stated in pertinent part:

> On November 21, 1991, you were suspended from duty with pay pending an investigation into allegations of gross misconduct.

> To reiterate, it was reported that you attempted to gain access to an inmate in D unit by fabricating that you had authorization to do so.
>
> The investigation in this matter has been concluded.
>
> As a result, I have cause to believe that the following Northwest State Correctional Facility Rules and Regulations have been violated:
>
> 1) Procedure 200, #2, "No employee shall disobey the direct and written order of a supervisor".
>
> 2) Procedure 200, #10, "No employee shall knowingly violate or fail to enforce any DOC Policy, NWSCF Rule or Regulation or any regulations governing inmates".
>
> A hearing to address the above potential violations has been set on your behalf for Tuesday, December 10, 1991, at 1400 hours (2:00 P.M.) at this facility. As the potential for disciplinary action does exist, you have the right to have VSEA or private counsel representation (State's Exhibit 10).

53. Arenz met with Grievant and her VSEA representative, Richard Lednicky. Grievant disputed that she had fabricated that she had authorization to see Davis. She said she had received approval. She also claimed she had not seen a copy of Fowler's November 8, 1991, memorandum. Arenz agreed to investigate further.

54. Arenz spoke with Hatin, who denied he had given Grievant permission. Arenz spoke with Fowler and a secretary regarding the distribution of Fowler's November 8, 1991 memorandum. He learned that a copy of the memorandum was placed in all the teachers' boxes with their names on it. A copy with Grievant's name on it was later found in her desk drawer.

55. Temporary Correctional Officer Reed, who had been in the D Wing office when Grievant claimed she had permission to see

Davis, wrote a report about the incident. This report was later put into affidavit form (State's Exhibit 4, 5).

56. Based upon his investigation, which included interviews, reports and affidavits of all individuals who had knowledge of the events of November 20, 1990, Arenz believed that Grievant had lied at the December 10, 1991 meeting. He sent her a Loudermill letter, dated December 24, 1991, which stated in pertinent part:

> As a result of your actions explained below, I am contemplating dismissing you from your position as a Correctional Instructor with the Vermont Department of Corrections. You have the right to respond to the specific reasons listed below.
>
> I have cause to believe that the following Northwest State Correctional Facility Rules and Regulations have been violated:
>
> 1) Procedure 200, #2, "No employee shall disobey the direct or written order of a supervisor".
>
> 2) Procedure 200, #10, "No employee shall knowingly violate or fail to enforce any DOC Policy, NWSCF Rule or Regulation or any regulations governing inmates."
>
> 3) I also have cause to believe that you provided me with false information during the course of your hearing on 12/10/91; to wit, you stated to me that you had never received the 11/08/91 memorandum from Assistant Superintendent Fowler...(State's Exhibit 14).

57. Arenz's letter further provided Grievant an opportunity to respond to the charges (State's Exhibit 14).

58. Arenz found Grievant's behavior bizarre and difficult to understand. He was reluctant to discipline Grievant at that time because of her recent behavior, but he questioned her fitness to work at the facility. He met with Grievant and her VSEA representative at various times in January, 1992.

59. Arenz attempted to negotiate a resolution without resorting to termination. VSEA was supportive of finding Grievant work in a less stressful environment.

60. A clinical psychologist who was treating Grievant at the time sent Arenz a letter dated February 7, 1992, at Grievant's request. The psychologist concluded that Grievant was "unable to effectively cope with the current level of work-related stress". The psychologist recommended that Grievant be transferred to a less stressful work environment (State's Exhibit 20).

61. Arenz, the Department of Personnel, Grievant and VSEA explored alternative worksites for Grievant but were not successful in locating a position for Grievant. They explored the possibility of a disability reduction in force ("RIF") under the provisions of Articles 38 and 66 of the collective bargaining agreement. On February 19, 1992, Arenz sent Grievant a letter notifying her that he was contemplating placing her on a disability RIF (State's Exhibit 21).

62. On or about February 25, 1992, Grievant replied to this letter and suggested it include language which indicated that her work-related stress was the result of changes at the facility "unlike that found in any other teaching position or form of state employment". In addition, Grievant suggested the letter also state that she was being separated "without prejudice" (State's Exhibit 22).

63. On February 28, 1992, Arenz sent Grievant a letter notifying her that she was being separated from her position, effective March 28, 1992, due to her medical inability to perform her required duties. His letter did not include Grievant's suggested changes (State's Exhibit 39).

64. At some point, Arenz discovered that the collective bargaining agreement did not provide for a RIF based upon mental disability. On March 9, 1992, he sent Grievant a letter which stated in pertinent part:

> Please be advised that my letter to you of February 28, 1992, was partially in error.
>
> You are NOT eligible for RIF reemployment rights. The nature of your particular illness does not qualify you for benefits of Article 38, Section 3.
>
> Your date of Separation remains unchanged at March 28, 1992. However, Article 39, under section N, states that "An employee who is unable to perform job duties because of an extended illness or disability...UPON REQUEST shall be granted a medical leave of absence for up to six months..." Under a Medical Leave of Absence the State would continue to fund it's share of your medical insurance...(State's Exhibit 40).

65. Arenz met with Steve Jansen, VSEA Director of Field Services, and it was agreed that Grievant would be granted a medical leave of absence. On March 18, 1992, Jansen sent a letter to John Murphy, Personnel Administrator, which stated in pertinent part:

> This is to confirm our understanding that Mary Jo Scott will be granted a three month medical leave (I would suggest that it commence March 23, 1992). At the conclusion of that leave the State reserves its right to have Ms. Scott's fitness for duty certified, pursuant to the provisions of the Sick Leave article of the contract. Any pending personnel action, discipline or grievance shall be held in abeyance until the conclusion of her leave...(State's Exhibit 23).

66. On or about June 4, 1992, Arenz received an unsolicited letter from a psychologist who had examined Grievant. The psychologist provided a brief, but positive, analysis of Grievant's ability to cope in her job (State's Exhibit 24).

67. Arenz did not know anything about the psychologist who had sent the June 4, 1992, letter and felt the letter was too brief to be of any value. Because the Employer had reserved its right to have Grievant's fitness for duty certified, Arenz requested that Grievant meet with Dr. Ursel Danielson for another psychiatric assessment (State's Exhibit 25).

68. Grievant met with Dr. Danielson on June 25 and 30, and July 14, 1992. On July 23, 1992, Dr. Danielson wrote a letter to Murphy and recommended that Grievant transfer to a less stressful work environment (State's Exhibit 27).

69. Because Danielson's letter did not specifically state that Grievant was certified to return to her position at the facility, Murphy contacted Danielson. On or about September 15, 1992, he sent a memorandum to Lucenti which stated in pertinent part:

> I was in communication with Dr. Danielson today regarding the specific question of Mary Jo Scott's fitness for duty. Dr. Danielson states that, although experiencing job related stress, there was no clear indication that she could not perform her job. Dr. Danielson felt that Ms. Scott appeared reasonable and that her judgment seemed appropriate.
>
> Given the above professional opinion I feel that Ms. Scott should be told to report for work as soon as a meeting can be scheduled to outline her performance objectives with her . . . (State's Exhibit 28).

70. Prior to Grievant's return to work, Arenz sent her a letter, dated September 24, 1992, notifying her that he was contemplating imposing discipline based on her actions on October 20, 1991. The discipline was contemplated at that time because VSEA had requested in March, 1992, that disciplinary action be held in in abeyance until the conclusion of Grievant's medical leave (see Finding No. 65). Arenz specified the same three alleged violations that he had in his December 24, 1991 Loudermill letter (see Finding No. 56). Arenz provided Grievant an opportunity to respond to the charges either orally or in writing (State's Exhibits 14, 23, 29).

71. Grievant, Jansen, and VSEA Representatives Gail Rushford met with Arenz on October 5, 1992. On October 9, 1992, Arenz notified Grievant that he was bypassing progressive discipline and imposing a one day suspension. The letter of *suspension provided in pertinent part as follows:*

> . . . (I)t is my belief that the following violations occurred:
> 1. Facility procedure 200, #2 - "No employee shall disobey the direct or written order of a supervisor.
>
> On 11/08/91, a memo from then Assistant Superintendent Dixie Fowler was received by you...As you will note, a process was given you and all teachers as to how inmates in close custody could be accessed. Based upon the written affidavits (copies attached) of staff involved, it is my belief that you attempted to circumvent an established process when you attempted to enter D Unit to see an inmate on 11/20/91.
>
> 2. Facility procedure 200, #10 - "No employee shall knowingly violate or fail to enforce any DOC Policy, NWSCF rule and regulation or any regulation governing inmates."
>
> The 11/08/91 memo clearly states a process. There is no doubt in my mind that you were aware of its existence but failed to comply.

3. During the course of our previous meeting of 12/10/91, you indicated that you had not received the 11/08/91 memo. The memo was subsequently found in your desk in the Silva Building . . . (State's Exhibit 30).

72. Grievant grieved the one day suspension.

73. In early 1993, Grievant continued to resist Lucenti's efforts to change her style of teaching to a classroom based system. She continued to compare her work schedule, classroom size and assignments to Clayton Harmon. She had still not developed an organized program of instruction. Lucenti concluded that Grievant appeared to be unable to translate his expectations of a classroom designed system into practice. She would demand specificity from Lucenti, then would complain that she was being singled out.

74. Grievant met with Lucenti and Harmon in January, 1993, and discussed her ongoing concerns. Lucenti summarized the meeting and his expectations of her work schedule. He prepared minutes of the meeting. Grievant later wrote a memorandum "correcting" the minutes of the meeting (Grievant's Exhibits 14, 16).

75. Grievant requested a meeting with Acting Superintendent Raymond Pillette and Area Manager Jackie Kotkin. During this meeting Grievant provided her perspective of her problems at NWSCF, starting in May, 1991 when she was given a new teaching assignment. Grievant displayed emotional outbursts during this meeting (Grievant's Exhibit 17).

76. Kotkin summarized the meeting in a memo to the file in which she made four general conclusions: Grievant was "holding on

to negative incidents dating back years"; that she is confused about the administration's instruction with respect to how she should interact with inmates and staff; that Grievant may not recognize boundaries with inmates; and that her emotional outbursts were out of proportion to the discussion (Grievant's Exhibit 17).

77. Grievant met again with Lucenti and reiterated her concerns about her teaching schedule and Harmon's teaching schedule and responsibilities, as well as other concerns. Each time Lucenti and Grievant met, Lucenti tried to respond and address each of Grievant's concerns, but Grievant left these meetings with a different understanding of what transpired and what Lucenti was trying to tell her. On March 3, 1993, he responded to her latest memorandum to him and again attempted to set forth his response to her concerns in writing (Grievant's Exhibit 18).

78. Lucenti believed Grievant needed to be taken out of the workforce for her own mental and physical well being. Lucenti determined he had no choice but to request that Grievant be placed on a relief from duty even though the consequences of removing Grievant from the workforce would cause the educational program fiscal problems by the loss of funding for the students enrolled in Grievant's classes.

79. Grievant was placed on relief from duty with pay in March, 1993. Grievant grieved this action. She remained out of work for three months.

80. Fowler left employment with NWSCF sometime after December, 1991.

OPINION

At issue is whether the Board should uphold the disciplinary action of a one day suspension taken against Grievant, filed as Docket No. 93-16. Also at issue is whether the Employer's placement of Grievant in a temporary relief from duty status (an action since rescinded by the Employer) reflected a pattern of harassment based upon her filing of grievances, filed as Docket No. 93-50. We will discuss the merits of the two grievances filed by Grievant in turn.

Docket No. 93-16

Grievant contends that the Employer violated Articles 14 and 15 of the Contract by suspending her for one day for her actions on November 20, 1991. Grievant claims that there was no just cause for discipline, and that the one day suspension imposed inappropriately bypassed progressive discipline.

Pursuant to the Contract, the Employer is to impose a procedure of progressive discipline for misconduct. The order of progressive discipline is as follows: (i) oral reprimand, (ii) written reprimand, (iii) suspension without pay, (iv) dismissal. Article 14, Section 1(c)(d). However, there are appropriate cases that may warrant the Employer bypassing progressive discipline. Article 14, Section 1(f)(i). Such disciplinary action may only be imposed for just cause. Article 14, Section 1.

To establish just cause for discipline, it is necessary for the Employer to show that disciplining the employee for certain conduct is reasonable, In re Grievance of Brooks, 135 Vt. 563 (1977); and that the employee had fair notice, express or

implied, that such conduct would be grounds for discharge or other discipline. In re Grievance of Yashko, 138 Vt. 364 (1980). Grievance of Colleran and Britt, 6 VLRB 235 (1983). Grievance of Roy, 13 VLRB 167, 182 (1990). Grievance of McCort, 16 VLRB 70, 104 (1993).

The Contract requires that a letter of suspension state the specific reasons for the Employer's action. Article 14, Section 8. In reviewing disciplinary action, the Board will not look beyond the reasons given by the employer in the disciplinary letter for the action taken; Grievance of Swainbank, 3 VLRB 34, 48 (1980); but will not turn disciplinary letters into dialectic exercises. Grievance of Erlanson, 5 VLRB 28 (1982). A letter which adequately puts an employee on notice of the misconduct will not be considered deficient. Erlanson, 5 VLRB at 39 (1982).

Keeping these standards in mind, we examine the suspension letter issued to Grievant. In support of the one day suspension, the Employer charged Grievant with three violations:

1) violating Facility Procedure 200, #2 (i.e.,"No employee shall disobey the direct or written order of a supervisor"), by violating the established process concerning how inmates in close custody could be accessed when she attempted to enter a unit to see an inmate on November 20, 1991;

2) violating Facility Procedure 200, #10 (i.e., "No employee shall knowingly violate or fail to enforce any DOC Policy, NWSCF rule or regulation or any regulation governing inmates") by being aware of the process concerning access to close custody inmates, but failing to comply with it; and

3) stating that she had not received a November 8, 1991, memorandum from Dixie Fowler detailing the established process, although it was subsequently found in her desk.

We cannot conclude that the Employer has met its burden by a preponderance of the evidence with respect to the third charge against Grievant, that she mislead the Employer about not receiving a copy of the November 8, 1991, memorandum. The Employer established that the memorandum was found in Grievant's desk sometime after a December, 1991, meeting among Superintendent Arenz, Grievant and her VSEA representative. However, the Employer did not establish that Grievant had seen the memorandum before she had allegedly violated its provisions on November 20, 1991.

However, the failure of the Employer to establish this charge is not of great significance under the circumstances. The remaining two charges against Grievant can be condensed into one charge: that she knowingly violated an established procedure with respect to attempting to gain access to inmates. Grievant does not dispute that she was on notice that there was a procedure in place at the time of the November 20, 1991, incident, when she attempted to gain access to an inmate in close custody, requiring that she gain permission from one of four staff members before she could meet with an inmate in close custody. Grievant was aware of this procedure because of a prior written directive which set forth this requirement, and because Fowler also had specifically told her that this was the procedure for teachers when she and Grievant met on November 8, 1991.

Although Grievant did not actually gain access to inmate Davis on November 20, 1991, she disobeyed this established facility procedure in seeking to see inmate Davis by telling officers in the close custody wing that she had the permission of one of the four applicable staff members, Chuck Hatin, to see Davis. Grievant was prevented from improperly gaining access to Davis only because the officers refused to act on her representations.

Grievant's failure to follow the procedure - established by the previous directive, past practice, and the required common sense dictated by a prison culture - could be characterized as disobeying an "order of a supervisor", as charged. Even assuming that Grievant's actions do not rise to that level, Grievant "attempted to circumvent an established process when [she] attempted to enter D unit to see an inmate on 11/20/91", as further charged in the letter of suspension. Although the letter of discipline could have been more artfully drafted on this point, we conclude that it adequately put Grievant on notice of the misconduct for which she was being disciplined - knowingly circumventing an established procedure in improperly attempting to gain access to an inmate in close custody.

In addition, the disciplinary letter charged that Grievant "knowingly" violated a "DOC Policy, NWSCF rule and regulation or any regulation governing inmates". We conclude that the process established for teachers to meet with inmates in close custody is properly considered a regulation governing inmates in that it limits close custody inmates' access to teachers. Again, even assuming that the process does not rise to the level of

constituting a regulation, we note that the disciplinary letter further states on this point that Grievant was aware of the existence of the established process, "but failed to comply" with it. Again, we conclude that the disciplinary letter adequately put Grievant on notice that she knowingly violated an established procedure in attempting to improperly gain access to an inmate in close custody.

In sum, we conclude that Grievant, as charged, knowingly violated an established procedure, in attempting to improperly gain access to an inmate in close custody. The letter of discipline was not deficient in putting Grievant on notice of the specific misconduct for which she was being disciplined with respect to the charges against her. The Employer has met its burden of establishing by a preponderance of the evidence these charges against Grievant.

The fact that one of the charges against Grievant has not been proven does not necessarily mean that the resulting discipline lacked just cause. Failure of the employer to prove all the particulars of a disciplinary letter does not require reversal of a disciplinary action; in such cases the Board must determine whether the remaining proven charges justify the penalty. Grievance of Regan, 8 VLRB 340, 366 (1985). Grievance of Ackerson, 16 VLRB 262, 272-274. Thus, we must determine whether the Employer acted with just cause in issuing a one day suspension based on the two proven charges.

We look to the factors articulated in Colleran and Britt, 6 VLRB at 268-269. The pertinent factors here are: 1) the seriousness of the offense, 2) the effect of the offense on the

employee's ability to perform her job at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties, and 3) the clarity with which the employee was on notice of the rules that were violated.

We first consider the seriousness of the offense. Grievant's improperly circumventing an established procedure to attempt to gain access to an inmate in a correctional facility is a serious offense. Such a procedures is important for the personal security of employees, as well as to enforce discipline of inmates. Such actions would understandably result in supervisors and colleagues losing confidence in Grievant's ability to carry out her duties as a correctional instructor. As discussed, Grievant had fair notice of the rules that were violated. We conclude that a one day suspension was commensurate with the offense, and bypassing progressive discipline was appropriate in this case. If anything, it could be said that the discipline imposed stretched the definition of leniency to an unusual degree.

We conclude that the Employer did not act unreasonably in suspending Grievant for one day, and such discipline was for just cause. Thus, we conclude the grievance filed as Docket No. 93-16 should be dismissed.

Docket No. 93-50

We next consider Docket No. 93-50. The Board granted the Employer's Motion to Dismiss with respect to Grievant's claim that there was no basis to place her on temporary relief from duty status. This was because the Employer has rescinded such

action and removed all references to it from Grievant's personnel file. This leaves the remaining issue before the Board as to whether the temporary relief from duty reflected a pattern of the Employer engaging in a pattern of harassment of Grievant because she filed grievances.

In determining whether action was taken against an employee for engaging in protected activities, the Board employs the analysis used by the U.S. Supreme Court and the National Labor Relations Board in such cases. Once the employee has demonstrated his or her conduct was protected, she or he must then show the conduct was a motivating factor in the decision to take action against the employee. Then, the burden shifts to the employer to show by a preponderance of the evidence it would have taken the same action even in the absence of the protected conduct. Mt.Healthy City School District Board of Education v. Doyle, 429 US 274 (1977). NLRB v. Transportation Management Corp., 462 U.S. 393 (1983). Wright Line, 251 NLRB No. 150 (1988). Grievance of Carbone, 16 VLRB 282, 300 (1993).

The first step in the analysis is to determine whether Grievant was engaged in a protected activity. Retaliation for having filed a grievance is protected under Article 5 of the Contract, which provides that an employee shall not be discriminated against for having exercised such rights.

The second step is that Grievant must show her protected conduct was a motivating factor in the Employer's actions. In Sypher, 5 VLRB 122, 131 (1982), the Board noted the guidelines it would follow in determining whether protected activity was a

motivating factor in an an employer's decision to take adverse action against an employee:

- whether the employer knew of the employee's protected activities;
- whether the timing of the adverse action was suspect;
- whether there was a climate of coercion;
- whether the employer gave as a reason for the decision a protected activity;
- whether an employer interrogated the employee about the protected activity;
- whether the employer discriminated between employees engaged in protected activities and employees not so engaged; and
- whether the employer warned the employee not to engage in protected activities.

Grievant alleges that, starting in 1990 when she complained to Superintendent Arenz about the release of an inmate who had threatened to rape her after he was released, the Employer engaged in a pattern of harassment against her, culminating in this grievance. Grievant's claims of harassment falls within three general categories: the Employer's failure to properly respond to her complaints about her safety while working in the Silva Building; her nonprofessional supervisor's complaints about her wearing inappropriate clothing to work; and her professional supervisor's criticism of her teaching.

We first note that Grievant has not presented evidence on any grievances which she filed, other than Docket No. 93-16, within the relevant time frame. This means that Grievant clearly has not established a link between the protected activity of filing grievances and alleged harassment against her with respect

to many of the claims which she has made. This is true with respect to all incidents occurring prior to Grievant filing a grievance with respect to the suspension imposed on her on October 9, 1992. Thus, Grievant has not even met the first step of the analysis with respect to claims on any occurrences predating the filing of the grievance over her suspension.

Even if we were to consider occurrences predating the filing of the grievance, all Grievant has established is that she often disagreed with actions of her superiors. She has not established that her expressed disagreement with management's actions has been a factor motivating management to take further actions against her.

The alleged harassment of which Grievant complains consists of a series of disagreements over the years between Grievant and her various supervisors. The Employer attempted to address Grievant's concerns over her safety in the Silva Building, but she remained dissatisfied with the speed and manner in which they acted. Grievant remained dissatisfied with her former nonprofessional supervisor's decision to send her home because of the clothes she was wearing August, 1990 and 1991, despite the fact that these events occurred years earlier and the supervisor is no longer at the facility. Similarly, Grievant continued to resist her professional supervisor's insistence that she move from a one-on-one one style of education to a classroom based system. This resistance included comparisons with other teachers, resistance to working in the Silva Building, and continuing to deliver one-on-one instruction to elective

students. In short, Grievant disagreed with management over various decisions made over the years, including but not limited to the above, but has not shown that management actions have been motivated in any way by Grievant's expressed disagreement.

In considering actions by management following the grievance filed by Grievant over her suspension in October, 1992, we find no differences in treatment of Grievant based on her grievance activity. The pattern established in the past simply continued. Grievant continued to disagree with actions of management, which actions were consistent with actions taken prior to Grievant filing the grievance over the suspension. The timing of the temporary relief from duty itself was not particularly suspect, occurring approximately five months after she grieved her suspension.

Also, Grievant has not established that management treated her differently from other employees. Instead, a more accurate reading of the evidence is that management was seeking to have Grievant perform, and act, in a way consistent with that expected of other employees. The fact that she disagreed with their attempts in this regard, and was unable to meet management expectations, does not reflect harassment of her for filing grievances.

In sum, Grievant has not established that the placement of her on a temporary relief from duty status, or any other action of management, was motivated by her protected grievance activity. Thus, we conclude that the grievance in Docket No. 93-50 should be dismissed.

## ORDER

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

1. The Grievances of Mary Jo Scott in Docket Nos. 93-16 and 93-50 are DISMISSED; and

2. The Grievance in Docket No. 93-50 is dismissed subject to the understanding that the Employer has rescinded the temporary relief from duty at issue in Docket 93-50 and removed all references to it from Grievant's personnel file.

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

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh, Chairman

/s/ Leslie G. Seaver
Leslie G. Seaver

Carroll P. Comstock