

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)
) DOCKET NO. 94-20
MICHAEL LAWRENCE)

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On May 2, 1994, the Vermont State Employees' Association, Inc. ("VSEA"), filed a grievance on behalf of Michael Lawrence ("Grievant"). The grievance alleged that the State of Vermont, Department of Corrections ("Employer"), violated the collective bargaining agreement between the State of Vermont and VSEA for the Corrections Unit, effective for the period July 1, 1992, to June 30, 1994 ("Contract"), by imposing a written reprimand and two day suspension on Grievant. Grievant alleges that the reprimand and suspension violated Article 14 of the Contract because there was no just cause for the actions, and the alleged deficiencies which gave rise to the reprimand and suspension were performance-related and not properly the subject of disciplinary action.

A hearing was conducted in the Labor Relations Board hearing room before Board Members Louis Toepfer, Acting Chairman; Catherine Frank and Carroll Comstock on November 3, 1994. Samuel Palmisano, VSEA Legal Counsel, represented Grievant. Michael Seibert, Assistant Attorney General, represented the Employer. At the hearing, the Employer moved to amend its answer to paragraph 9 of the grievance to allege that Grievant failed to timely grieve the letter of reprimand. The Board denied the motion as untimely filed.

Grievant filed Proposed Findings of Fact and Memorandum of Law on November 15, 1994. The Employer filed a Memorandum of Law on November 18, 1994.

FINDINGS OF FACT

1. Article 14 of the Contract provides in pertinent part:

1. No permanent or limited status employee covered by this agreement shall be disciplined without just cause. The parties jointly recognize the deterrent value of disciplinary action. Accordingly, the State will:
 - a. act promptly to impose discipline or corrective action within a reasonable time of the offense;
 - b. apply discipline or corrective action with a view toward uniformity or consistency;
 - c. impose a procedure of progressive discipline or progressive corrective action;
 - d. In misconduct cases, the order of progressive discipline shall be:
 - i. oral reprimand;
 - ii. written reprimand;
 - iii. suspension without pay;
 - iv. dismissal.
 - e. In performance cases, the order of progressive corrective action shall be as follows:
 - i. oral or written notice of performance deficiency; (not to be placed in an employee's personnel file except in compliance with the Performance Evaluation Article);
 - ii. written performance evaluation, special or annual, with a specified prescriptive period of remediation specified therein, normally 3 to 6 months;
 - iii. warning period of thirty (30) days to six (6) months, extendable for a period of up to six (6) months. Placement on warning status may take place during the prescriptive period if performance has not improved since the evaluation;
 - iv. dismissal.
 - f. The parties agree that there are appropriate cases that may warrant the State:
 - i. bypassing progressive discipline or corrective action . . .

2. Grievant has been employed by the Department of Corrections since 1977. He began as a Correctional Officer, and then was promoted to correctional facility supervisory positions. In 1989, Grievant became a Probation and Parole Officer in the Field

Services Unit of the Burlington District Office. He has remained in that position to the present.

3. At all times relevant, Grievant was supervised by Gail LeBlanc, Casework Supervisor in the Burlington Office. LeBlanc reported to Neil Christiansen, District Manager. Christiansen reported to Jacqueline Kotkin, Area Manager. Kotkin reported to Richard Turner, Director of Corrections Services. Turner reported to Commissioner John Gorczyk.

4. During his 17 years of employment with the Department of Corrections, Grievant has never received an overall unsatisfactory performance evaluation.

5. Grievant's duties as a Probation and Parole Officer involved supervising offenders. At all times relevant, Grievant had a caseload of 60-70 cases.

6. Among Grievant's duties were to prepare pre-sentence investigation ("PSI") reports. A PSI report is prepared pursuant to a court order after an individual is convicted of a crime. The purpose of the PSI report is to provide the sentencing Judge with sufficient background information on the defendant to make an appropriate sentencing decision. In preparing a PSI report, a Probation and Parole Officer interviews the defendant, the defendant's family members, and victim(s) of the defendant's crime; conducts research on the defendant's offense, criminal record, social history, and financial history; prepares findings; and makes a recommendation on an appropriate sentence and case plan (State's Exhibit 4, 5).

7. During his time as a Probation and Parole Officer, Grievant has prepared 8 - 10 PSI reports.

8. Pursuant to V.R.Cr.P 32(c)(3), PSI reports must be provided to the sentencing court at least fourteen days prior to the defendant's sentencing date. The Department of Corrections has issued a directive and a policy statement which set forth this 14 day requirement. A Probation and Parole Officer is instructed on this 14 day requirement during initial training after being hired. Probation and Parole Officers in the Burlington District Office are required to submit a completed PSI report to the casework supervisor for review and signature at least one day prior to the date the report needs to be provided to the sentencing court. Grievant was aware of these requirements at all times relevant (State's Exhibits 3 - 5).

9. Probation and Parole Officers generally are provided between four and six weeks from the date of assignment to complete a PSI report.

10. On June 21, 1993, LeBlanc assigned Grievant the responsibility to prepare a PSI report on David Racine. The case involved a second driving while intoxicated offense by Racine. The sentencing date for Racine was set for August 24, 1993. This meant that the PSI report had to be provided to the sentencing court by August 10, 1993, and that Grievant was required to provide the completed PSI report to LeBlanc for review and signature by August 10, 1993.

11. Upon receipt of the assignment of the Racine PSI report, Grievant mistakenly put an incorrect due date for the report in the

book which he keeps for noting appointments and deadlines. Grievant entered a due date for a date after the actual due date, but he does not know the specific due date for the Racine PSI report which he entered into his book.

12. Grievant did not complete the Racine PSI report in a timely manner, and did not complete it by the sentencing date of August 24, 1993. On August 24, the clerk of the sentencing court contacted LeBlanc and told her that the PSI report had not been filed and the sentencing hearing had to be cancelled. LeBlanc asked Grievant that day why the report had not been filed. Grievant told LeBlanc that the report had not been done and that he was not aware that he had missed the due date.

13. Grievant completed the PSI report and provided it to the sentencing court within a few days after August 24.

14. Grievant met with LeBlanc and Christiansen prior to September 7, 1993, regarding his late submission of the Racine report. LeBlanc and Christiansen advised Grievant of his right to VSEA representation at the meeting. Grievant declined VSEA representation.

15. By letter of September 7, 1993, LeBlanc and Christiansen informed Grievant that they were reprimanding him. The letter provided in pertinent part:

. . . (Y)ou failed to prepare a presentence investigation on David Racine; the presentence was due in Court on 8/10/93 . . (Y)ou, myself and the District Manager met and discussed your not preparing the Racine PSI.

At this meeting, you stated you didn't know why you didn't do it, it just didn't get done. As you know, of all of the duties of a probation and parole officer, the timely preparation of PSI's is foremost.

This letter is to serve as a reprimand for failure to perform a top priority function for the Court and the Department of Corrections. You should also be aware that any repeat of this behavior could lead to further discipline up to and including dismissal.

(State's Exhibit 2)

16. On October 13, 1993, the Vermont Parole Board approved Melvina Fletcher for parole, subject to acceptance for out-of-state supervision by the State of New York. Fletcher was a female inmate at the Chittenden Correctional Center. Grievant was assigned the responsibility to complete the necessary paperwork to request that New York accept out-of-state supervision of Fletcher. Grievant was assigned this task within a week of the Parole Board decision (State's Exhibit 6).

17. Prior to being assigned the Fletcher case, Grievant had not worked on an out-of-state transfer. Grievant eventually sought out co-workers for guidance on how to proceed. Grievant was not informed that there was a deadline for completion of the out-of-state transfer request. There were no written guidelines in the office with respect to the timeframe for completion of the necessary paperwork for out-of-state transfers. The general practice in the office was to complete such transfer requests within 15 days. The amount of time necessary for Grievant to spend on the out-of-state transfer request was less than half an hour.

18. In early December, Fletcher's caseworker asked LeBlanc about the status of the out-of-state transfer request. LeBlanc approached Grievant about this issue. Grievant informed LeBlanc that the necessary paperwork was "done". LeBlanc told Grievant to inform Fletcher of that fact. A few days later, Fletcher contacted LeBlanc

and told her that she did not believe Grievant's representation that the necessary paperwork had been completed. LeBlanc then approached Grievant again, and Grievant told her the paperwork was "in the typewriter". Grievant actually submitted the necessary paperwork on December 13, 1993.

19. On December 13, 1993, Area Manager Jacqueline Kotkin was approached by Fletcher as Kotkin was walking through the Chittenden Correctional Center. Fletcher indicated that she was upset because no action was taken on her case; that the necessary paperwork had not been submitted. Kotkin spoke with Grievant on December 14. She told him that Fletcher was claiming that the paperwork was 60 days overdue. Grievant responded that, while the paperwork had been completed late, it had been submitted and the delay was not as long as claimed by Fletcher.

20. During the period in which Grievant delayed in acting on the Fletcher transfer request, he was involved in preparing a PSI report on an individual who had been charged with cruelty to children. This PSI report consumed a substantial amount of Grievant's time; he still had ample time to complete the Fletcher transfer request.

21. On January 4, 1994, Grievant met with LeBlanc and Christiansen to discuss the Fletcher out-of-state transfer request. By letter of January 5, 1994, Christiansen informed Grievant that he was being suspended for two days in connection with that issue. The letter, which accurately summarized the January 4 meeting, provides:

On 1/4/94, Gail LeBlanc, myself and you met to talk about your not sending Melvina Fletcher's out of state request to live in New York. We met without your having VSEA present, because you waived those rights in

writing 12/16/93. What we found was that Ms. Fletcher was paroled to an approved plan October 17, 1993 and you didn't send the request until December 13. When we asked why you were so tardy, you responded by saying you 1) were working on a serious PSI and wanted to be sure to get that in on time, 2) weren't sure how to request the New York acceptance and 3) were having some family problems. When asked if you consulted your supervisor, Gail LeBlanc, on how to request out of state acceptance, you stated you didn't and you asked some coworkers instead. When asked if you needed the Employee Assistance Program for your family problems, you indicated you didn't need the referral, you were taking care of the problems and "things" were getting better. As far as working on the PSI, you are well aware that as a probation and parole officer we are often required to balance several duties at one time.

As a result of your inaction with Ms. Fletcher's paperwork to New York, this woman will be held in jail for at least 30 to 45 days more than she should be. The effect on her is completely unacceptable and certainly unprofessional. Your inaction in this also reflects poorly on the office and Department. As a probation and parole officer, you have to be ever mindful of your accountability to the Department, offender and public. You are a capable person and have demonstrated effective work in other areas.

Considering the profound impact on Ms. Fletcher and our need to help you understand your responsibilities as a Probation and Parole Officer, I have decided to suspend you for a period of 2 working days. For those days suspended, you will not be able to take annual leave. The dates of the suspension will be negotiated between you and your supervisor.

I have taken this action after careful consideration, and you need to understand that any repeat of this behavior can lead to further disciplinary action up to and including dismissal.

(State's Exhibit 10)

22. Fletcher was released from the Chittenden Correctional Center on February 7, 1994.

23. On May 16, 1994, Grievant received a performance evaluation covering the period April 2, 1993, to April 2, 1994.

Grievant received an overall performance rating of satisfactory. The issue involving Melvina Fletcher was mentioned in the evaluation as indicating Grievant's difficulty in balancing tasks. The issue involving the David Racine PSI report was not specifically mentioned in the evaluation (Grievant's Exhibit 2).

OPINION

Before addressing the merits, we need to discuss a preliminary issue raised by the Employer. The Employer requests that the Board reconsider the denial of the Employer's motion to amend its answer. The Employer moved to amend its answer to the grievance to allege that Grievant filed a grievance over the written reprimand in an untimely manner.

A review of the procedural history concerning the Employer's answer to the grievance resulted in the Board denying the Employer's motion, and leads us to reaffirm our denial. The Employer's answer was filed two and one-half months after service of the grievance, well after the requirement set forth in Section 18.4 of the Board Rules of Practice "to file an answer within 20 days after service of the grievance". In the tardy answer, the Employer admitted that "Grievant challenged . . . the September 7, 1993 (reprimand) . . . in a timely fashion through the contractually mandated grievance procedure". The Employer then waited until the day of the hearing before the Board to move to amend its answer, and offered no plausible explanation for the delay in making the motion.

Under these circumstances, granting the Employer's motion would have been prejudicial to Grievant's presentation of his case

and disruptive to the orderly and efficient processing of cases by the Board. We thus denied the motion at the hearing, and reaffirm our denial now.

We turn to addressing the merits. Grievant alleges that the written reprimand and two-day suspension imposed on him violated Article 14 of the Contract because: 1) the alleged deficiencies which gave rise to the reprimand and suspension were performance-related and not properly the subject of disciplinary action; and 2) even if the Board concludes that Grievant's deficiencies were properly the subject of disciplinary action, there was no just cause for the disciplinary action taken.

We first address Grievant's contention that the alleged deficiencies which gave rise to the reprimand and suspension were performance-related and not properly the subject of disciplinary action. Article 14 of the Contract distinguishes between the progressive sanctions that are available in misconduct cases and the progressive sanctions that are available in performance cases. From the language of the Contract and the fact that the sanctions in misconduct cases differ from the sanctions in performance cases, it is clear that the parties intended a distinction between misconduct and nonperformance. Grievance of Roy, 13 VLRB 167, 182 (1990). Thus, an employee's underlying actions or inactions must first be categorized as a question of misconduct or a question of performance. Id.

Grievant contends that misconduct can only occur if the employee intentionally or deliberately breaches his or her job

duties. Grievant reasons that, since he did not so breach his job duties, disciplining him was improper.

We disagree that misconduct can only occur if the employee intentionally or deliberately breaches his or her job duties. Negligence in carrying out job duties has been found by the Board in several cases to constitute misconduct justifying the imposition of disciplinary action. Grievance of Munsell, 11 VLRB 135 (1988). Grievance of Patterson, 5 VLRB 276 (1982). Grievance of Erlanson, 5 VLRB 28 (1982). Grievance of DeForge, 3 VLRB 204 (1980).

"Negligence" taken in its ordinary meaning connotes a failure to do what a reasonably prudent person in Grievant's circumstances would do to accomplish the job mission, and means both a failure to act as well as an affirmative act taken which adversely affects the functions of the agency. Munsell, 11 VLRB at 146. Indifference in carrying out duties can warrant a determination of negligence and imposition of disciplinary action. Erlanson, 5 VLRB at 39-41.

In applying these standards to the facts of this case, we conclude that Grievant engaged in misconduct through his negligence in carrying out job duties. The written reprimand which Grievant received resulted from his failure to timely complete a pre-sentence investigation (PSI) report on a convicted person to submit to the sentencing court, which caused the court to cancel the sentencing hearing. The facts before us demonstrate that Grievant failed to do what a reasonably prudent person in Grievant's circumstances would have done.

His only explanation for failure to timely file the PSI report

was that he placed some other due date, the specific date of which he is not aware, in the book which he keeps for noting deadlines. This is an unsatisfactory explanation to justify his failure to timely file the PSI report. Grievant was well aware of the deadline for submitting PSI reports. He had seven weeks to timely complete this report, and did not complete it until being reminded by his supervisor two weeks after the deadline that the report had not been submitted to the court. His inaction on completing the report over this nine week period strikes us as indicative of an employee who was indifferent to meeting deadlines.

A reasonably prudent person in Grievant's circumstances would have kept the deadline in mind during the relevant period, or at least had some system in place to ensure the deadline would not be missed. The fact that Grievant not only missed the deadline, but had to be made aware of it two weeks after the fact, leads us to conclude he did not place much significance on its importance. This indifference in meeting deadlines, which placed his employer in a difficult position with the sentencing court, demonstrates misconduct on Grievant's part.

The written suspension which Grievant received resulted from Grievant taking nearly two months to complete an out-of-state transfer request for a female inmate who had been approved for parole. Again, the facts before us indicate that Grievant failed to do what a reasonably prudent person under Grievant's circumstances would have done.

Important interests were at stake - i.e., the liberty

interests of an inmate - and the investment of time necessary by Grievant was minimal. He ultimately spent less than half an hour performing the necessary work to complete the transfer request. A reasonably prudent person in Grievant's circumstances would have completed the transfer request quickly so that the inmate would not be held at the correctional facility any longer than necessary. Grievant's delay of nearly two months in completing the transfer request demonstrated again his indifference to timely carrying out his duties. This was negligence on his part and constituted misconduct.

Thus, the Employer was justified in categorizing Grievant's deficiencies as misconduct, rather than performance deficiencies. Nonetheless, Grievant contends that just cause does not exist for the specific disciplinary actions imposed on Grievant.

To establish just cause for discipline, it is necessary for the Employer to show that disciplining the employee for certain conduct is reasonable; and that the employee had fair notice, express or implied, that such conduct would be grounds for discipline. In re Brooks, 135 Vt. 563 (1977). Grievance of Scott, 17 VLRB 46, 69 (1993). Grievance of McCort, 16 VLRB 70, 104 (1993). We look to the factors articulated in Grievance of Colleran and Britt, 6 VLRB 235, 268-69 (1983); to determine the legitimacy of the particular disciplinary action. The pertinent factors here are: 1) the nature and seriousness of the offense, and its relation to the employee's duties, including whether the offense was intentional or inadvertent; 2) the employee's past work record; 3) the effect of

the offense upon supervisors' confidence in the employee's ability to perform assigned duties; 4) the impact of the offense upon the reputation of the agency; 5) the clarity with which the employee was on notice that such conduct could lead to discipline; 6) mitigating circumstances surrounding the offense; and 7) the adequacy and effectiveness of alternative sanctions.

We first address the written reprimand of Grievant. The offense of not completing the PSI report in a timely manner was significant in that it resulted in the cancelling of a sentencing hearing. The fact that Grievant's offense was not intentional diminishes its seriousness to some extent, but Grievant did demonstrate an indifference to the importance of abiding by deadlines. Grievant's satisfactory work record is in his favor, but does not serve to completely exonerate him from being disciplined for his offense.

The offense had an adverse effect upon supervisors' confidence in Grievant carrying out his duties in a timely manner. It also would adversely impact the reputation of Grievant's office with the sentencing court. Grievant was well aware of the requirement that PSI reports be filed with the sentencing court 14 days before the sentencing hearing, and had at least implied notice that he could be disciplined for failure to do so.

In sum, Grievant's offense was of sufficient seriousness under the circumstances for the Employer to appropriately bypass the oral reprimand step of progressive discipline and impose the relatively minor penalty of a written reprimand. It was reasonable for the

Employer to conclude that a written reprimand was an appropriate penalty for the offense and that an oral reprimand would have been inadequate to sufficiently deter Grievant from missing such deadlines in the future.

We also conclude that just cause existed for the two day suspension of Grievant for his nearly two month delay in completing the transfer request for a female inmate who had been approved for parole. This was a serious offense in that it substantially delayed the release of the inmate, and Grievant could have avoided such delay by performing less than half an hour of work.

Grievant's offense further eroded supervisors' confidence that Grievant would carry out his duties in a timely manner. The offense also would not only have adversely affected the reputation of the Employer with the affected inmate, but also could harm the Employer's reputation with persons interested in prisoners' rights.

Grievant had at least implied fair notice that his inaction in this matter could result in discipline. The nature of his duties should have made it clear that he could be disciplined if he was responsible for inappropriately delaying the release of an inmate from the correctional facility. Grievant offers the fact that he was working on an involved PSI report as a mitigating circumstance to justify his delay in acting on the transfer request. Grievant cannot

plausibly claim that he could not have found the time in his schedule to work in the transfer request, given that it took him less than half an hour of work to complete the request.

The two day suspension imposed on Grievant was an appropriate discipline for Grievant's offense. A suspension was the logical next step on the heels of the written reprimand for again failing to carry out his duties in a timely manner. This is particularly so given the substantial adverse effect on the liberty interests of the inmate. Also, the pattern of Grievant acting indifferently to timely carrying out his duties lead the Employer reasonably to conclude that a lesser sanction would have been inadequate to deter Grievant in the future from such untimely action.

ORDER

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

Dated this 22nd day of December, 1994, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Louis A. Toepfer
Louis A. Toepfer, Acting Chairman

Catherine L. Frank
Catherine L. Frank

/s/ Carroll P. Comstock
Carroll P. Comstock