

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 95-11
WILLIAM PATTERSON)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On March 1, 1995, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of William Patterson ("Grievant"). Therein, Grievant 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 Bargaining Unit, effective July 1, 1994, to June 30, 1996 ("Contract"), by dismissing Grievant from his Correctional Officer II position at the Chittenden Correctional Facility. Grievant contended that his dismissal was not based in fact and was imposed without just cause in violation of Article 14 of the Contract, and that the Employer inappropriately bypassed progressive discipline in violation of Article 14 of the Contract.

The Employer did not file an answer to this grievance until July 21, 1995. On July 25, 1995, Grievant filed a Motion for Admission By Failure to Answer. Therein, Grievant requested that the Labor Relations Board deem that the Employer, by failing to file a timely answer to the grievance, admitted all material factual allegations contained in the grievance and waived an evidentiary hearing on the reasons for Grievant's dismissal. The Employer filed a response to Grievant's motion on August 9, 1995.

Hearings were held before Labor Relations Board Members Catherine Frank, Acting Chairperson; Leslie Seaver and Carroll Comstock on August 22, 1995, August 31, 1995, and September 11, 1995. Samuel Palmisano, VSEA Legal Counsel, represented Grievant. David Herlihy, Assistant Attorney General, represented the Employer. At the outset of the August 22 hearing, the Board granted Grievant's motion to the extent that all factual allegations contained in the grievance were deemed admitted, with the proviso that the letter of dismissal spoke for itself. The Board denied Grievant's motion to the extent that it requested that the Employer be deemed to have waived an evidentiary hearing on the merits of Grievant's dismissal.

The parties filed Proposed Findings Fact and Memoranda of Law on September 25, 1995.

FINDINGS OF FACT

1. The Contract provides in pertinent part as follows:

ARTICLE 14 DISCIPLINARY ACTION

1. No permanent . . . 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:

. . .

- c. impose a procedure of progressive discipline . . .
- d. In misconduct cases, the order of progressive discipline shall be:
 - I. oral reprimand;
 - ii. written reprimand;
 - iii. suspension without pay;
 - iv. dismissal.

. . .

f. The parties agree that there are appropriate cases that may warrant the State:

I. bypassing progressive discipline . . .

. . .

2. The appointing authority or authorized representative . . . may dismiss an employee for just cause . . .

ARTICLE 36 SICK LEAVE

. . .

2. POLICY

. . .

b. Use of sick leave

. . .

v. Unless physically unable to do so, an employee shall notify his or her supervisor or other person designated by the appointing authority no later than one hour prior to the beginning of the scheduled workday, of his or her inability to report to work and the nature of the illness.

vi. An appointing authority, or delegated representative, may require, when there is sufficient reason, the submission of a certificate from a physician or other evidence to: (1) justify the approval of sick leave; and (2) furnish evidence of good health and ability to perform work without risk to self, co-workers, or the public as a condition of returning to work. Whenever a doctor's certificate is required, as a condition for approval of sick leave usage, the time period for such requirement shall not normally exceed six months (unless specifically imposed for a lesser period of time), and may be extended for up to an additional six month period of time.

The State may require an employee to be examined by a physician designated by the employer, at State expense, for the purpose of determining the employee's fitness for duty.

. . .

3. RESPONSIBILITIES

- a. The employee shall
- iv. Obtain a doctor's certificate if requested by the supervisor.
- ...

ARTICLE 39

OFF PAYROLL AND ADMINISTRATIVE LEAVES OF ABSENCE

SECTION 1. POLICY

a. A leave of absence may only be granted to a classified employee who can be expected to return to work provided that, in the opinion of the Commissioner of Personnel upon advice of the appointing authority, the leave of absence is in the overall best interests of the employee and clearly not detrimental to the State of Vermont . . .

b. An administrative leave of absence may be granted:

...

5. (for) any other justifiable reason at the request of the employee and with the concurrence of the appointing authority and the Commissioner of Personnel.

...

f. All leaves of absence must be approved in advance and must be for a definite period of time with an established date for return to duty . . .

j. Off Payroll

1. A classified employee . . . may be granted time off the payroll for short periods when it is necessary to be absent from duty and the employee has no accumulated annual leave, personal leave, compensatory time off, or - in the case of a leave request for injury or illness - sick leave credits. Such off payroll time may not exceed a full pay period . . . If it is anticipated that an employee will be unable to work for more than a full pay period, a leave of absence may be granted as outlined in this Article.

2. A classified employee who does not report to work . . . and who does not have authorization for such absence shall be considered "absent without leave". Any such absence shall be without pay, and, in addition, may be grounds for disciplinary action . . .

n. An employee who is unable to perform job duties because of extended illness or disability (more than a full pay period), and who has exhausted all but 15 days sick leave, and who chooses not to use annual leave, personal leave or comp time balances, upon request shall be granted a medical leave of absence for up to six months, which may also be extended with the approval of the appointing authority . . .

SECTION 2. PROCEDURES

a. When a leave of absence or off payroll time can be anticipated in advance, the employee shall request such leave or time off as soon as possible.

b. The employee's request for leave shall include the reason for the absence and the anticipated period of absence.

. . .

2. Grievant was employed by the Employer for approximately 23 years, from 1972 until he was dismissed on January 27, 1995. He was employed as a correctional officer at the Chittenden Correctional Facility in South Burlington for many years prior to being dismissed.

3. From 1981 - 1990, Grievant overall performance evaluations always were satisfactory or above. Grievant did not receive any performance evaluations after 1990 (Grievant's Exhibits 7 - 7f).

4. During his employment, Grievant received several letters of commendation (Grievant's Exhibits 1 - 6).

5. On March 3, 1993, Interim Security and Operations Supervisor Gary Dillon informed Grievant that, as a result of 232 hours in which Grievant had been in an "off payroll" status, Grievant would be required to furnish a physician's certificate

for the approval of any paid or unpaid leave until September 1, 1993 (State's Exhibit 11).

6. On September 22, 1993, Security and Operations Supervisor Walter Mariani informed Grievant that, as a result of 352 hours in which Grievant had been in an "off payroll" status between April 24 and September 11, 1993, Grievant would be required to furnish a physician's certificate for the approval of any paid or unpaid leave until March 20, 1994 (State's Exhibit 10).

7. On February 16, 1994, then Chittenden Superintendent Stewart Robinson informed Grievant that he was suspended for two days. The suspension letter, which was placed in Grievant's personnel file, provided in pertinent part as follows:

We have found you in violation of Institutional Work Rule #11 (Most Serious) Violation of a reasonable and lawful written or verbal order of a supervisor. To wit, on January 17, 1994 you failed to report to work and further failed to call Supervisor Mariani or myself as ordered. Further you failed to report for the hearing of February 10, 1994 or communicate reasons for that failure . . .

Any repetition of this behavior will result in increased disciplinary action up to, and including, dismissal . . .

(State's Exhibit 14, p. 2)

8. On April 7, 1994, Superintendent Robinson sent Grievant a letter which provided in pertinent part as follows:

...

You will be required to furnish a Physician's Certificate, pursuant to Article 36 of the bargaining Agreement, for the approval of any future leave, paid or unpaid. This requirement will remain in effect until October 1, 1994.

You are to contact Chief of Security Mariani personally on those days that you are requesting approval of sick leave, paid or unpaid . . . You are not to call in sick to the third, second or first shift supervisor unless it is on a weekend or Mr. Mariani is unavailable.

On February 16, 1994, you were suspended for two days for failing to follow a directive similar to the one given above. The Department feels that progressive discipline short of dismissal has been used. Any future failure on your part to follow lawful directives will result in your dismissal from State service.

. . .

(State's Exhibit 9)

9. During the Fall of 1994, Grievant was assigned to work the first shift, from 7:30 a.m. to 3:30 p.m.

10. Between October 21, 1994, and October 31, 1994, Grievant called in sick for nine work shifts. Grievant had no leave balances of any type to cover the absences. On October 31, 1994, Grievant advised his Shift Supervisor Gary Dillon that he would not be into work so that his continuing health problems could be re-evaluated (State's Exhibit 7, Grievant's Exhibit 19).

11. In an October 31, 1994, memorandum, Chittenden Superintendent John Murphy cited Grievant's absences between October 21 and 31, 1994, and informed Grievant:

You do not have any leave, sick or otherwise, that will cover your absences to date. It is not possible to continue to carry you in an "Off Payroll" status. Consequently I am directing you to provide me with a diagnosis of your medical situation by the end of first shift, Monday, November 7, 1994. This diagnosis must be provided to me by a license (sic) medical professional. If that information cannot be made available by the above date please inform me by that date as to when I can expect this information.

You will be required to furnish a Physician's Certificate, pursuant to Article 36 of the Bargaining Agreement, for the approval of any future leave beyond November 7, 1994, paid or unpaid. This requirement will remain in effect until May 1, 1995.

You are **required** (emphasis in original) to contact Chief of Security Mariani personally on those days that you are requesting approval of sick leave, paid or unpaid, pursuant to Article 36, Section 3 . . . You are not to call in sick to the third, second, or first shift supervisor unless it is on a weekend or Mr. Mariani is unavailable.

On February 16, 1994, you were suspended for two days for failing to follow a directive similar to the one given above. The Department feels that progressive discipline short of dismissal has been used. Any future failure on your part to follow lawful directives will result in your dismissal from State service.

(State's Exhibit 7)

12. On October 25, 1994, Grievant had an appointment with a doctor at the Community Health Center in Burlington. Subsequent to the appointment, the doctor gave Grievant a doctor's note stating: "Bill Patterson was seen on 10/25/94 for bronchitis. Please excuse him from work 10/26 / 10/28". On November 2, 1994, Grievant again saw the doctor at the Community Health Center. On that date, the doctor gave Grievant a doctor's note stating: "Wm. Patterson was seen 11/2/94 for persistent bronchitis. Please excuse him from work 10/29 - 11/3/94." Grievant placed copies of these doctor's notes in Superintendent Murphy's mailbox at the Chittenden facility on November 7, 1994 (Grievant's Exhibit 11).

13. Grievant worked some days during November, 1994, but was continuously absent and off payroll during December 1994, and January 1995 until his dismissal (Grievant's Exhibit 34).

14. During November and December, 1994, Superintendent Murphy did not handle personnel matters at the Chittenden facility as a result of an investigation into an allegation made against Murphy that he had demonstrated bias against a correctional officer. Jacqueline Kotkin, Correctional Services Area Manager, took over the handling of personnel related matters in Murphy's absence. On November 14, 1994, Kotkin sent a letter to Grievant which provided in pertinent part as follows:

This letter is to inform you to report to Asst. Superintendent Joe Smyrski's office on Tuesday, November 22, 1994 at 1530 hours to meet with me to discuss the circumstances surrounding the allegation that you failed to follow a direct order outlined in the (October 31, 1994) memo from Superintendent Murphy. Specifically, you failed to provide Superintendent Murphy with a diagnosis of your medical situation by the end of first shift, on Monday, November 7, 1994 . . .

Since the result of our meeting may result in disciplinary action you may choose to be represented by a member of the Vermont State Employees' Association or private counsel . . .

(State's Exhibit 6)

15. On November 22, 1994, Grievant called the Chittenden facility an hour before the scheduled 3:30 p.m. meeting with Kotkin, and left a message that he would not attend the meeting because he was ill.

16. On November 29, 1994, Kotkin sent Grievant a letter rescheduling the meeting, which had been scheduled for November 22, to December 8, 1994, at 3:30 p.m. On December 8, 1994, Grievant called Kotkin and informed her that he would not be attending the meeting because he was ill (State's Exhibit 3).

17. Kotkin instructed Assistant Superintendent Joseph Smyrski to reschedule the meeting. Smyrski rescheduled the meeting for December 22, 1994. Richard Lednický, the VSEA Field Representative representing Grievant, came to the facility for the meeting, but Grievant did not appear.

18. On most occasions that Grievant did not work during November and December 1994, Grievant spoke to Mariani personally concerning his absence due to illness. There were three exceptions. On November 23, 1994, Grievant was scheduled to work the first shift. He did not work that day and failed to call the facility. On December 7, 1994, Grievant called in sick and left a message for Mariani. Mariani left a message at Grievant's home for Grievant to call Mariani, but Grievant did not return Mariani's call. On December 22, 1994, Grievant called the facility to report that he would not be working that day due to illness, but he talked with someone other than Mariani (State's Exhibits 4, 5; Grievant's Exhibit 34).

19. Sometime near the end of December 1994, Mariani told Grievant that he needed to obtain a doctor's certificate before he could return to work. After this conversation, Grievant generally failed to talk to Mariani personally concerning his absences from work, although he called the facility on occasion to report that he was not coming into work (Grievant's Exhibits 29 - 34).

20. Grievant's absences during the period November 1994 through January 1995 resulted from various physical problems, including bronchitis, back pain, and depression. In addition to the doctor's certificates which Grievant provided Murphy on November 7, 1994, Grievant provided doctor's certificates for four days of absence in the first half of November due to back pain. Grievant provided doctor's

certificates for only some of the days he was absent during this period, and the doctor's certificates for the period from the middle of November through January were not provided to the Employer until Grievant's pre-termination meeting on January 27, 1995 (Grievant's Exhibit 12 - 15).

21. On those days when Grievant called in sick, the shift supervisor for the shift previous to the shift Grievant was scheduled to work typically sought volunteers or required an employee working the previous shift to be held over to work the first four hours of Grievant's shift. An officer scheduled to work the shift following Grievant's shift typically would be required to report early if volunteers could not be found, and work the last four hours of Grievant's shift as well as the officer's regularly scheduled shift. Grievant's long-term absences created a significant morale problem among the employees who covered the shifts, and resulted in a substantial amount of overtime being worked by employees to cover Grievant's absences.

22. On the days that Grievant was absent, Chittenden management was required to have an employee replace Grievant because of mandatory staffing requirements. There was no excess coverage built into the system, and there were no excess correctional officer positions at the facility. If Grievant had applied for and been granted a leave of absence, Chittenden management could have hired an additional correctional officer on an interim basis to cover the period of Grievant's absence.

23. Grievant was aware of the availability of a medical leave of absence. He previously had applied for, and been granted, such leaves on two occasions. He

took one medical leave of absence from January to April, 1993. He took a second medical leave of absence for one month in late 1993 (Grievant's Exhibit 37, p.3).

24. Grievant filed a grievance concerning the inclusion in his personnel file of various documents, including: 1) the February 16, 1994, letter informing Grievant of his 2 day suspension, and 2) another February 16, 1994, letter, from Stewart Robinson informing Grievant that he would be considered to have voluntarily quit work if he failed to work on February 23, 1994, and did not have a pre-approved excused absence for that date. At a Step III grievance hearing held on January 11, 1995, Robinson agreed to the removal of the voluntary quit letter from Grievant's personnel file, but did not agree that the 2 day suspension should be rescinded. Subsequent to the Step III grievance hearing, the 2 day suspension letter was removed from Grievant's personnel file. This apparently was an administrative error, as no understanding had been reached that the suspension should be rescinded (Grievant's Exhibits 40 - 41; State's Exhibits 13, 14).

25. On January 23, 1995, Superintendent Murphy sent Grievant a letter which provided in pertinent part as follows:

As a result of your actions explained below, I am contemplating dismissing you from your position as a Correctional Officer II. You have a right to respond to the specific allegations listed below, either orally or in writing, before my decision is finalized. You have the right to representation during proceedings connected with this action by VSEA or by legal counsel.

The reasons your dismissal is contemplated are as follows:

You have been continuously absent from the work place without authorization since November 16, 1994. You have not complied with specific written directives you received by memorandum dated October 31, 1994, outlining your responsibilities related to future

absences from work. You were warned in that memorandum that failure to follow those directives would result in your dismissal.

First, you were ordered to provide me with a diagnosis of your medical situation by November 7, 1994, or to provide an explanation as to when that would be available. You have never done that.

Secondly, you were ordered to furnish a Physician's Certificate to justify approval for any future absences due to illness, whether paid or unpaid. The last such Certificate you provided explained your absences of November 13 & 14, 1994. You have been continuously absent from work for a full two months without providing a Physician's Certificate confirming that you could not work for medical reasons, as you were ordered to do.

Thirdly, you were ordered to contact Mr. Mariani personally (emphasis in original), no later than the first hour of when your shift began, on days you were requesting approval of a paid or unpaid absence for medical reasons. You were specifically ordered not to call other supervisors unless Mr. Mariani was unavailable or it was a weekend. Yet you have consistently failed to call Mr. Mariani personally with such requests as ordered, and instead have consistently called the facility at 6 a.m. knowing Mr. Mariani would not be there. You also failed to call in at all on November 23, 1994.

By letter dated November 14, 1994, Jacqueline Kotkin instructed you to attend a meeting November 22, 1994, to discuss your failure to comply with the October 31, 1994, directives. You called in an hour before that meeting to say you could not attend for medical reasons. You have never, however, provided a Physician's Certificate or other evidence confirming you were unable to attend for medical reasons.

A letter dated November 29, 1994, scheduled another meeting on December 8, 1994, for the same purpose. You again called and said you could not attend for medical reasons. You have never, however, provided a Physician's Certificate or the evidence confirming you were unable to attend for medical reasons.

A third attempt to meet with you was scheduled for December 19, 1994. You again called and failed to attend, and again failed to confirm your illness with a Physician's Certificate.

In summary, you have violated the directives you received in the October 31, 1994, letter. It was made clear that you had to comply with the terms of that letter to escape discipline for off-payroll

absences. As a result, you have been absent from work without approved leave for a period of two months. The circumstances in which you find yourself is only exacerbated by your failure to attend meetings scheduled to give you the chance to explain your actions.

These actions on your part appear to provide just cause for bypassing progressive discipline and for your dismissal.

You are required to notify me . . . of your intention to respond to this allegation and whether your response will be oral or in writing . . .

(State's Exhibit 2)

26. Grievant elected to respond to these allegations by meeting with Murphy. The meeting occurred on January 27, 1994. Grievant, Murphy and Lednický attended the meeting. At the meeting, Grievant provided Murphy with copies of those doctor's certificates which he had excusing his absences for some days from the second half of November 1994 through January 1995. These certificates covered a few days in the latter part of November due to bronchitis, and one day in late November due to vomiting and diarrhea. In addition, Grievant provided doctor's certificates from the Community Health Center dated December 1, 1994, December 31, 1994, and January 10, 1995, which indicated that Grievant was being treated for depression. Murphy was unaware that Grievant was being treated for depression until the January 27 meeting. Murphy was aware prior to this meeting of Grievant's bronchitis and back problems. Further, Grievant gave Murphy a copy of a letter which he had received from the Veterans Affairs Outreach Clinic, dated January 18, 1995, which indicated that Grievant had scheduled a January 23, 1995, appointment with a clinic doctor for an assessment (Grievant's Exhibits 12 -17).

27. Prior to dismissing Grievant, the Employer did not require Grievant to be examined by a physician designated by the Employer, at State expense, for the purpose of determining Grievant's fitness for duty in connection with his absences from October 1994 through January 1995.

28. On January 27, 1995, Murphy sent Grievant a letter informing him of his dismissal. The letter provided in pertinent part as follows:

After careful consideration of all the evidence presented to me, to include that which was given at your January 27, 1995, Loudermill hearing, I have decided to dismiss you from your position as a Correctional Officer II. Your dismissal is effective immediately.

The reason(s) that I have decided to dismiss you are contained in your Loudermill letter dated January 23, 1995, which is attached hereto and incorporated herein.

...

(State's Exhibit 1)

OPINION

Grievant contends that his dismissal was not based in fact and was imposed without just cause in violation of Article 14 of the Contract, and that the Employer inappropriately bypassed progressive discipline in violation of Article 14 of the Contract.

The ultimate criterion of just cause is whether an employer acted unreasonably in discharging an employee for misconduct. In re Grievance of Brooks, 135 Vt. 563, 568 (1977). There are two requisite elements which establish just cause for dismissal: 1) that it is reasonable to discharge an employee because of certain

conduct, and 2) the employee had fair notice, express or fairly implied, that such conduct would be grounds for discharge. Id. In re Grievance of Yashko, 138 Vt. 364 (1980).

In reviewing dismissals, our review does not go beyond the reasons given by the employer in the dismissal letter for the action taken. In re Grievance of Warren, (Unpublished Decision, Vt. Supreme Court Docket No. 83-640, August 22, 1986). Grievance of King, 13 VLRB 253, 282 (1990). We first decide whether the Employer has established the charges made against Grievant in the dismissal letter.

The Employer charged Grievant with failure to comply with directives to: 1) provide the facility superintendent with a diagnosis of his medical condition by November 7, 1994; 2) furnish a physician's certificate to justify approval of any future absences beyond November 7, 1994; and 3) contact the facility security and operations supervisor personally on those days Grievant was requesting approval of an absence for medical reasons. The Employer further charged Grievant with failing to attend three scheduled meetings to discuss his failure to comply with the directives, and not providing evidence confirming that he was unable to attend such meetings for medical reasons.

We conclude that the Employer has proven some of these charges by a preponderance of the evidence, and has not proven other charges. Ultimately, we conclude that the proven charges are sufficient to warrant Grievant's dismissal.

The charge of failing to provide the facility superintendent with a diagnosis of his medical condition by November 7, 1994, was not established. A diagnosis is an opinion concerning the "nature of a diseased condition by examination of the

symptoms" (Webster's New World Dictionary, 3rd College Ed., 1988). Grievant's placement of physician's certificates in Superintendent Murphy's mailbox on November 7, indicating that Grievant had been suffering from persistent bronchitis for the previous two weeks, met the requirement to provide a diagnosis of his medical condition. Although Grievant could have provided a more detailed diagnosis, and the Employer subsequently was justified in seeking more extensive information from Grievant on his medical condition, we conclude that Grievant's actions as of November 7 did not rise to the level of misconduct on his part.

The Employer did substantially establish, however, that Grievant failed to comply with the directive to furnish physician certificates to justify the approval of any future absences beyond November 7, 1994. Grievant furnished certificates for only some of his November absences after November 7, and furnished no physician certificates for his December 1994 and January 1995 absences in a timely manner. He did not provide physician certificates to justify any of his December and January absences until his pre-termination meeting on January 27, well after the absences actually occurred. Even then, the certificates were not sufficient to justify all of his absences. Grievant should have known by the October 31 memorandum from Superintendent Murphy that he needed to explicitly justify each and every one of his medical absences, and he fell well short of providing such justification.

The Employer substantially established the further charge that Grievant failed to comply with the directive to contact the facility security and operations supervisor personally on those days Grievant was requesting approval of an absence for medical reasons. The Employer charged Grievant with having "consistently failed to call Mr.

Mariani personally with such requests as ordered", and having "failed to call in at all on November 23, 1994". It is true that Grievant did not call in on November 23, 1994, and that he did not personally contact Security and Operations Supervisor Mariani on several occasions when he called in to report that he was not reporting to work due to illness. The Employer attempts to prove too much, though, by charging Grievant with consistent failure to personally contact Mariani. Nonetheless, Grievant failed on several occasions to personally contact Mariani, most frequently from early January 1995 until his dismissal, even though he was specifically directed to do so and such directive was never rescinded. This demonstrated misconduct on Grievant's part, although not to the extent charged.

Finally, the Employer substantially established the charge that Grievant failed to attend three scheduled meetings to discuss his not complying with the directives, or provide evidence confirming that he was unable to attend such meetings for medical reasons. Grievant provided some evidence that he was suffering from bronchitis around the time of the first scheduled meeting, and was being treated for depression during the general period of the second and third scheduled meetings. Such evidence was not provided in a timely manner, however, since it was provided one to two months after the scheduled meetings. Further, the evidence provided was of insufficient specificity to confirm that Grievant was unable to attend such meetings for medical reasons.

The fact that some of the charges against Grievant have not been proven does not mean that his dismissal lacked just cause. Failure of an employer to prove by a preponderance of the evidence all the particulars of a dismissal does not require

reversal of a dismissal action. King, 13 VLRB at 283. Grievance of Regan, 8 VLRB 340, 366 (1985). In such cases, the Board must determine whether the remaining proven charges justify the penalty. King, 13 VLRB at 283. Grievance of Colleran and Britt, 6 VLRB 235 (1983).

We look to the factors articulated in Colleran and Britt, 6 VLRB at 268-69, to determine whether the proven charges justify dismissal. The pertinent factors here are: 1) the nature and seriousness of the offenses, and their relation to the employee's duties and position, 2) the employee's past work record, 3) the employee's past disciplinary record, 4) the clarity with which the employee was on notice of the prohibited conduct, 5) the potential for Grievant's rehabilitation, and 6) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

Grievant's offenses were serious. Grievant's failure after November 7, 1994, to comply with the directives to timely and sufficiently justify his absences for medical reasons left the Employer in the position of being unable to plan adequate staff coverage on an extended basis. As a result of Grievant's absences, coverage was provided on a day to day basis, meaning that other correctional officers often had to work beyond the end of their shift, or were called in early, and thereby accumulated extensive overtime. This understandably had a significant adverse impact on employee morale and the operations of the facility.

Superintendent Murphy had cautioned Grievant in the October 31, 1994, memorandum that it was "not possible to continue to carry you in an 'off payroll' status". Grievant should have gotten the clear message that he needed to diligently justify his absences in a timely and thorough manner, or request a medical leave of

absence. He fell woefully short in this regard. He first provided physician's certificates on a sporadic basis, and then not at all for approximately two months. Grievant's shortcomings were exacerbated by failing to personally contact Mariani on several occasions, when he called into the facility to report that he was not coming to work, despite a clear directive from the superintendent to do so.

Further, when the Employer attempted on three occasions to set up a meeting with Grievant to discuss his continuing failure to justify his absences, Grievant did not attend the meetings, and his justification for not attending was untimely provided and insufficient. In sum, Grievant committed the serious ongoing offenses of failing to comply with the Employer's directives for no justifiable reason, with significant adverse impact on employee morale and the operations of the facility.

The seriousness of Grievant's offenses must be weighed against his past work record and past disciplinary record. He was a long-term employee, with approximately 23 years of service. His overall performance consistently had been rated satisfactory or above. This work record operates in Grievant's favor in determining whether it was reasonable to dismiss him.

Grievant was suspended for two days less than a year prior to his dismissal for misconduct similar to that leading to his dismissal. He was suspended for failing to comply with a directive to call his supervisors when he was not going to report to work, and for not attending a meeting and not communicating reasons for failing to attend the meeting. Grievant requests that the Board reconsider its decision to allow this suspension into evidence, and either reverse the ruling on the admissibility of the

suspension, preclude the employer from relying on the suspension, or give the existence of the suspension little weight.

We decline to reverse our ruling. Article 14, Section 6, of the Contract provides that “(n)o written warning or other derogatory material shall be used in any subsequent disciplinary proceeding . . . unless it has been placed in an employee’s official personnel file”. The evidence indicated that the suspension letter had been placed in Grievant’s personnel file, and no understanding was ever reached that the suspension should be rescinded. The evidence further indicated that the letter apparently was removed from Grievant’s personnel file by an administrative error . In allowing the suspension letter into evidence, the Board had a concern with respect to possible deficient notice to Grievant that the suspension letter would be relied upon by the Employer at the Board hearings. The Board thus offered Grievant the opportunity for a continuance of the hearing to present any evidence in this respect. Grievant declined the Board offer of a continuance, and the hearing concluded. Under these circumstances, we believe reasonable precautions have been taken to protect Grievant’s rights, and we conclude that the Employer may rely on the suspension to provide some support for the dismissal of Grievant.

The two day suspension is pertinent to Grievant’s dismissal on progressive discipline grounds. It demonstrates that the Employer used a lesser form of discipline prior to Grievant’s dismissal for misconduct by Grievant similar to the actions leading to his dismissal.

The suspension also is pertinent in providing clear notice to Grievant that he could be dismissed for the conduct for which he ultimately was dismissed. In the

suspension letter itself, he was warned that “(a)ny repetition of this behavior will result in increased disciplinary action up to, and including, dismissal”. In two subsequent letters from superintendents prior to his dismissal, one on April 7, 1994 and the other on October 31, 1994, Grievant was required on an ongoing basis to furnish physician’s certificates for medical absences, and contact Security and Operations Supervisor Mariani when not reporting to work. In both letters, Grievant was provided notice that the Employer considered his two day suspension to mean that “progressive discipline short of dismissal has been used”, and that “(a)ny future failure on your part to follow lawful directives will result in your dismissal from State service”.

The remaining Colleran and Britt factors to examine to determine whether the proven charges against Grievant justify his dismissal are the potential for Grievant's rehabilitation, and the adequacy and effectiveness of alternative sanctions. Grievant has not demonstrated a strong potential for rehabilitation. He exhibited a pattern over a lengthy period of time of not taking seriously his obligations to comply with management directives to timely and sufficiently justify his medical absences. The evidence before us does not suggest that Grievant recognizes his failings in this regard to the extent that he would correct them in the future.

We also conclude that the Employer reasonably concluded that alternative sanctions would be neither adequate nor effective. Grievant persisted in not complying with management directives to timely and sufficiently justify his medical absences even after being suspended for such behavior. Also, we question the effectiveness of even a lengthy suspension under circumstances where Grievant

already was off payroll due to having exhausted all of his leave balances. Further, a lengthy suspension would have done nothing to alleviate a serious staffing problem at the facility caused by Grievant's extended absences.

On balance, we conclude that the Employer acted reasonably in dismissing Grievant. We recognize that Grievant was dealing with significant medical problems, primarily bronchitis and a bout with depression in the period immediately preceding his dismissal. We also are mindful that approximately 23 years of satisfactory service preceded Grievant's difficulties. Nonetheless, Grievant did not present evidence justifying the persistent disregard of obligations and failure to comply with management directives which he displayed. It is unfortunate that the employment of a long-term employee such as Grievant was terminated, but Grievant's actions justified his dismissal.

ORDER

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

Dated this 30th day of November, 1995, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Catherine L. Frank

Catherine L. Frank, Chairperson

/s/ Leslie G. Seaver

Leslie G. Seaver

/s/ Carroll P. Comstock

Carroll P. Comstock