VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 79-44S
RICHARD HARRISON	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of the Case:

On June 18, 1979, the Vermont State Employees' Association (hereinafter VSEA) filed a petition with the Vermont Labor Relations Board (hereinafter "Board") on behalf of State employee Richard Harrison, a Correctional Officer at the Chittenden Community Correctional Center and a member of the Non-Management Unit. In that petition, the VSEA contends Richard Harrison (hereinafter "Grievant") was terminated for illegitimate reasons, racial discrimination and union activity, in violation of Articles IV and XII (Section 7) of the Non-Management agreement.

The State filed its answer to the Grievant's allegations on June 28, 1979, denying that the Grievant was dismissed, contending the termination instead constituted a removal from State employment because of Grievant's absence without leave. The State further denied the allegations of race discrimination.

Hearings on this matter were held before Board members Kimberly B. Cheney, William G. Kemsley, Sr., and Robert H. Brown on September 6, 1979, and September 27, 1979. Representing the Grievant was Michael R. Zimmerman, counsel for VSEA, while Assistant Attorney General Bennett E. Greene represented the State.

Requests for findings of fact and conclusions of law were filed by the parties on October 16, 1979.

FINDINGS OF FACT

1. From August 22, 1976, to May 21, 1979, Grievant was an employee of the State of Vermont, working as a correctional officer at the Chittenden Community Correctional Center at Burlington, Vermont. After completion of his probationary period in 1978, he became a "permanent" status employee.

2. Grievant is a black man and the only black employee at the Chittenden Community Correctional Center.

3. At all times relevant herein, Grievant was a member of the Non-Management Unit of the Vermont State Employees' Association, Inc., and was governed by the Agreement Between the State of Vermont and the Vermont State Employees' Association for the Non-Management Unit in effect from July 5, 1976 to June 30, 1979 (hereinafter referred to as "the contract").

4. From the time Grievant began employment at the Chittenden Community Correctional Center until sometime between July 1977 and December 1977, the superintendent of that facility was Richard L. Bashaw. Superintendent Bashaw's successor was N. George Africa, III, who continues to occupy that position.

5. On July 13, 1977, Grievant was awarded the Employee of the Month Award by Superintendent Bashaw.

6. Work as a correctional officer at the Chittenden Community Correctional Center is not easy. Many of the residents are volatile and prone to violence. In addition to that constant underlying threat, there is the inevitable "us versus them" feeling that develops among correctional officers on the one hand, and residents on the other. Correctional officers find some degree of relief from the constant pressure of their jobs in jocular comments, including occasional comments by one correctional officer to another

about ethnic or racial origins, or perceived characteristics about such ethnic or racial groups. During the period of his employment at the Chittenden Community Correctional Center, Grievant on occasion engaged in such jocular exchanges, both by making comments about other correctional officers' ethnic characteristics, and in being the subject of such comments from other correctional officers.

7. When Grievant was first employed at the Chittenden Community Correctional Center, Grievant and fellow correctional officer MacArt developed a social relationship which involved frequent contacts during non-duty hours. This relationship necessarily carried over to contacts between Grievant and Mr. MacArt during duty hours. While the relationship between Grievant and Mr. MacArt had this characteristic, the jocular comments of Mr. MacArt concerning Grievant's race were received by Grievant in the spirit of jocularity. Such comments were made in private under circumstances such that residents were not able to overhear.

8. Correctional officers at the Chittendent Community Correctional Center were not armed and did not wear uniforms. They did, however, wear name tags. It was customary for inmates (or "residents", as they were called) to address correctional officers by the names on their name tags.

9. Residents were subject to internal disciplinary rules. A violation of those rules was grounds for issuance of a Disciplinary Report (commonly referred to as "D.R.") by the correctional officer who observed such a violation. Procedurally, once a "D.R." was issued by a correctional officer, a "D.R." Board, consisting of other correctional officers, sat in order to consider whether or not some form of discipline would be imposed on the resident charged in the "D.R."

10. On December 26, 1977, a white resident, whose last name was

Bricker, addressed the Grievant as "boy", rather than by his correct surname. "Boy" is a racially derogatory form of address when used by white people in addressing blacks. Resident Bricker's use of the term "boy" in addressing Grievant was interpreted by Grievant as an insult.

11. Grievant called Bricker's attention to his (Grievant's) name tag, and suggested to Bricker that the proper form of address by a resident to a correctional officer was his (the correctional officer's) last name, as indicated on the name tag. Resident Bricker persisted in calling Grievant "boy", and Grievant again instructed resident Bricker to address him (Grievant) by the name on his (Grievant's) name tag. Resident Bricker, for a third time, addressed Grievant as "boy". Grievant then made an angry suggestion the Grievant would rearrange his (Bricker's) anatomy if he (Bricker) persisted in addressing Grievant by anything but his name. As a result of that incident, Grievant issued a "D.R." to resident Bricker. The ultimate result of that incident was that resident Bricker's "D.R." was not approved, but Grievant was verbally reprimanded for his conduct in connection with the incident.

12. Grievant believed this action was racially motivated, but "brushed off" this one incident and continued to work regularly at the Chittenden Community Correctional Center.

13. Grievant believed the respect and esteem he had previously enjoyed from his employer in the persons of Mr. MacArt and Mr. Africa changed after July 22, 1978, when the relationships with these individuals began to deteriorate.

14. On July 22, 1978, Grievant, while in an off-duty status and in a public bar, was assaulted by a knife-wielding former resident of the Chittenden Community Correctional Center. In the course of the assault,

Grievant, in order to protect himself, used a broken bottle as a weapon, thereby injuring one of his attackers.

15. Shortly prior to July 22, 1978, MacArt was promoted and became Grievant's supervisor.

16. After learning of the July 22, 1978, incident, Superintendent Africa, by letter dated July 25, 1978, relieved Grievant from duty, with pay, for thirty (30) days, in order that he could determine the propriety of Grievant's conduct during the July 22nd incident.

17. On August 3, 1978, Grievant was given a citation to appear in Vermont District Court and answer a charge of Reckless Endangerment as a result of the July 22, 1978, incident. The citation included a notice of Grievant's required appearance in court on August 21, 1978, for entry of a plea to the charge.

18. After learning of the citation, Superintendent Africa, by letter dated August 8, 1978, suspended Grievant from duty, without pay, effective August 9, 1978.

19. As a result of the suspension action against him, Grievant timely filed a Step II grievance. As a result of that grievance, Grievant was notified, by letter dated October 27, 1978, from the Commissioner of the Department of Corrections, that Superintendent Africa's decision to suspend Grievant without pay had been reversed, and that, as a result of that reversal, Grievant's status was changed to "relieved from duty". The ultimate result of that decision was that on August 9, 1978, and thereafter, Grievant continued in a "relieved from duty" status, in which he had initially been placed by Superintendent Africa on July 25, 1978, and was paid for that period.

20. The criminal charge of Reckless Endangerment against Grievant

was dismissed by the court on the motion of the State's Attorney.

21. Grievant believed the bar-room incident with the broken bottle invoked racial stereotypes of black behavior in his white superiors and changed their attitude towards him from esteem to disrespect.

22. Between MacArt's promotion and May 4, 1979, the social relationship between him and Grievant deteriorated until they ceased to see each other socially.

23. Gradually, after July 22, 1978, the ethnic jokes became less amusing to Grievant and less effective in sustaining a feeling of comradery among correctional officers. The Grievant found the jokes insulting.

24. On October 11, 1978, Grievant worked the third shift at the Correctional Center, the hours of which shift are from 11:00 p.m. to 7:00 a.m.

25. On October 12, 1978, during the normal working hours of the Vermont Attorney General's Office in Montpelier, Grievant visited that office for the purpose of making a complaint to the Civil Rights Division. The substance of that complaint was Grievant's belief that he (Grievant) was being discriminated against at work because of his race. Grievant had never before in his lifetime made such a complaint.

26. Grievant had been scheduled to work the third shift on October 12, 1978. Prior to the time he was to report for duty, Grievant telephoned the Chittenden Community Correctional Center and advised that he was too tired to work that night.

27. Grievant did not work the third shift, or any shift, on October 12, 1978.

28. As a result of his absence from work on October 12, 1978, Grievant received, by letter dated October 16, 1978, an official reprimand.

29. By mid-November 1978, Superintendent Africa knew that Grievant had made such a race discrimination complaint with the Attorney General's office. It is also clear that, having learned of Grievant's complaint, Superintendent Africa took no steps whatever to investigate, either formally or informally, into the cause of Grievant's complaint. Superintendent Africa testified that the reasons for his inaction in this regard were twofold: (1) he did not consider there to be race discrimination against Grievant at Chittenden Community Correctional Center; and (2) had he (Superintendent Africa) taken any steps, such as discussing with Grievant the reasons for the complaint, he (Superintendent Africa) would be accused of trying to influence Grievant to forego the pursuit of his (Grievant's) complaint.

30. On January 31, 1979, Grievant disputed his assignment (to the Special Adjustment Unit) with Supervisor James MacArt. He claimed he was given more of that undesirable duty than whites because he was black. At that time and within hearing of others, Grievant said to MacArt, "Oh fuck you MacArt; this is bullshit and you know it." Grievant also repeated these offensive words several times and said he wished he could have MacArt outside for five minutes. Grievant was a semi-pro boxer, and he knew that MacArt was aware of that fact.

31. By letter of February 1, 1979, (State's 1) Grievant was reprimanded and warned about his conduct. In that letter, Supervisor Bessette informed Grievant that he had researched the staff assignment records of the Special Adjustment Unit and had determined that Grievant had worked in that unit seven (7) times during the period of December 2, 1978, through January 31, 1979. Five (5) other correctional officers on Grievant's shift had worked that same duty ten (10) to thirteen (13) times that same period.

32. The Board finds as a fact the status of Grievant's absences, contained in the letter of May 1, 1979, written to Grievant by Robert Bessette and before the Board as State's 2.

33. On May 4, 1979, Grievant was working in the Special Adjustment Unit of the Chittenden Community Correctional Center. That unit was reserved for the most unruly residents, and was, from the standpoint of the residents, the worst unit in which to be placed.

34. One of the residents of the Special Adjustment Unit on May 4, 1979, was Mr. Lapen, who had a reputation among correctional officers as a defiant troublemaker. Grievant, on that date, issued two (2) D.R.'s" to resident Lapen, one of which was for disrespect (ie., calling Grievant a "fat black nigger"). Grievant, in accordance with established procedure, delivered the "D.R.'s" he had issued to resident Lapen to his supervisor, Mr. MacArt.

35. Thereafter, on that same date and during the same shift, Grievant was coming out of the Special Adjustment Unit, and Supervisor MacArt was coming down a corridor in the opposite direction. At that time, Supervisor MacArt shouted out to Grievant, "You can't give him a D.R. for calling you a 'fat black nigger.' You are a fat black nigger." The loudness of the remark of Supervisor MacArt, the proximity of other people in the area, and the acoustics of the area combined to make it likely that this comment was heard by residents in the area.

36. The comment which Supervisor MacArt addressed to Grievant on May 4, 1979, was perceived by Grievant as an insult, and as an attempt to undermine his authority over the residents of the Correctional Center. The comment caused Grievant to be upset.

37. Grievant was scheduled to work the first (1st) shift (ie., from 7:30 a.m. to 3:30 p.m.) on May 5, 1979, and on May 6, 1979. In the early

morning of May 5, 1979, at about 4:00 a.m., Grievant telephoned his supervisor, Mr. Finnigan, and told him (Finnigan) that he (Grievant) would not be in for work on either May 5, 1979, or May 6, 1979. Even though the subject of the cause for this failure of Grievant to report for work did not arise during the telephone conversation between Grievant and Supervisor Finnigan, Grievant reported feeling ill primarily because of the inhospitable racial climate at work, and that was the reason for Grievant's telephonic notification to Supervisor Finnigan.

38. Grievant did not request or obtain permission to be absent on May 5 and 6, 1979, nor did he obtain a physician's certificate indicating he was ill on those days.

39. On May 9, 1979, his first scheduled workday after May 6, 1979, Grievant reported for work. He went to the office in order to fill out a sick leave request for his absences on May 5 and 6, 1979. While Grievant was doing so, Superintendent Africa entered the room in which Grievant was located. Superintendent Africa remarked that Grievant needn't bother to complete a sick leave request, since he (Grievant) was not going to be paid for the days of absence. Grievant was given a letter (Grievant's 12) dated May 9, 1979, from Superintendent Africa, which letter advised Grievant that he was placed in an off-payroll status for the absences on May 5th and 6th, and that recurrence of absences such as this would lead to progressive disciplinary action.

40. Later that day, Grievant told Supervisor MacArt that he (Grievant) had resolved to go to the Civil Rights Division of the Attorney General's office the following day, May 10, 1979. Grievant was, as a result of what had transpired that day, upset and angry.

41. On May 10, 1979, Grievant was scheduled to work at the Correctional Center from 7:30 a.m. to 3:30 p.m. At that time, he did not appear for work.

42. Grievant did call at 3:30 p.m. on May 10, 1979, after the conclusion of his scheduled shift, and told Supervisor Bessette that he wouldn't be in to work on May 10, and would return to work on May 14, 1979.

43. No employee of the Department of Corrections gave Grievant permission to take time off until May 14, 1979.

44. For his unauthorized absences from work on May 10, 11, 12 and 13, 1979, Grievant was taken "off payroll" for those days and suspended for two more workdays, May 17 and May 18, 1979.

45. Notice of that action was given to Grievant by letter of Superintendent Africa dated May 14, 1979, and before the Board as Grievant's #13.

46. The said letter also refers to disrespect to other staff members on May 10, 1979.

47. On that date, Grievant refused to go to Superintendent Africa's office when so requested by his supervisor.

48. Also on that date, Grievant was handed a copy of the item before the Board as Grievant's #12, by Supervisor MacArt.

49. Grievant refused to read the letter. He used loud and abusive language directed against his supervisors and the superintendent.

50. Grievant was scheduled to return to work, after the suspension referenced in Grievant's #13, on May 19, 1979, and was so notified in Grievant's #13.

51. On May 18, 1979, Grievant telephoned the Chittenden Community Correctional Center, and advised that he would not report for work until after the "fact-finding" meeting on May 25, 1979, which meeting had been

previously arranged by the Civil Rights Division of the Attorney General's office in connection with Grievant's race discrimination complaint.

52. Grievant did not work on May 19, May 20, or May 21, 1979.

53. Grievant did not receive permission to be absent on May 19, 20, and 21, 1979.

54. The experience of Superintendent Africa was that when a correctional officer was absent for two or more days without first obtaining leave or giving notice, that correctional officer never returned to work at the Correctional Center.

55. On May 19 or 20, 1979, Supervisor MacArt saw Grievant driving in a direction away from the Correctional Center.

56. At that time MacArt pulled his motorcycle up alongside Grievant, approximately fifteen feet away, and called to him.

57. Grievant looked straight at MacArt, then turned away and drove off without response.

58. Based upon Grievant's past history of absenteeism, his unauthorized absence of May 19, 20, and 21, 1979, the past experience of Africa with correctional officers who were AWOL for two or more days, and the report of MacArt related in Findings 55 - 57, Superintendent Africa concluded that Grievant did not intend to return to work.

59. Grievant was separated from his position by letter dated May 21, 1979, from Superintendent Africa, wherein the nature of Grievant's termination was designated as "removal", rather than "dismissal".

60. For the period May 21, 1979, to July 9, 1979, Grievant was unemployed.

61. From July 9, 1979, to (at least) the first hearing date of this grievance (ie., September 6, 1979), Grievant was employed by a private

employer as a security guard. Grievant's take-home pay for the period July 9, 1979 to August 29, 1979 was $757.27, higher than his previous pay.

62. During his employment as a correctional officer, Grievant filed, with the assistance of the Vermont State Employees' Association, the following grievances:

(A) A Step II grievance as a result of Grievant's suspension without pay in August 1978 (see Finding 18 above);

(B) A Step II and Step III grievance in connection with his off-payroll status on May 5th and 6th, 1979;

(C) A Step II and Step III grievance in connection with the action taken by Superintendent Africa by his letter dated May 14, 1979;

(D) A grievance, at an unspecified time, in conjunction with two other employees, which grievance concerned an issue of overtime pay;

(E) This grievance.

63. Grievant failed to report for work on October 12, 1978, May 5, 6, 10, 11, 12, 13, 17, and 18, 1979 because he found the racial jokes prevalent at the center so insulting and harrassing he was unable to work.

64. Grievant failed to report for work from May 11 until May 25 because he hoped the Civil Rights fact-finding session would reduce racial tension and enable him to return to work thereafter.

OPINION

This grievance raises two major issues: first, can the State terminate a permanent status employee from State service using the Rules and Regulations for Personnel Administration by an action designated as "removal", thereby avoiding the grievance machinery of the contract including this appeal; and second, if not, was the Grievant dismissed for just cause, absenteeism and insubordination, or was the discharge motivated by discrimination based on race and union activity.

I. Removal

It is uncontroverted that the Grievant was absent from work for several days before he was "removed" from State service under Personnel Rule 2.038 Separation, which provides:

> 2.038 SEPARATION is the termination of an employee from employment by the State through resignation, removal, dismissal, retirement, or layoff.
>
> 2.0381 DISMISSAL is an involuntary separation of an employee other than by layoff, retirement or removal.
>
> 2.0382 LAYOFF is an involuntary separation from a position of an employee whose service record has been adequate or better either by reason of a reduction of force due to lack of work or lack of funds, or by reason of discontinuance of the position as previously established.
>
> 2.0383 REMOVAL is the separation of an employee from a position for failure to report to duty.
>
> 2.0384 RESIGNATION is a separation of an employee from the State service by his own voluntary act.
>
> 2.0385 RETIREMENT is the separation of an employee from the State service in accordance with the provisions of the Vermont Employees' Retirement System or other retirement systems under which an employee is eligible to receive retirement benefits.

The State maintains the collective bargaining agreement's exclusion of "removal" in the definition of "dismissal" by inference distinguishes the term from "dismissal" and is an independent means of separation. Moreover, the State argues the failure of the VSEA to negotiate over the "removal" procedure, and to include it in the contract, constitutes an acceptance of the State's position. Consequently, we are urged to hold that the rights of a "dismissed" person (i.e. notice or 2 weeks pay in lieu of notice, the right to appeal) are not available to a "removed" person. Essentially, the State's position rests on the notion that a "failure to report to duty" is such a gross violation of the employment relationship that its occurrence works a forfeiture of all employee rights.

The VSEA, on the other hand, argues there is only one method of separating a permanent employee involuntarily: the contracted for procedures under a "just cause" standard. Such a conclusion, VSEA contends, is consistent with our Court's characterization of Vermont's public employment system as one "premised on dismissal for cause", In re Maher 132 Vt. 560, 563, 326 A.2d 142, 144 (1974), and its interpretation of a contractual "just cause" clause as serving "to remove from the employer the right to fire arbitrarily his employees", In re Brooks 135 Vt. 563, 568, 382 A.2d 204, 207 (1977).

We disagree with both parties. In our opinion the concept of "removal" contemplates an employee's acquiescence to separation from State service, primarily because it is the employee who initiates the severing of the employment relationship by his failure or election not to report to work. Under these circumstances the appointing authority is required to make a decision based on his experience with similar unaccounted for employee

absences in the past. This decision calls for a subjective judgment on the part of the appointing authority as to the likelihood of the absent employee's return to work. If in the estimation of the appointing authority, the employee's return is unlikely, "removal" is not only proper but probably necessary to the efficient operation of any particular State agency or department. In a "removal", an employee has implicitly consented to separation by his election not to report to work (without authorized leave) and, in turn, the State responds by officially terminating that employee, upon the recommendation of the appointing authority.

However, should the affected employee, after receiving notice of the "removal", dispute the State's action, the separation becomes involuntary. The crucial element to "removal", implied consent, vanishes with a timely appeal under the grievance procedures of the contract. The termination, once it is involuntary, becomes a "dismissal", with all of its concommitant rights to due process (except some aspects of notice, see infra).

This case, is perhaps, the perfect example of a claimed, legally excused, absence from work. Thus, we decline to hold that a mere "failure to report for duty" gives the State cause to dispense with any further procedures and avoid questions in any other place concerning the propriety of its action.

We find the Grievant did not acquiesce in his separation, and consequently, the action grieved is a "dismissal". As such, the Grievant is entitled to an appeal before this Board under Article XI of the contract, Dismissal. Moreover, under the facts of this case, the Grievant's claim of discrimination alleges other contractual and statutory violations. Specificially, the Grievant's discrimination claim states a grievance under

Article IV of the contract, an unfair labor practice under 3 V.S.A. §961(3) and (6), an alleged unfair employment practice under 21 V.S.A. §465, and is appealable to this Board pursuant to 3 V.S.A. §926.

II. Notice of "Removal"

We are urged by VSEA to find the letter notifying the Grievant of his "removal" is fatally defective because it did not give the Grievant sufficient notice of his appellate rights. (See Grievant's Exhibit #14) This defect, VSEA claims, is sufficient cause for a full backpay and return to work order.

Paragraph 1, Article XI, of the contract provides for the required contents of a dismissal letter and states in pertinent part:

> "In the dismissal notice, the appointing authority shall state the reason(s) for dismissal and inform the employee of his right to appeal the dismissal at Step IV before the State Labor Relations Board..."

Here the State notified the Grievant of his "removal" and informed him that he had no right to appeal, but if he had been "dismissed" he could appeal that action to the Board. The notice here did not attempt to mislead the Grievant and did convey the essential facts constituting his rights. The Grievant believed he was "dismissed" and appealed here thereby perfecting his rights. Accordingly, we find no fatal lack of due process in this notice.

However, having held in Part I of this opinion that "removal" is a viable option available to the State under certain circumstances and conditions, we are required to comment on the sufficiency of "removal" notices should they later become "dismissal" notices, as is the case here.

We presume the clock starts running on the appeal process for "removals" when the employee is given actual notice, or when the State places in the

mail to the employee's last given address written notice of the action taken. The type of mail most likely to be received by the employee with evidence of receipt should be used. And, if that notice of "removal" informs the affected employee of his status and available appellate rights, we would find it met the conditions of the contract.

Assuming future "removal" notices comply with these general standards, as did the notice in this case, the employee's rights to due process are adequately protected.

III. Cause for Dismissal

The Grievant alleges the reasons for his failure to report for duty and consequent dismissal were caused by his race, and to a lesser extent, union activity. Evidence of the race discrimination charge, the Grievant asserts, largely consists of a climate of racial hostility which existed at the Correctional Center which was tolerated by the Superintendent and encouraged by some supervisors. It is important to note that the Grievant does not claim he was fired soley because he was black, that is, that the Superintendent deliberately took this action because of his prejudice against blacks. Rather, he claims that the Employer's insensitivity to the experience of being black in this country was so great that a climate of hostility existed which made working painful and deeply disturbing to the Grievant, a situation ultimately causing him to absent himself from work until conditions could be improved. That climate was created and manifested the Grievant says by constant use of ethnic jokes, and the Employer was insensitive to their adverse impact on minority group members.

The Employer claims otherwise and maintains the jocularity was appreciated by all. We are asked to find for example that a supervisor's remark

to a slightly obese black man, where others could overhear, that "You can't him a D(isciplinary) R(eport) for calling you a fat black nigger, because you are a fat black nigger," was meant to be a joke. But, as this case clearly demonstrates, race is no joking matter. We find it hard to accept that such a statement could ever be funny even in the face of evidence that the Grievant once considered some racial references to be so.

In our view of the law, however, we need not be judges of mirth. We think a pattern of racial jokes existing in the workplace, whether or not anyone thinks them funny, is itself a violation of Article IV of the contract which provides:

> "There shall be no discrimination against any employee because of race, color, religion, creed, ancestry, sex, age, national origin, or membership in the Association."

In reviewing the racial discrimination issue in this case, we think it appropriate to look to employment discrimination law. Included in Title VII of the Civil Rights Act of 1964 as an unlawful employment practice is discrimination against any individual with respect to his "conditions of employment" because of his race. (§703(a)(1) of the C.R.A. of 1964)

The authorities are unanimous in holding the employer to an affirmative duty to maintain a non-discriminatory place of employment. Arthur Larson discusses "employment atmosphere" as a "condition of employment" stating:

> "the employer has a responsibility to provide a work environment free of racial harassment, ridicule, or disrespect... (T)his forbids such conduct as the practice of supervisors calling black employees 'Niggers' [EEOC Decision 72-0779, 4 FEP 317(1971], of the employers' tolerating ethnic jokes [EEOC Decision 72-0957 4 FEP 837, (1972)], and of employers' requiring that black employees be addressed in less respectful terms than whites [EEOC Decision 71-32, 2 FEP 866 (1970)]." Employment Discrimination, Vol. 3 Race, §84. at 17-1, 17-2.

The Equal Employment Opportunity Commission has ruled that this responsibility of maintaining a working environment free of racial harassment and intimidation includes the obligation of an employer, once he is aware of this kind of humor, to take affirmative action. Schlei and Grossman's treatise of Employment Discrimination Law, addresses this responsibility and states:

> "The EEOC has long found a violation of Title VII where members of management have addressed black employees in inherently derogatory terms. In fact, the Commission has ruled that an employer is responsible for maintaining a 'working environment free of racial intimidation', and that the requirement includes positive action where positive action is necessary to redress or eliminate employee intimidation. This principle has been extended by the Commission to include employee jokes." (footnotes omitted) Schlei and Grossman, supra at 236, 237.

We think the contract between the parties requires the same result.

We are mindful of the State's position that Grievant was dismissed ("removed") for continual unauthorized absences, abuse of sick and annual leave, and insubordination. This behavior, we acknowledge, is highly incompatible with the degree of reliability required of correctional officers. In fact, the State contends, so wholly unreliable was the Grievant prior to his separation, that either his failure to report to duty, chronic absenteeism or insubordinate confrontations alone would have been reason enough to dismiss him for gross neglect of duty without notice or pay in lieu of notice. We acknowledge, too, that these facts have substantial support in the evidence.

Our difficulty, however, is in determining the cause of this behavior. Was it a reaction to the pain and humiliation of discriminatory treatment, or was race simply an excuse used by Grievant to defend indefensible

conduct? Although not entirely free from doubt, we conclude that the preponderance of the evidence shows Grievant's behavior was caused by discrimination. We have given Grievant the benefit of the doubt because places of employment where ethnic "jokes" and other discriminatory treatment exist should not be tolerated. Once Superintendent Africa became aware of the practice of ethnic jokes, let alone Grievant's distress and sensitivity as evidenced by his complaint with the Attorney General's office, we believe he was legally deficient in not taking any action to investigate and prohibit the practice. We can only speculate, but suggest had these practices been investigated and addressed at an earlier point in time, this action may have been prevented. The facts as they are, however, evidence a toleration of a racially hostile working atmosphere that came to be significantly responsible for the rapid deterioration of a once exemplary employee.

IV. Union Activity

The Grievant also charged that his discharge was motivated by his union activity, for as VSEA points out, "he was no stranger to the grievance procedure". (VSEA Brief at 22). Pointing to Grievant's "successful" grievance of October, 1978, in which he prevailed over Superintendent Africa's suspension without pay, combined with Grievant's October 12, 1978, filing of the race discrimination complaint with the Attorney General's office, VSEA suggests the Grievant may have been viewed as a "troublemaker to be gotten rid of". While such a conclusion may appear reasonable from the Grievant's experience, there is insufficient evidence on record of any discrimination or harassment for pursuing grievances.

V. Remedy

Our task now is to determine the appropriate remedy in this case. In the past, we have stated that our authority in this regard is analogous to that of an arbitrator. See Grievance of James Harrison, 2 VLRB 171, 183 (1979), where we suggested:

> "The arbitrator must also be left free to decide more than which party is right or which party is wrong. Having found a contract violation, he must fashion a remedial order to bring the parties' actions in conformity with the contract and make reparation for past infringements."

In "fashioning" a remedy in this case, we look for guidance to the relief available to aggrieved employees under our Fair Employment Practice statute, 21 V.S.A. §495(d), which states in pertinent part:

> "...the superior courts may order restitution of wages or other benefits on behalf of an employee and may order reinstatement and other appropriate relief on behalf of an employee."

We look also to the power vested in this Board to prevent unfair labor practices under 3 V.S.A. §965, where we may issue an order for an employer "to take such affirmative action as will carry out the policies of this chapter."

The Supreme Court, in reviewing standards a federal district court should follow in awarding backpay, has commented on its purpose in effecting the policies of Title VII. In Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975), the Court characterized the purpose of remedial orders for Title VII violations as "prophylactic". Backpay, viewed in this manner, not only serves to eliminate the discriminatory effects of the past but may deter like discrimination in the future. In its review, the Court held backpay should be used to make persons whole for injuries suffered on account of unlawful employment discrimination. Furthermore, the prospect of a backpay award provides a "catalyst" for employer self-examination and evaluation of their employment practices. Under this scrutiny, the Court suggests, an employer will try to eliminate any practices suspect of unlawful discrimination.

While we found in Part III of this opinion that the employer here was at fault in failing to take immediate affirmative action upon learning of the practices complained of by Grievant, we note that testimony revealed Superintendent Africa's inaction was advised by other members of the Department of Corrections and more importantly, the Department of Personnel. We are sufficiently concerned at this dangerously insensitive position so as to invoke the "catalyst" purpose in the remedial order of this case which we hope will serve as a "prophylactic" measure against giving or taking such advice in the future. Although there is no evidence here as to whether the Employer consulted with the Civil Rights Division of the Attorney General's office, we suspect they would have been cited to the same cases and principles set forth in this opinion which affirm the Employer's duty to take positive action.

We conclude backpay is an appropriate remedy here.

ORDER

For all the foregoing reasons, it is hereby ORDERED that the grievance of Richard Harrison be allowed, and that Richard Harrison be paid at the rate effective at the time of his dismissal for the days he would normally have worked between May 21, 1979 to July 9, 1979, Grievant's period of unemployment.

Dated this 7th day of December, 1979 at Montpelier, Vermont.

Appealed to Sup. Ct.
Remanded by Sup. Ct.
Settled by stip

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

/s/ William G. Kemsley, Sr.
William G. Kemsley, Sr.

Robert H. Brown
Robert H. Brown