

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 98-16
BRENT SOUCIER)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

Through materials filed on February 20 and 27, and March 9, 1998, Attorney Norman R. Blais filed a grievance on behalf of Brent Soucier ("Grievant") against the State of Vermont, Agency of Human Services, Department of Corrections ("Employer"). Grievant alleged that the Employer violated Article 14 of the collective bargaining agreement between the State of Vermont and the Vermont State Employees' Association for the Corrections Bargaining Unit, effective for the period July 1, 1997 to June 30, 1999 ("Contract"), by dismissing him without just cause.

A hearing was held on August 20, 1998, in the Vermont Labor Relations Board hearing room in Montpelier before Board Members Richard Park, Acting Chairperson; Leslie Seaver and John Zampieri. Special Assistant Attorney General George Gay represented the Employer. Attorney Norman Blais represented Grievant.

Grievant filed a post-hearing brief on August 31, 1998. The Employer filed a brief on September 3, 1998.

FINDINGS OF FACT

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

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:

- (1) oral reprimand;
- (2) written reprimand;
- (3) suspension without pay;
- (4) dismissal.

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

(1) bypassing progressive discipline ...

2. The appointing authority or authorized representative ... may dismiss an employee for just cause with two weeks notice or two weeks pay in lieu of notice ...

2. Department of Corrections Work Rules #9 and #10 provide:

9. No employee, whether on or off duty, shall comport himself in a manner that reflects discredit upon the Department.

10. No employee, whether on or off duty, shall violate any law or ordinance. Any conduct constituting a felony or misdemeanor can be the basis for disciplinary action whether or not prosecution or conviction results. A formal adjudication of felonious or misdemeanor behavior is not necessary before a decision to discipline is made.

3. Grievant began working as a temporary correctional officer in the Northwest State Correctional Facility ("NWSCF") in March 1995. He certified on May 12, 1995, that he had read and understood the Department of Corrections Work Rules. Grievant passed his probationary period and became a permanent full time correctional officer in the Fall of 1996 (State's Exhibit 2).

4. On November 6, 1996, Grievant was involved in an off-duty altercation with two other correctional officers in a bar in St. Albans. NWSCF superintendent Stephen Maranville investigated the incident and interviewed all three officers. He determined that Grievant was the aggressor in the incident and gave Grievant a written reprimand on November 12, 1996, for his actions. In the written

reprimand, Maranville stated in pertinent part:

After review of the facts as I know them, it is my decision that you receive a written reprimand for this incident. As you recall during the meeting, your attention was drawn to Department Work Rule 9 and 10. I find the behavior without excuse and sincerely hope that it does not occur again.

I want to be very clear that if similar type behavior occurs again, you could be subject to additional discipline, up to and including dismissal . . . (State's Exhibit 4).

5. Approximately 85 officers are involved in the direct supervision of 242 inmates lodged in NWSCEF. Many inmates are incarcerated at NWSCEF because they had been convicted of violent crimes.

6. It is not uncommon for inmates to taunt and deride the officers who are supervising them. It also is not uncommon for inmates to occasionally assault the officers supervising them. In April 1997, Grievant was assaulted by an inmate and hospitalized and treated for his injuries. Despite his injuries, Grievant was able to restrain the inmate without using excessive force.

7. On or about August 6, 1997, Grievant's shift supervisor gave him a "positive feedback" memorandum for the professionalism and team work he displayed during an August 4, 1997, incident in which he successfully removed unruly inmates from an activity room (Grievant's Exhibit 1).

8. Grievant received an overall "satisfactory" annual performance evaluation for the period September 21, 1996 to September 21, 1997 (Grievant's Exhibit 2).

9. During the Fall of 1997, Grievant and Tammy Hatterrick were involved in a romantic relationship. Just prior to the incident which gave rise to this

action, they had agreed to take a break from their relationship.

10. On Friday evening, October 17, 1997, Grievant visited several drinking establishments with another correctional officer, David Bovat. Grievant saw Hatterick at one of the establishments, Sha Booms. Hatterick attempted to talk to Grievant about their relationship and Grievant suggested that they discuss it at some other time and at some other place. Later that evening, Derek Tetrault gave Hatterick, Samantha Young and Young's boyfriend a ride home to Hatterick's mobile home, where they all spent the night. After leaving Sha Booms that evening, Grievant and Bovat went to other drinking establishments.

11. At approximately 3:00 a.m. on October 18, 1997, Grievant called Hatterick at her home to see if she would give him a ride home. During this conversation, Hatterick mistakenly called Grievant "Derek". Shortly thereafter, Hatterick, Young and Young's boyfriend picked up Grievant and took him to his home. Hatterick, Young and Young's boyfriend then returned to Hatterick's home.

12. Grievant was drunk. He also was angry and jealous because Hatterick had called him "Derek". He decided to go to Hatterick's home. He put on a coat which had a gun in its pocket. The clip was not in the gun, but the clip was in the pocket of his jacket. Grievant drove to Hatterick's home.

13. Young and Hatterick were in the living room of Hatterick's home when Grievant charged into the living room, asking where Tetrault was. He stormed into Hatterick's bedroom where Tetrault was lying on Hatterick's bed. Grievant was enraged that Tetrault was on Hatterick's bed. Grievant grabbed Tetrault and struggled with him, demanding to know what was going on between him and Hatterick.

Tetrault ended up on the floor. Grievant had his gun in his hand. Grievant knew the gun was not loaded. Neither Tetrault nor Hatterick knew that Grievant's gun was not loaded and were terrified for their lives. Grievant pounced on top of Tetrault and pressed the gun into his head so hard that it caused his ear to bleed. Tetrault thought Grievant was going to kill him. Hatterick attempted to pull Grievant off from Tetrault and, in the ensuing struggle, Grievant forced Hatterick against the wall and pointed the gun at her. Hatterick yelled for Young to call the police. Grievant stormed out of the house, breaking the glass door as he left.

14. Grievant drove around in his car for some time and eventually drove to Bovat's house. Bovat was not at his home and Grievant left the gun and clip in Bovat's outdoor cooking grill. He later spoke to Bovat and told him what he had done and where he had left the gun.

15. Grievant attempted to contact Hatterick several times by telephone that morning. At one point, Grievant asked Hatterick if she would ask Tetrault not to press charges. Grievant also asked her if she would leave out any mention of a gun when she talked to the police.

16. Grievant was arrested later that same day. Grievant's hands were lacerated from the broken glass of Hatterick's door.

17. The police apprised Maranville of the arrest. Maranville requested that Grievant be lodged at the Chittenden Regional Correctional Facility instead of NWSCF due to concerns of adverse effects on Grievant, other staff and the reputation of NWSCF if Grievant was lodged at the same facility in which he worked. Grievant was lodged at the Chittenden facility (State's Exhibit 6B).

18. On October 20, 1997, Grievant was arraigned and charged with two counts of simple assault against Tetrault and two counts of domestic assault against Hatterick. He was released under certain conditions (State's Exhibit 7).

19. The next day, October 21, 1997, the Burlington Free Press printed a detailed story about the incident and Grievant's subsequent arrest and arraignment (State's Exhibit 8).

20. On or about October 21, 1997, Maranville relieved Grievant from duty with pay for his conduct on October 18, 1997, pending an investigation of the matter. Maranville informed Grievant by letter dated December 2, 1997, that his relief from duty with pay was being extended due to the ongoing investigation (State's Exhibits 9, 12, 13).

21. On or about January 29, 1998, Maranville sent Grievant a Loudermill letter advising him that he was considering dismissing him from his position of correctional officer because of his actions on October 18, 1997. Maranville charged Grievant with violating Work Rules 9 and 10 due to the following actions:

- At about 3:30 AM on October 18, 1998, at the residence of Tammy Hatterick, you assaulted Derek Tetrault, hitting him with your hands and fists.
- During that assault, you place[d] a Semi-Automatic handgun to Mr. Tetrault's head after cocking the gun by pulling back on the chamber, caused him pain and a cut, and threatened to shoot him, placing him in fear for his life and safety.
- You also assaulted Ms. Hatterick by pushing her, grabbing her by the throat, pinning her against the wall, and pointing the gun at her, placing her in fear for her life and safety.
- When you left Ms. Hatterick's residence, you damaged her residence by punching the storm door on your way out and shattering

its glass.

- Later on October 18, 1997, you attempted to cause Ms. Hatterick to falsify evidence to the police by asking her to leave out the part about the gun when she described your behavior to them.

- Also on October 18, 1997, in a further apparent attempt to cover up your behavior, you went to the home of David Bovat and gave him your handgun. The gun was later secured as evidence, and there were two loaded clips in the gun case.

...
(State's Exhibit 14).

22. Maranville provided Grievant with an opportunity to meet with him to respond to the charges. On or about February 5, 1998, Grievant met with Maranville. Grievant did not deny the essence of the charges against him, although he denied that he had engaged in assaultive behavior against Hatterick or that he had pointed the gun at her.

23. Maranville considered the seriousness of the charges against Grievant, his position as a correctional officer, the notoriety of the offense and the possibility of rehabilitation, given that he previously had warned Grievant about dismissal if he violated Work Rules #9 and #10. He determined that dismissal would be an appropriate sanction.

24. On February 11, 1998, Maranville sent Grievant a letter dismissing him from employment, effective February 14, 1998. Maranville stated in the letter of dismissal:

This dismissal is for engaging in behaviors and actions that violate any law or ordinance and comporting yourself in a manner that brings discredit to the Department of Corrections. The aggravated violence of your actions are incompatible with you remaining employed in a law enforcement position such as a Correctional Officer. Your actions have completely destroyed the trust I must have in a Correctional

Officer. As indicated in my letter of January 29, 1998, I believe you have violated Department of Corrections work rules number 9 and 10 and your behavior violates the criminal offense discussed in the earlier letter. This dismissal is also in keeping with the progressive discipline as you received a written reprimand on November 12, 1996 for an incident that occurred on or about November 6, 1996 when you had been the aggressor in an incident and had assaulted another individual in St. Albans.

...
(State's Exhibit 15)

25. On or about February 17, 1997, the two charges against Grievant involving Hatterick were dismissed and Grievant was given a suspended sentence and placed on probation with special conditions for the two charges involving Tetrault (State's Exhibit 16).

OPINION

Grievant contends that the Employer violated Article 14 of the Contract by dismissing him without just cause. Grievant contends that the Employer inappropriately bypassed progressive discipline in that a suspension would have been an adequate sanction.

The ultimate criterion of just cause is whether an employer acted reasonably 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) 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).

The burden of proof on all issues of fact required to establish just cause is on the employer, and that burden must be met by a preponderance of the evidence.

Colleran and Britt, 6 VLRB 235, 265 (1983). Once the underlying facts have been proven, we must determine whether the discipline imposed by the employer is reasonable given the proven facts. *Id.* at 266.

The Employer charged Grievant with violating Work Rules # 9 and # 10 due to his off duty conduct on October 18, 1997, which resulted in his arrest and incarceration. Specifically, the Employer charged Grievant with assaulting Derek Tetrault, placing a handgun to Tetrault's head and placing him in fear of his life and safety, assaulting Tammy Hatterick, pointing the gun at Hatterick and placing her in fear for her life and safety, damaging Hatterick's property, attempting to cause Hatterick to falsify evidence, and hiding his gun at the home of another correctional officer.

Work Rule # 9 provides that no off duty employee "shall comport himself in a manner that reflects discredit upon the Department." In applying Work Rule # 9, the Employer must establish that the off duty conduct reflects discredit upon the Employer. Grievance of VSEA and the Corrections Bargaining Unit, 19 VLRB 357, 365 (1996). Work Rule # 10 provides that no off duty employee "shall violate any law or ordinance" and that a "formal adjudication of felonious or misdemeanor behavior is not necessary before a decision to discipline is made". In applying Work Rule #10, the Employer must determine misconduct has been committed, not just alleged, prior to imposing discipline. *Id.* at 366. This does not mean management is required to await the outcome of a criminal proceeding prior to imposing discipline. An employer may proceed with its own investigation to determine whether the allegations are substantiated, and decide whether just cause exists to impose

discipline at the conclusion of the investigation. Id. Further, if the Employer imposes disciplinary action because an off duty employee violated a local law or ordinance, or criminal statute, the Employer has to establish the requisite nexus between the off duty conduct and employment in justifying the disciplinary action before the Board. Id. at 365-66.

We conclude that the Employer has met its burden with respect to proving by a preponderance of the evidence each of the specific charges against Grievant, and has established the requisite nexus between such misconduct and Grievant's duties as a correctional officer. In two previous cases, the Board decided there was a nexus between off duty conduct by correctional officers and the officers' duties involving the custody, treatment and training of inmates who had violated the law. Grievance of Boyle, 13 VLRB 209, 227 (1990). Grievance of Petty, 20 VLRB 44, 56 (1997).

In Boyle, the Board determined that the officer's offenses of careless and negligent driving, attempting to elude a police officer and giving false statements to police, demonstrated a disregard for the law and a disrespect for, and dishonesty towards, law enforcement officers sufficient for the Employer to reasonably draw a connection between the off duty conduct and Grievant's ability to supervise individuals imprisoned because they have violated the law. Boyle, at 227. In Petty, the Board concluded that an officer's off duty conduct of violating an abuse prevention order by breaking into his wife's home, and assaulting his wife's guest, demonstrated a disregard for the law and violent behavior sufficient for the Employer to reasonably draw a connection between the off duty conduct and the officer's ability to supervise individuals who have violated the law. Petty at 56. Similarly,

Grievant's off duty violent behavior, which rose to the level of placing others in reasonable fear for their lives, and attempts to cover up his actions, demonstrated a disregard for the law and violent behavior sufficient for the Employer to reasonably draw a connection between such conduct and Grievant's ability to supervise individuals who have violated the law.

The charges against Grievant having been proven, 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 disciplinary record, 3) the notoriety of the offenses and the impact upon the reputation of the Employer, 4) the effect of the offenses upon supervisors' confidence in Grievant's ability to perform assigned duties, 5) the clarity with which Grievant was on notice of the prohibited conduct, and 6) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

Grievant's offenses were serious. His off duty conduct demonstrated a disregard for the law and inappropriate violent behavior contrary to adequately performing his duties as a correctional officer. It is significant that this was the second incident of inappropriate off duty violent behavior engaged in by Grievant. He had received a written reprimand within the past year for an off duty altercation in which he was the aggressor. Given this repeated behavior, Superintendent Maranville reasonably lost confidence in Grievant's ability to responsibly perform his assigned duties in a correctional facility. Petty, 20 VLRB at 57.

The fact that Grievant was lodged in a correctional facility, and his arrest was

publicized in the newspaper, exacerbates the seriousness of his offenses. As a correctional officer, Grievant had the responsibility to serve as a role model to further the Employer's goal of rehabilitating inmates. Petty, 20 VLRB at 57. Grievance of Smith, 11 VLRB 35, 46 (1990). Through his misconduct, Grievant served as a poor role model. Further, the notoriety of Grievant's offenses generated by the newspaper coverage discredited the Employer's reputation. Petty at 57.

Grievant had fair notice that his off duty conduct was known to him to be prohibited by the Employer. He had been provided with a copy of the Employer's Work Rules containing the pertinent rules and Maranville had specifically cited Work Rules # 9 and # 10 in the previous letter of reprimand stemming from off duty conduct of Grievant. Also, in the letter of reprimand Maranville had warned Grievant that similar conduct in the future could result in his dismissal.

We ultimately conclude that the Employer acted reasonably in bypassing the progressive discipline step of suspension and imposing the maximum penalty of dismissal. The Employer reasonably concluded that the "aggravated violence" of Grievant's actions were incompatible with him remaining employed as a Correctional Officer. Our conclusion that just cause existed for Grievant's dismissal is bolstered by Grievant's attempts to cover up his actions and his previous similar off duty conduct resulting in disciplinary action. The Employer's judgment that an alternative sanction less than dismissal was inadequate and ineffective was warranted given that Grievant had been disciplined before for violent off duty behavior and had not been deterred from engaging in similar conduct.

ORDER

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

Dated this 22^d day of October, 1998, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Richard W. Park
Richard W. Park, Acting Chairman

Leslie G. Seaver
Leslie G. Seaver

John J. Zampieri
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