

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 00-39
JAMES DOWNING)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On May 24, 2000, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of James Downing ("Grievant"), alleging that the dismissal of Grievant from his position as a Transportation Area Maintenance Supervisor with the State Agency of Transportation ("Employer") violated Article 14 of the collective bargaining agreement between the State of Vermont and the VSEA for the Non-Management Unit, effective July 1, 1999 – June 30, 2001. Specifically, Grievant alleges that his dismissal was not based in fact or supported by just cause, the Employer improperly bypassed progressive discipline, and the Employer failed to apply discipline with a view toward uniformity and consistency.

A hearing was held on February 1, 2001, in the Labor Relations Board hearing room before Board Members Catherine Frank, Chairperson; Carroll Comstock and Edward Zuccaro. Assistant Attorney General William Reynolds represented the Employer. Michael Casey, VSEA Deputy Counsel, represented Grievant. The parties filed post-hearing briefs on February 16, 2001.

FINDINGS OF FACT

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

- (a) act promptly to impose discipline . . . within a reasonable time of the offense;
- (b) apply discipline . . . with a view toward uniformity and consistency;
- (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 . . .

3 . . . (T)he appointing authority or authorized representative . . . may dismiss an employee immediately without 2 weeks' notice or 2 weeks' pay in lieu of notice for any of the following reasons:

...

- (b) gross misconduct;
- (c) refusal to obey lawful and reasonable orders given by supervisors;
- ...
- (e) conduct which places in jeopardy the life or health of a co-worker or of a person under the employee's care.

...

10. In any misconduct case involving a suspension or dismissal, should the Vermont Labor Relations Board find just cause for discipline, but determine that the penalty was unreasonable, the Vermont Labor Relations Board shall have the authority to impose a lesser form of discipline.

...

2. Grievant was employed by the Agency of Transportation ("AOT") in highway maintenance positions from 1968 until he was dismissed in May of 2000. Grievant was promoted to Transportation Area Maintenance Supervisor of the Bradford Garage in District 7 in 1991, and remained in that position until his dismissal. As a highway maintenance worker throughout his employment with AOT, Grievant was responsible for a variety of tasks associated with maintaining state roads, including

driving plow trucks, spreading salt and other materials to keep surfaces clear of ice and snow, repairing road surfaces, installing and repairing guardrails, keeping the highways litter-free, operating equipment, and assisting in the repair and maintenance of bridges, culverts, drop inlets and other structures.

3. In performance evaluations covering the period 1968 through June of 1975, Grievant received overall performance evaluations of “fully satisfactory”. In evaluations covering July 1975 through June 1977, Grievant’s overall ratings were “frequently exceeds job requirements/standards”. During the period June 1978 through September 1983, Grievant received overall performance evaluations of “consistently meets job requirements/standards”. In evaluations covering September 1983 through September 1990, Grievant’s overall ratings were “frequently exceeds job requirements/standards”. After his promotion to Transportation Area Maintenance Supervisor in 1991, Grievant received overall performance evaluations of “satisfactory” from 1991 through September 1995. His overall evaluations were “excellent” from September 1995 through September 1997. In his last performance evaluation covering the period September 1998 through September 1999, Grievant received an overall evaluation of “satisfactory” (Grievant’s Exhibit 7).

4. Prior to the incidents resulting in his dismissal, Grievant has never been disciplined during his employment with AOT.

5. As Transportation Area Maintenance Supervisor, Grievant had supervisory responsibility over the transportation maintenance employees in the Bradford Garage. Upon his promotion and until his dismissal, he was supervised by Kenneth Leach, Transportation General Maintenance Supervisor for District 7. Leach has overall

responsibility for the various garages and approximately 40 employees of District 7. Grievant was one of six Transportation Area Maintenance Supervisors who reported to Leach.

6. Initially, Grievant and Leach had a satisfactory working relationship. As time went on, their relationship deteriorated. Grievant viewed Leach as one who liked power and control. He became bothered by what he perceived as a frequent changing of orders by Leach, Leach's lack of consistency in how jobs were to be completed, and Leach's belittling of him and other employees. Leach viewed Grievant as not working with him cooperatively, disliking supervision and fostering a separatist attitude in the Bradford Garage to the extent that employees there sometimes did not participate in District 7 functions.

7. In June 1998, Grievant contacted AOT Human Resources Chief Pamela Ankuda and expressed concerns about Leach's management style. Grievant complained that Leach micromanaged him. Ankuda spoke with Leach about these concerns. There was no meeting or other action to follow up on these concerns. Additionally, after Grievant spoke with Ankuda in June 1998, he heard nothing further from her and he did not know whether Ankuda had done anything about the concerns he expressed.

8. The relationship between Grievant and Leach further deteriorated after June 1999, when Leach removed Grievant from his supervision of a drainage project, which was not going well. In early 2000, Grievant complained to AOT Personnel Administrator Tom Trahant about Leach's management style. Downing indicated that Leach was calling his performance into question, and that this may impact on the

performance evaluation received by Grievant. There is no evidence that Trahant took action to follow up on these concerns with a meeting or otherwise.

9. Each morning, Grievant and the other Area Maintenance Supervisors were required to contact Leach and inform him of the planned activities of their crew for the day. On March 29, 2000, Grievant informed Leach that his crew would be picking up litter along the roads that day. Leach directed Grievant to have his crew repair guardrails on the interstate instead of picking up litter. Grievant sent all of his crew to the interstate to repair guardrails except for one member of the crew who was attending a training session that morning. Repairing guardrails requires both employees to do the repair work and employees to handle safety issues associated with traffic on the highway.

10. Sometime prior to Wednesday, March 29, 2000, Grievant told Leach that repair work had to be done on a drop inlet or drain near the Bradford Garage. Leach contacted bridge mechanic Michael Derosier and asked him to repair the drop inlet on March 29. Derosier told Leach he would need help to do the work. Derosier arrived at the Bradford Garage shortly after noon on March 29. Grievant told Derosier that his crew was repairing guardrails on the interstate, but that one of workers, Tim Faye, would be returning from training shortly and that he and Faye could help Derosier. Derosier also told Grievant that he needed a loader to repair the drop inlet. Downing told him that the loader was with the crew repairing guardrails. Derosier then called Leach and told him he could not complete the work because the loader was not at the garage and he did not have enough assistance. Leach asked Derosier if Grievant was present. Derosier said he was but that he was eating lunch. Leach told Derosier to put Grievant on the telephone. Leach asked Grievant where the manpower was to help Derosier. Grievant told Leach that he

and Fay could help Derosier. Leach told Grievant in an agitated, loud voice to supply more help to Derosier. Grievant told Leach in an agitated, loud voice he would have the whole crew leave the guardrail project and return to the garage to help Derosier. Grievant then hung up the telephone on Leach as Leach was talking. Grievant immediately radioed his crew and instructed them to return to the garage to assist in the drop inlet repair. The crew then returned to the garage.

11. Grievant had never before hung up the telephone on Leach. He was aware that his action was inappropriate, and he was concerned that he could be disciplined as a result of the incident. Later that day, Grievant contacted Gary Hoadley, Vermont State Employees' Association Field Representative, and told him of the incident. Hoadley arranged to meet Grievant the following morning at the garage, and instructed Grievant to not discuss the incident with anyone and to not engage in further argument with Leach.

12. Leach viewed Grievant's hanging up the telephone on him as failure to cooperate with him and an act of misconduct. Leach would have liked to discuss the staffing of the drop inlet repair work further with Grievant so that the whole crew would not be pulled off the guardrail work. Leach called the AOT Human Resources Division and sought advice on how to handle the situation from Personnel Administrator Tom Trahant. Trahant indicated that a meeting should be set up with Grievant to discuss the issue, and suggested that an oral reprimand would be appropriate. Trahant advised Leach to write a letter to Grievant to arrange a meeting.

13. Leach wrote a letter to Grievant dated March 30, 2000, providing in pertinent part:

Please make arrangements to meet with me in my office tomorrow, Friday, March 31st at 8:00 a.m. The subject of discussion will be your conduct yesterday, during

and immediately following my efforts to communicate with you by phone regarding bridge crew-member operations in your area. In-as-much (sic) as disciplinary action is contemplated, you are here-by (sic) notified that you have a right to request the presence of a VSEA representative.

At the time of the meeting, I will also discuss with you performance issues, in part related to the conduct issues involved.

(State's Exhibit 2)

14. On Thursday, March 30, 2000, Leach attended a meeting at the Bradford Garage with Grievant, an employee from AOT headquarters, and an engineering consultant to discuss hooking up the drainage and sewer system of the Bradford Garage. Leach took the letter to Grievant dated March 30, 2000, with him to the meeting. The meeting concluded on the grounds outside the garage.

15. When the meeting ended, Grievant walked back to the garage. Leach followed Grievant and caught up to him as he entered the garage. Leach told Grievant he had a letter he wanted to give him concerning Grievant hanging up the phone the previous day. Leach gave Grievant the letter. Grievant tore the letter in half, threw it in a trash barrel, and said something to the effect of he knew what it was or he did not want to deal with it. Grievant began walking away from Leach into the garage. Leach said something to the effect of "that will be noted", and he retrieved the letter from the barrel. Grievant continued to walk away from Leach into the garage, and Leach followed Grievant. Grievant walked towards a hallway to enter his office in the garage. As he followed Grievant, Leach told Grievant the letter directed Grievant to come to Leach's office the following day to meet with him on the incident of the previous day, and that he expected Grievant to cooperate with him until they had the meeting. Grievant proceeded down the hallway and entered his office. Leach walked up to the doorway of the office and told Grievant that he wanted to talk with him. Grievant then said something to the

effect of “Why don’t you get the hell out?” Leach responded: “What did you say?” Grievant then said something to the effect of “Why don’t you get the hell out?”, and stated he was going to “lose it”. Leach made no move to leave. Grievant reached up with both hands and grabbed Leach by his jacket in the chest area. Grievant pushed Leach out of the doorway and into the hallway. Leach said to Grievant something to the effect of “What are you going to do now?” Grievant pushed Leach out of the hallway into the main part of the garage and then out the door. Grievant closed the door behind him. Leach left the premises and returned to his office in St. Johnsbury (State’s Exhibit 14).

16. After returning to his office, Leach called Pamela Ankuda, AOT Human Resources Chief, to inform her of the incident with Grievant. He also sent Ankuda and Personnel Administrator Tom Trahan a memorandum by e-mail describing the incident (State’s Exhibit 3).

17. On March 30, 2000, Ankuda sent a letter to Grievant informing him that he was “being temporarily relieved from duty with pay effective Friday, March 31, 2000, for up to thirty (30) work days pending an investigation into allegations of gross misconduct involving threatening behavior and physical confrontation directed at your supervisor” (State’s Exhibit 5).

18. Ankuda assigned Personnel Administrator Tom Trahan to investigate the incident. Trahan met with Leach and Grievant separately on April 3. Trahan subsequently submitted an investigation report to Ankuda and David Dill, Director of Maintenance and Aviation (State’s Exhibit 4).

19. On April 7, Ankuda sent Grievant a *Loudermill* letter, setting forth in detail the March 29 and 30 incidents between Grievant and Leach, and informing him

that the Employer was “contemplating serious discipline or your dismissal”. Ankuda informed Grievant that he had a right to respond to the allegations made against him, either orally or in writing (State’s Exhibit 6).

20. On April 14, 2000, Grievant and his representative, VSEA Field Representative Gary Hoadley, had a *Loudermill* meeting with Ankuda. Shortly after this meeting, Ankuda and other AOT officials met to discuss what discipline would be appropriate in Grievant’s case. It was decided to dismiss Grievant.

21. By letter dated April 28, 2000, Ankuda informed Grievant of his dismissal. The letter provided in pertinent part:

I have considered the information which both you and your VSEA representative Gary Hoadley, presented at the meeting which was held on April 14, 2000.

As described in the letter of April 7, 2000, by your own admission, did on March 29, 2000 raise your voice and hang up the telephone during a conversation with Kenneth Leach the Transportation General Maintenance Supervisor (TGMS), your immediate supervisor.

On March 30, 2000 TGMS Leach traveled to the Bradford garage to present you with a letter instructing you to attend a meeting the following day in his office. When Mr. Leach handed you the letter you again by your own admission, said to Mr. Leach “I know what this is about and I don’t want to talk about it”. You then tore the letter in half and threw it in a trashcan. You walked across the garage making some inappropriate comments and insubordinately refused Mr. Leach’s direct order to stop saying he “wanted to talk to you”. Mr. Leach retrieved the letter from the trashcan and followed you into the garage office and again said to you “I want to talk to you.” You responded again by your own admission and said to Mr. Leach “Get the hell out of here I’m going to lose it.” Mr. Leach then asked you what you had said whereupon you rose from your desk and confronted him at the door of the garage office.

You then physically grabbed TGMS Leach and pushed him out of the office door and down a step into an anti room. You then grabbed Mr. Leach a second time and forcibly ejected him from the building and closed and locked the door.

Your demeanor in raising your voice and hanging up the telephone during a conversation with TGMS Leach, tearing the letter he presented to you in half and throwing it in a trashcan and your refusal to follow a direct lawful and reasonable

order to stop and talk to Mr. Leach your immediate supervisor constitute acts of deliberate insubordination. Through your acts of violence against TGMS Leach you placed the safety and health of a coworker in jeopardy. Your actions are of such an egregious nature as to constitute gross misconduct.

No information was presented during our meeting of April 14, 2000 that would alter the facts of this case or that would mitigate the egregious nature of your misconduct. To date I have not received any additional testimony or documentation surrounding the case.

You are terminated from your employment with the State of Vermont effective May 5, 2000 for the above stated reasons and those outlined in the April 7, 2000 letter. You will be paid two weeks in lieu of notice as authorized by Article 14, Section 2 of the collective bargaining agreement. This action is taken after considering all aspects of your employment and taking into account factors including the nature of the job and the potential impact your continued presence can have on the State, public and your co-workers. It also takes into account your time with the State and the fact that you had full knowledge of the seriousness of this behavior.

...
(State's Exhibit 7)

22. In deciding that Grievant should be dismissed, Ankuda concluded that Grievant committed a very serious offense by physically assaulting a superior. She determined that it was significant that employees reported directly to Grievant. She considered the message that such an action by a supervisor sends to others. Ankuda took into account Grievant's lengthy employment with AOT, his lack of previous discipline, and his past performance record. She determined that supervisory confidence in Grievant was seriously damaged by his misconduct and difficult to turn around after an act of physical violence. Ankuda determined that Grievant had fair notice that assault was not appropriate and that he should not disregard an order of a supervisor. She concluded that, given the seriousness of his misconduct, rehabilitation of Grievant was not going to happen. She considered imposing a sanction other than dismissal, but determined that a

lesser discipline would not equal the seriousness of Grievant's misconduct and would send a message that his actions were not that serious.

OPINION

Grievant alleges that the Employer violated Article 14 of the Contract by dismissing him. Specifically, Grievant contends that his dismissal was not based in fact or supported by just cause, and that the Employer improperly bypassed progressive discipline.¹

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 standard for implied notice is whether the employee should have known the conduct was prohibited. Grievance of Towle, 164 Vt. 145 (1995). Brooks, supra, 135 Vt. at 568. Knowledge that certain behavior is prohibited and subject to discipline is notice of the possibility of dismissal. Towle, supra. Grievance of Gorruso, 150 Vt. 139, 148 (1988).

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

¹ In his grievance, Grievant alleged that the Employer failed to apply discipline with a view toward uniformity and consistency. Grievant did not pursue that claim during the hearing and in his post-hearing brief.

determine whether the discipline imposed by the employer is reasonable given the proven facts. Id. at 266.

The Employer charged Grievant with raising his voice and hanging up the telephone during a March 29, 2000, conversation with his supervisor, Kenneth Leach. The Employer further charged Grievant with misconduct concerning a follow-up incident the next day, March 30. Specifically, the Employer alleges that Grievant tore up a letter presented to him by Leach concerning the previous day's incident, refused to talk to Leach after Leach told him he wanted to talk with him, and pushed Leach out of his office and the building when Leach persisted in trying to talk to Grievant. We conclude by a preponderance of the evidence that the Employer has established these facts underlying Grievant's dismissal.

The Employer having established these charges against Grievant, 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 Grievant's duties and position, 2) Grievant's job level, including supervisory role, 3) the effect of the offenses upon supervisors' confidence in Grievant's ability to perform assigned duties, 4) the clarity with which Grievant was on notice of any rules that were violated in committing the offenses, 5) Grievant's past disciplinary record, 6) Grievant's past work record, 7) the potential for Grievant's rehabilitation, 8) mitigating circumstances surrounding the offenses, and 9) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

Grievant's offenses were indeed serious. He demonstrated a disregard for supervisory authority by his actions. In directing the workforce, management is entitled to employees not hanging up the telephone on them during conversations, not tearing up letters they give them, not disregarding their attempts to talk to them, and not forcibly removing them from offices and buildings. In engaging in these acts, Grievant's behavior cannot be condoned. Grievant had fair notice that he could be disciplined for this conduct as he should have known that this conduct was prohibited. All employees have implied notice that they should not engage in conduct which undermines the authority of supervisors and/or indicates disrespect for supervisors. Grievance of King, 13 VLRB 253, 284 (1990). The seriousness of Grievant's misconduct is increased by the fact that he was a supervisor himself. His offenses were contrary to his responsibilities to promote subordinate employees respecting supervisory authority in carrying out their duties.

While we conclude that Grievant's offenses were serious, we find that his misconduct was not as serious as alleged by the Employer in the letter dismissing Grievant. The Employer alleged that Grievant failed to follow a "direct lawful and reasonable order" of his supervisor in refusing to stop and talk to Leach, "placed the safety and health of a coworker in jeopardy through his "acts of violence against . . . Leach", and engaged in "gross misconduct" through his actions. In making these allegations against Grievant, the Employer evidently was referencing Article 14, Section 3, of the Contract. It provides in pertinent part that an employee may be dismissed "immediately without 2 weeks notice or 2 weeks' pay in lieu of notice" for "gross misconduct", "refusal to obey lawful and reasonable orders given by supervisors", and "conduct which places in jeopardy the life or health of a co-worker".

We conclude that Grievant's misconduct did not justify immediate dismissal. One of the most difficult aspects of this case involves whether or not Leach was issuing a "direct order" to Grievant when he told Grievant that he expected Grievant to cooperate with him and that he wanted to speak with Grievant during the March 30 incident. Where the contract penalty for violation of a direct order is dismissal, there can be no question, uncertainty or doubt about whether the supervisor was issuing such an order and the employee understood it to be so. In determining whether Leach issued a "direct order", we must look at all of the circumstances surrounding the exchange of words between Leach and Grievant. Grievant was clearly agitated and upset and had lost his ability to rationally deal with the events which were taking place. A "direct order" implies a command authoritatively given. In this case we have a supervisor attempting to give Grievant a letter dealing with Grievant's misconduct and stating to Grievant "I want to talk to you". Neither the words nor the circumstances under which they were uttered constitute the clear mandate required to constitute a "direct order", the violation of which merits a dismissal. We also do not believe that the degree of force used by Grievant in removing Leach from his office and the building placed Leach's health in jeopardy. In pushing Leach out of his office and the building, the evidence does not indicate that Grievant was intending to inflict bodily injury, or did inflict such injury, on Leach. He displayed the degree of force sufficient to remove Leach from the premises, but he did not place Leach's health in jeopardy. Further, under all the circumstances of the case, we conclude that Grievant's offenses did not rise to the level of "gross misconduct".

Our conclusions in this regard do not necessarily result in a determination that just cause did not exist for Grievant's dismissal. Our inquiry continues to determine whether

the seriousness of Grievant's offenses, considered along with the other pertinent Colleran and Britt factors, otherwise constitute just cause for Grievant's dismissal under the Contract.

In examining all the circumstances, we ultimately conclude that just cause did not exist for Grievant's dismissal. Grievant's misconduct cannot be condoned, and the Employer was justified in bypassing progressive discipline to the extent of imposing a significant degree of discipline on Grievant. However, we believe it was not appropriate for the Employer to completely bypass progressive discipline and dismiss Grievant.

Grievant's seniority and past work record are factors that weigh heavily in his favor. He worked for the Employer for 32 years without any previous discipline and had a consistently good performance record. This lengthy and commendable employment history indicates that his offenses over two days leading to his dismissal were an uncharacteristic aberration on Grievant's part.

Mitigating circumstances surrounding Grievant's offenses also are significant in our conclusion that just cause did not exist for Grievant's dismissal. Grievant's relationship with Leach had been deteriorating for several years, and Grievant made constructive efforts to address this problem. He contacted the Employer's Human Resources Division on two separate occasions to complain about Leach's supervision of him. The Employer took no significant action to respond to his concerns. If the Employer had acted promptly to respond to the differences between Grievant and Leach, we doubt this case would be before us.

Given this lack of support from the Employer, Grievant was left to his own devices to handle problems he had with Leach. When he hung up the telephone on Leach

on March 29, 2000, he acted inappropriately by his own admission. Nonetheless, he was not solely to blame for this incident. Leach provoked the incident to some extent by acting agitated during the telephone conversation, involving securing help for a mechanic to repair a drop inlet near the Bradford Garage. It was evident through the testimony presented in this hearing that there was a lack of communication among the principal participants concerning when and what assistance needed to be provided to the mechanic to do the repair. It also should be noted that there was little assistance for the mechanic at the garage because the crew was elsewhere repairing guardrails pursuant to the express direction of Leach, and such guardrail work needed a sizeable crew. Leach could have acted reasonably and responsibly during this telephone conversation by calmly discussing with Grievant how to address the situation. Instead, he provoked Grievant to some extent by his agitated manner. Leach's actions did not justify Grievant's response of hanging up the telephone, but Leach's provocation mitigates Grievant's misconduct to some extent.

Leach also provoked Grievant the following day. When he presented Grievant with the letter and Grievant tore it up, it should have been obvious to Leach that Grievant was upset and not prepared to discuss the matter. Yet, Leach followed Grievant into his office and insisted on pursuing the matter. Insisting on discussing the matter with him then was inappropriate at best and showed poor judgment on Leach's part. Even when warned by Grievant that he was about to "lose it", Leach did not back off but continued to engage Grievant. Grievant's response of forcibly removing Leach from his office and the building obviously was inappropriate and cannot be excused, but again Leach's actions contributed to the escalation of the incident. Leach again demonstrated poor judgment by not giving Grievant both time and space to get himself under control. Such

provocation is a pertinent mitigating circumstance contributing to a determination that dismissal is not warranted. Bethlehem Structural Products Corp., 106 L.A. 453, 455 (1995). Zeon Chemicals Kentucky, 105 L.A. 649, 653-654 (1995).

In addition to the lack of support from the Employer and Leach's provocation, another mitigating circumstance is the degree of force used by Grievant in the March 30 incident. The degree of force used can be a pertinent mitigating circumstance in contributing to a conclusion that dismissal is not justified. Keebler Co., 92 L.A. 871 (1989). As indicated above, in pushing Leach out of his office and the building, the evidence does not indicate that Grievant was intending to inflict bodily injury, or did inflict such injury, on Leach. We emphasize our concern over workplace violence, and again indicate that we are not condoning Grievant's use of force against Leach. Nonetheless, in determining whether the ultimate penalty of dismissal is warranted, it is pertinent to consider the degree of force used.

In sum, Grievant's lengthy and commendable employment record, when considered together with the above-discussed mitigating circumstances, result in our conclusion that Grievant should not have been dismissed. We have considered the effect of Grievant's offenses upon supervisors' confidence in Grievant still being able to perform his duties, and have considered the potential for Grievant's rehabilitation. We ultimately have concluded that Grievant's offenses were an uncharacteristic aberration that likely would have been prevented with more diligence on the part of the Employer in addressing his difficulties with Leach, and would not have occurred absent provocation by Leach.

An adequate and effective sanction other than dismissal is the maximum penalty short of dismissal permitted by the Contract, a 30-day suspension. This should suffice to deter such conduct by Grievant in the future given his knowledge that the next disciplinary step in the Contract for similar misconduct is dismissal. It also should suffice to send the message to other employees that the misconduct displayed here was serious and will not be condoned.

ORDER

Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ordered:

1. The grievance of James Downing ("Grievant") is sustained in part;
2. Grievant shall be reinstated to his position as Transportation Area Maintenance Supervisor at the Bradford Garage;
3. Grievant shall be awarded back pay and benefits from the date commencing 30 working days from the effective date of his dismissal until his reinstatement, for all hours of his regularly assigned shift, minus any income (including unemployment compensation received and not paid back) received by Grievant in the interim;
4. The interest due Grievant on back pay shall be computed on gross pay and shall be at the legal rate of 12 percent per annum and shall run from the date each paycheck was due during the period commencing 30 working days from Grievant's dismissal, and ending on the date of his reinstatement; such interest for each paycheck date shall be computed from the amount of each paycheck minus income (including unemployment compensation) received by Grievant during the payroll period;
5. The parties shall file with the Labor Relations Board by July 16, 2001, a proposed order indicating the specific amount of back pay and other benefits due Grievant; and if they are unable to agree on such proposed order, shall notify the Board in writing that date of specific facts agreed to by the parties, specific areas of factual disagreement and a statement of issues which need to be decided by the Board. A hearing on disputed issues, if any, shall be held July 26, 2001, at 9:00 a.m. in the Labor Relations Board hearing room; and

6. The Employer shall remove all references to Grievant's dismissal from Grievant's personnel files and other official records and replace it with a reference to a 30 day suspension consistent with this decision.

Dated this 15th day of June, 2001, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Catherine L. Frank, Chairperson

Carroll P. Comstock

Edward R. Zuccaro