VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 00-36
THOMAS CHARNLEY	)	
GRIEVANCE OF:	)	
	)	DOCKET NO. 00-37
SCOTT CAMLEY	)	
GRIEVANCE OF:	)	
	)	DOCKET NO. 00-40
MARK LECLAIR	)	

FINDINGS OF FACT, OPNION AND ORDER

Statement of Case

On May 12, 2000, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Thomas Charnley ("Charnley"), Docket No. 00-36, alleging that the State of Vermont Department of Corrections ("Employer") violated Article 14 of the collective bargaining agreement between the State and VSEA for the Corrections Bargaining Unit, effective July 1, 1999 to June 30, 2001 ("Contract"), by dismissing Charnley without just cause, improperly bypassing progressive discipline, failing to apply discipline with a view toward uniformity and consistency, and failing to impose discipline within a reasonable time of the offense.

On May 12, 2000, VSEA also filed a grievance on behalf of Scott Camley ("Camley"), Docket No. 00-37, alleging that the Employer violated Article 14 of the Contract by dismissing Camley without just cause, improperly bypassing progressive discipline, failing to apply discipline with a view toward uniformity and consistency, and failing to impose discipline within a reasonable time of the offense. On June 12, 2000,

Attorney Norman Blais filed a notice of appearance on behalf of Camley in place of VSEA counsel.

On May 31, 2000, VSEA filed a grievance on behalf of Mark Leclair ("Leclair"), alleging that the Employer violated Article 14 of the Contract by dismissing Leclair without just cause, improperly bypassing progressive discipline, failing to apply discipline with a view toward uniformity and consistency, and failing to impose discipline within a reasonable time of the offense. On September 18, 2000, Attorney Richard Davis, Jr., filed a notice of appearance on behalf of Leclair in place of VSEA counsel.

The parties agreed to consolidate these three cases for hearing. Hearings were held before Board Members Catherine Frank, Chairperson, Richard Park and Edward Zuccaro in the Thomas J. Costello Courthouse in Burlington on March 14 and 15, and April 9, 2001. There was a fourth day of hearing on May 3, 2001, in the Labor Relations Board hearing room in Montpelier. Assistant Attorney General William Reynolds represented the Employer. Michael Casey, VSEA Deputy Counsel, represented Charnley. Blais represented Camley. Davis represented Leclair. The parties filed post-hearing briefs by May 25, 2001.

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:
>
> (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 . . .

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. Charnley began working for the Department of Corrections at the Chittenden Regional Correctional Facility ("CRCF") in July 1994 as a temporary correctional officer. In January 1995, he was hired as a permanent Correctional Officer I at CRCF. On August 16, 1998, he was promoted to the position of Correctional Officer II and remained in that position until his dismissal (Grievant Charnley Exhibit 7, pages 98-99, 117-20).

3. Throughout Charnley's employment at CRCF, he received overall performance evaluations of either "satisfactory" or "excellent". Prior to being dismissed, Charnley had not been disciplined during his employment at CRCF (Grievant Charnley Exhibit 7, pages 94-97, 102-105, 107-116; Exhibit 8, page 121-23).

4. Camley was employed at the CRCF for nine years prior to his dismissal. He began his employment as a temporary correctional officer, became a permanent

Correctional Officer I, and subsequently was appointed to a Correctional Officer II position. At the time of his dismissal, he was a shift supervisor. There are only two performance evaluations of Camley in evidence covering his employment. In one evaluation, covering September 1993 through March 1994, Camley received an overall rating of "satisfactory". In the second evaluation, covering March 1995 to March 1996, Camley's overall performance was rated "outstanding". He also received several commendations for his work. Prior to being dismissed, Camley had not been disciplined during his employment at CRCF. CRCF Superintendent John Murphy considered Camley to be an outstanding officer (Grievant Camley Exhibits 1 - 6).

5. Leclair was a Correctional Officer I at CRCF from early 1998 until his dismissal. In a performance evaluation he received covering the period September 1998 to March 1999, Leclair's overall performance was rated "satisfactory". Prior to being dismissed, Leclair had not been disciplined during his employment at CRCF.

6. At all times relevant, Department of Corrections Work Rules 1, 4, 5, 6, 9 and 10 provided in pertinent part as follows:

> 1. No employee shall violate any provision of the collective bargaining agreement or and (sic) State or Department work rule, policy, procedure, directive, local work rule or post order.
>
> . . .
>
> 4. Employees shall be honest and complete in their descriptions, whether given orally or in writing, to the employer of events occurring in the work place and in all other circumstances related to their employment.
>
> 5. Employees shall cooperate with any inquiry or investigation, whether formal or informal, conducted by the Department. This shall include answering fully and truthfully any questions related to their employment.
>
> 6. . . . No employee shall exhibit behaviors which are physically or mentally abusive towards offenders.
>
> . . .

9. No employee, whether on or off duty, shall comport himself or herself 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 misdemeanant behavior is not necessary before a decision to discipline is made.

. . .

(State's Exhibits 9 – 11)

7. At all times relevant, Charnley, Camley and Leclair were aware of, and understood, these Work Rules (State's Exhibits 9 – 11).

8. Camley was co-leader of the Corrections Emergency Response Team ("CERT") at CRCF. The CERT team was designed to be mobilized to deal with emergency security crises at CRCF. Charnley was also a member of the CERT team. Leclair was not a member of the CERT team.

9. Charnley and Camley had received extensive training in the use of force. In 1999, Charnley had twenty-one hours of CERT team training that included Advanced Physical Control Technique training ("APCT"). Some of these CERT team training sessions were taught by Camley, who was certified to teach APCT to other officers. Leclair received training in the use of force and APCT at the Vermont Correctional Academy in Pittsford, Vermont (State's Exhibits 13, 14, 15).

10. As of October 1999, Charnley, Camley and Leclair had reviewed Department of Corrections Directive 413.02 and CRCF Directive 321 on the use of force. Camley and Leclair were familiar with these directives (State's Exhibits 25, 26).

11. Directive 413.02 provides in pertinent part:

The Vermont Department of Corrections believes in non-violent conflict resolution, although on occasion physical force becomes the only alternative . . .

. . . The Department of Corrections is committed to non-violent conflict resolution and to the principle the least forceful, least impactful methods to achieve safety. Our goal is to use verbal conflict resolution with offenders whenever possible. When an offender's behavior is dangerous to self or others, it is legitimate to employ physical handling techniques and equipment.

. . .

DEFINITIONS

Dangerous Behavior: Any behavior that causes a situation where there is a risk of injury to staff or offenders.

. . .

Force: Physical contact that controls any part of an offender's body and the use of restraints, chemical agents or impact weapons.

Necessary Force: Only the amount of force required to subdue the inmate to prevent injury, damage, or to effect the legal order.

. . .

Use of Force Report:

1. An accounting of the events leading to the use of force;
2. An accurate and precise description of the incident, force used and reasons for employing force

. . .

(State's Exhibit 17)

12. CRCF Directive 321 provides in pertinent part:

. . .

At no time is it justifiable for an employee to retaliate in kind against an inmate because that employee has been abused by an inmate. Punitive action by an employee on his own is strictly forbidden and could lead to immediate dismissal.

. . .

Video Camera

When ever (sic) possible the hand held video camera will be used during any use of force. The complete incident, ie. cell extraction, will be recorded. The video camera must be used for any preplanned use of force.

Reporting Incidents:

A. When any force must be used on an inmate, the employee(s) will notify the Shift Supervisor as soon as incident has ended.

B. Each employee involved must file a written report detailing the incident and his own part in it.

. . .

(State's Exhibit 16)

13. Prior to October 1999, the CERT team at CRCF had never filed a use of force report after responding to an emergency situation.

14. On October 24, 1999, Charnley was scheduled to report to work early at 7:30 p.m. to work four hours of overtime before working his regular shift from 11:30 p.m. to 7:30 a.m. the following day. Charnley reported to his post at 7:30 p.m. in the Special Adjustment Unit ("SAU"). SAU is designed to deal with high security risks. That evening, inmates Eddy Carrasquillo and Steven Lopreste were roommates in SAU. They were imprisoned as federal detainees charged with drug offenses. Carrasquillo had a history of escape from custody and was considered an escape risk.

15. At approximately 8:00 p.m. that evening, registered nurse Karen Brannagen arrived in SAU with medications for inmates. Charnley accompanied Brannagen to the cell of Carrasquillo and Lopreste. As Brannagen was dispensing medications, Carrasquillo pulled a shank (a homemade knife whittled from a plastic toothbrush) from his clothing, gestured towards Charnley with it, and ordered Charnley to get in one of the SAU cells. Carrasquillo told Lopreste to "get" Brannagen. Lopreste grabbed Brannagen around the neck, and held what appeared to be a razor blade to her throat. Charnley called a "10-33" into his radio, signaling he needed emergency assistance. He then pulled out pepper spray to attempt to incapacitate Carrasquillo who had charged at Charnley, but the spray malfunctioned and was ineffective. Charnley grappled with Carrasquillo. Carrasquillo stabbed Charnley twice with the shank in the left side of his head above his temple. Charnley, with the assistance of arriving officers Walter Duncanson and Matthew Greenia, succeeded in getting Carrasquillo back into a

cell. Lopreste released Brannagen and voluntarily returned to the cell. Neither of the inmates' weapons were recovered prior to them returning to the cell (State's Exhibit 1).

16. Charnley then left the SAU and went to Brannagen's office so she could tend to his wound. Charnley was agitated and hyper during this time. Brannagen put a bandage on Charnley's wound.

17. Hostage situations at CRCF are rare. Given the weapons used by the inmates, there is no evidence of other hostage situations at the facility at a level comparable to the one of October 24, 1999.

18. Correctional Facility Shift Supervisor Robert Gordon ordered that the CERT team be paged. Gordon briefed CRCF Superintendent John Murphy by telephone. Gordon also called Security and Operations Supervisor Walter Mariani who came to the facility. Upon his arrival, Mariani became the highest-ranking person at the facility. It was decided that the CERT team would transport Carrasquillo and Lopreste to the Northwest State Correctional Facility ("NWSCF") in St. Albans.

19. CERT team members Camley, Shaun McCuin (co-leader of the CERT team), Mark Colgrove, John Hanson and Clark Stever reported to the facility upon being contacted. Stever indicated that his involvement on the CERT team would have to be limited because he was recovering from a broken rib. The CERT team was understaffed for the planned extraction of the inmates from the cell. Training protocol called for four members to be assigned to each shield used in an extraction. Since two inmates were being extracted and two shields were being used, eight team members would have been the desired number of officers for the extraction (Grievant Charnley Exhibit 9).

20. Camley conducted a briefing and rehearsal of the cell extraction with the CERT team members, including Charnley. Mariani and Camley discussed whether Charnley should be included on the CERT team, and Camley agreed to use Charnley due to having a low number of CERT team members available for the cell extraction and because of the inexperience of the team.

21. Tensions in the facility were high that evening due to the hostage attempt by Carrasquillo and Lopreste. Information circulated among the CERT team members that, prior to being brought into the facility, Carrasquillo reportedly had previously escaped and had broken cuffs. Pieces of the broken cuffs had been found in his pants when he had been booked at CRCF. Consequently, Charnley and other officers were concerned that the inmates may have enlisted outside help to assist them in escaping.

22. Shortly after 9:00 p.m., the six CERT team members went to the SAU to extract Carrasquillo and Lopreste from the cell. Correctional officer Matthew Greenia recorded the cell extraction on video camera.. The CERT team members entered the cell with two shields. They placed Carrasquillo and Lopreste in handcuffs and leg shackles. The inmates did not actively resist the officers. Carrasquillo was escorted out of the SAU with his arms handcuffed behind him, and was placed face down on the booking room floor. He was stripsearched while he was lying on the floor. Carrasquillo whimpered frequently but did not provide any active resistance to the officers. Camley asked Carrasquillo about the location of the weapons that had been used against Charnley and Brannagen. Carrasquillo told Camley there were no weapons.

23. Lopreste was taken to the admissions area. He was stripsearched by officers Leclair, Duncanson and McCuin. Leclair had not been scheduled to begin his

shift until 11:30 p.m. that evening, but he had been called at home and ordered to report immediately due to a hostage crisis. Duncanson, Lelcair and officer Dennis Jewett stayed with Lopreste until he was brought out to the van. At some point, a van was backed into the CRCF garage to transport Carrasquillo and Lopreste.

24. While Carrasquillo and Lopreste were being prepared for transportation to the St. Albans facility, the shank used by Carrasquillo and the weapon used by Lopreste were found in the room from which they had been extracted.

25. Hanson, Charnley and Colgrove took Carrasquillo to the van. Stever also was present. Carrasquillo had leg irons on and was handcuffed behind the back. They took him through booking and through the steel-framed R-2 and R-1 doors leading into the garage. As they exited the R-1 door leading to where the van was parked, they were outside of the view of the camera recording the movement of the inmates. Charnley took his knee and struck Carrasquillo in his midsection more than once. Charnley said something to the effect of "the camera can't see us now" or "we're out of sight" before striking Carrasquillo. Carrasquillo was upright, but bent over as he was struck. The knee strikes sounded like thuds into the body. While kneeing Carrasquillo, Charnley said something like "you don't assault me". Carrasquillo was crying and whining throughout the transport to the van; his tone of voice did not change much upon being struck by Charnley's knee. Prior to the knee strikes, Carrasquillo did not actively resist the officers although he was uncooperative and at times dragged his feet during the transport (State's Exhibit 23).

26. As the knee strikes were delivered, Carrasquillo was moved towards the van. Before Carrasquillo was placed in the van, Charnley pulled Carrasquillo's hair back,

said something to the effect of “I’d like to send you back where you came from”, and then spit in Carrasquillo’s face. At the doorway to the van, Charnley again struck Carrasquillo with his knee in Carrasquillo’s midsection. Colgrove said something to Charnley to the effect of “that’s enough, let’s get him in the van”. Camley observed this knee strike.

27. The officers placed Carrasquillo on the first bench seat in the back portion of the van. The driver and front passenger seats of the van were separated from the rear passenger bench seats by a steel mesh screen covered with Plexiglas. A seat belt was placed on Carrasquillo as soon as he was put in the van. Camley then approached Carrasquillo and said something to the effect of: “by the way, we found your fucking shanks”. At this point, Camley was half in and half out of the van, and his right hand was on the screen between the front seat and the back seats of the van. When Camley said this, Carrasquillo looked at him and then he looked away. Camley then said something to the effect of “do you think you were going to get away with assaulting one of my officers?” Carrasquillo then turned with his lips puckered. Camley thought Carrasquillo was going to spit on him. Camley struck him with his left fist in a jab-like motion on the right side of the face. Camley had a glove on his left hand. Carrasquillo’s head moved a little due to the strike. Camley then backed out of the truck and walked away from the van.

28. After Carrasquillo had been placed in the van, Leclair, Duncanson and Jewett brought out Lopreste. They placed him in the second bench seat behind Carrasquillo.

29. After Lopreste was placed in the van, Leclair came to the side of the van and struck Carrasquillo in the right jaw with a closed fist. Leclair said something to the effect of “that will teach you to mess with us at this facility”.

30. Camley drove the van to NWSCF in St. Albans. Stever was in the front passenger seat. Colgrove was in the first bench seat with Carrasquillo. Hanson was in the second bench seat with Lopreste. Charnley and McCuin were in the third bench seat. During the ride to NWSCF, Carrasquillo kept raising his head to look around. Colgrove instructed him to keep his head down, and he slapped him on the forehead several times to keep his head down.

31. When the van arrived at NWSCF, the inmates were taken into booking where they were photographed and then taken to their cells. Colgrove checked Carrasquillo for bruises, including on his face. He did not see any bruises. No other officer noticed bruises on Carrasquillo’s face.

32. Charnley and Stever were among the officers who escorted Carrasquillo to his cell at NWSCF. As Stever and Charnley were walking Carrasquillo down the hall, Charnley gave Carrasquillo a knee strike to his front midsection. Stever said to Charnley “that’s enough”, to which Charnley responded “did you see what he did to me?”

33. On the way back from NWSCF, Charnley said something to the effect of “if there are questions about inmate injuries, they happened during the initial incident”. He also said something to the effect of: “nothing happened, they got what they deserved”.

34. After returning from NWSCF, Charnley went to the hospital. The doctor disinfected his wound, gave him a tetanus shot and said the wound would have to heal on its own without stitches.

35. When they got back from NWSCF, Colgrove asked Camley if they had to file a report. He meant a use of force report. Camley said no. Camley never said anything to Colgrove that night or subsequently indicating that he tried to enlist him in a conspiracy of silence about what occurred that night. Camley did not try to enlist others in a conspiracy of silence.

36. No manager ordered officers to complete a use of force report due to the cell extraction, and no officer involved in the cell extraction and transport of Carrasquillo and Lopreste filed a use of force report.

37. On Wednesday, October 27, 1999, a debriefing on the October 24 hostage situation, and cell extraction and transport of inmates, was held by Superintendent Murphy at CRCF. In attendance were members involved in the cell extraction and transport, and administrative staff. The videotape of the cell extraction was shown at the meeting. None of the officers informed Murphy of excessive use of force on Carrasquillo. Following the debriefing, Hanson approached Murphy and advised him that, in the future, the Employer should not allow an officer who has been assaulted to participate in the transport of an inmate who assaulted him or her.

38. On Monday, November 29, 1999, Murphy first learned that Hanson may have witnessed excessive use of force on the night of October 24, 1999. Murphy called Hanson into his office and asked him to tell him what happened that night. Hanson informed Murphy of the events he observed. Murphy called the Vermont State Police and arranged for Hanson to meet with a detective. Hanson went to the Williston State Police Barracks where he was interviewed by Detective Dane Shortsleeve.

39. On November 29, 1999, Murphy wrote Charnley and Camley, informing them that they were temporarily relieved from duty with pay pending an investigation into the events of October 24. On December 2, 1999, Murphy wrote Leclair, informing him that he was temporarily relieved from duty with pay pending an investigation into the events of October 24 (State's Exhibit 2).

40. Detective Shortsleeve interviewed many of the officers who witnessed the events of October 24. On December 1, 1999, Colgrove told State Police investigator Shortsleeve that Duncanson had punched Carrasquillo. Later that evening, Colgrove called Shortsleeve and told him that Leclair, not Duncanson, had punched Carrasquillo. Duncanson and Leclair are similar in appearance.

41. On December 14, 1999, Shortsleeve interviewed Mark Leclair. Leclair denied striking Carrasquillo (State's Exhibit 47).

42. The Employer hired private investigator James Cronan to investigate the allegations of excessive force against Carrasquillo. In a December 22, 1999, interview with Cronan, Leclair denied striking Carrasquillo on October 24 (State's Exhibit 32).

43. In February 2000, the Franklin County State's Attorney filed criminal assault charges against Charnley, Camley and Leclair. The correctional officers' arraignments, in which they pleaded not guilty, received press coverage in the Burlington Free Press and on WCAX television. The criminal charges against the officers ultimately were dismissed in May 2000 (State's Exhibit 21).

44. The Employer requested immunity letters from the Franklin County State's Attorney's office so that Charnley and Camley could be interviewed as part of the Employer's investigation. The Employer's investigation was delayed pending the receipt

of the immunity letters. On March 2, 2000, Deputy State's Attorney Diane Wheeler informed Charnley and Camley that they had been granted limited immunity for purposes of the internal investigation conducted by the Employer concerning events in the assault charges brought against them, (State's Exhibit 35).

45. On March 8, 2000, Cronan interviewed Camley. Camley told Cronan that he had struck Carrasquillo in the face with his fist on October 24, and indicated that he did so because he thought that Carrasquillo was going to spit on him. Camley told Cronan that the thing he could have or would have done differently is to just push Carrasquillo's face back instead of hitting him (State's Exhibit 31).

46. In retrospect, Camley concluded that he should not have stuck his head in the van because he was trained that the first thing to do when confronted with harm is to increase the distance from the threat. He also concluded that he should have used an open hand instead of his fist to push Carrasquillo's face away because he had never been taught that a punch was a proper block. He acknowledged that his punch was not a proper use of force.

47. On March 16, 2000, Cronan interviewed Charnley about the events of October 24. Charnley said that, when they exited the door leading to the place where the van was parked, Carrasquillo was passively resisting by collapsing. Charnley said that he told Carrasquillo to knock it off, that they were not on the camera anymore, and then he used his leg to pick Carrasquillo back up. Charnley told Cronan that, when they got to the van door, Carrasquillo had collapsed and he had used his leg to pick Carrasquillo up and put him in the van (State's Exhibit 30).

48. On March 30, 2000, CRCF Superintendent John Murphy sent Charnley a *Loudermill* letter that provided in pertinent part:

> As a result of your behavior described below, the Department of Corrections ("DOC") is contemplating your dismissal from your position as a Correctional Officer II. You have the right to respond to the specific allegations listed below, either orally or in writing, before the final decision is made . . .
>
> Your dismissal is contemplated for the following reasons:
>
> On about October 24, 1999, you were on a team that transported offenders Carrasquillo and Lopresti from the Chittenden facility to the St. Albans facility. A DOC investigation has revealed that you assaulted offender Carrasquillo one or more times prior to and/or during the course of the transport while he was in restraints. Specifically, you repeatedly kneed and/or kicked offender Carrasquillo in his midsection in the garage at Chittenden prior to placing him in the transport vehicle. You also grabbed offender Carrasquillo by the hair, forced his head up, and spat in his face on one occasion.
>
> After you arrived at the St. Albans facility, you again kneed inmate Carasquillo as you escorted him down the hall toward the cell. When another officer told you "that's enough," you replied, "do you know what he did to me?"
>
> You claimed that you used your knee to help lift Carasquillo back up after he collapsed while being passively noncompliant, but this explanation is in conflict with the preponderance of the evidence and appears to be a misrepresentation of the facts.
>
> Prior to the above events, offenders Carasquillo and Lopreste created a major incident in which you were assaulted and injured by offender Carasquillo. DOC has taken the totality of the circumstances into account in determining the appropriate penalty. However, retribution by correctional officers against offenders simply cannot be tolerated, and physical assault of a restrained offender is among the most serious of misconduct offenses.
>
> On February 28, 2000, you entered a plea of not guilty to the criminal charge of simple assault arising out of the events discussed above.
>
> Your actions appear to have violated the following DOC Work Rules: #1 (violation of use of force policy); 4 & 5 (dishonesty during investigation); #6 (inappropriate verbal and physical treatment of offenders); # 9 (behavior reflecting discredit on DOC); #10 (violation of law or ordinance, i.e., 13 V.S.A. 1023 (Simple Assault)).

It appears that your conduct provides just cause for bypassing progressive discipline and for your dismissal. While such conduct is extremely serious in any instance, it is made more serious by the fact that you are a senior COII and a member of the CERT team with extensive training in responding to offender crisis situations in an appropriate manner. The fact that your conduct was criminal in nature further aggravates the seriousness of your offense.

You must notify me within twenty-four (24) hours after receiving this letter whether you wish to respond to the above allegations . . .

(State's Exhibit 3)

49. On March 30, 2000, Murphy sent Camley a *Loudermill* letter that provided in pertinent part:

As a result of your behavior described below, the Department of Corrections ("DOC") is contemplating your dismissal from your position as a Correctional Officer II. You have the right to respond to the specific allegations listed below, either orally or in writing, before the final decision is made . . .

Your dismissal is contemplated for the following reasons:

On about October 24, 1999, you were on a team that transported offenders Carrasquillo and Lopresti from the Chittenden facility to the St. Albans facility. A DOC investigation has revealed that you assaulted offender Carasquillo after he had been seated and secured in the transport vehicle. Specifically, you used your kevlar-gloved fist to strike offender Carrasquillo in the face in the garage at Chittenden after he was seated and secured in the transport vehicle. You struck Carrasquillo in conjunction with a comment, to the effect of, "nobody assaults my officers." You admit to striking Carrasquillo but justify your actions as an attempt to deter Carrasquillo from spitting on you. This explanation is at odds with the comment you made to Carrasquillo and with the preponderance of the evidence. As such, you appear to have misrepresented the facts during the course of this investigation.

On February 28, 2000, you entered a plea of not guilty to criminal charge of simple assault arising out of the events described above.

Your actions appear to have violated the following DOC Work Rules: #1 (violation of use of force policy); 4 & 5 (dishonesty during investigation); #6 (inappropriate verbal and physical treatment of offenders); #9 (behavior reflecting discredit on DOC); #10 (violation of law or ordinance, i.e., 13 V.S.A. 1023 (Simple Assault)).

It appears that your conduct provides just cause for bypassing progressive discipline and for your dismissal. As a Shift Supervisor, you serve as a role model for subordinate Correctional Officers. While such conduct is extremely serious in any instance, it is made even more serious by the fact that you are a long-term shift supervisor and the CERT team leader and CERT trainer with extensive training in how to appropriately respond to offender crisis situations. A further aggravating factor is that you assaulted Carrasquillo while he was restrained and secured in the transport van as payback for his earlier actions. Finally, the fact that your conduct was criminal in nature further aggravates the seriousness of your offense.

You must notify me within twenty-four (24) hours after receiving this letter whether you wish to respond to the above allegations . . .

(State's Exhibit 3)

50. On March 30, 2000, Murphy sent Leclair a *Loudermill* letter that provided in pertinent part:

As a result of your behavior described below, the Department of Corrections ("DOC") is contemplating your dismissal from your position as a Correctional Officer II. You have the right to respond to the specific allegations listed below, either orally or in writing, before the final decision is made . . .

Your dismissal is contemplated for the following reasons:

On about October 24, 1999, you were called in to assist in a cell extraction and preparation for transport of offenders Carrasquillo and Lopresti from the Chittenden facility to the St. Albans facility. A DOC investigation has revealed that you assaulted offender Carrasquillo after he had been seated and secured in the transport vehicle. Specifically, you struck offender Carrasquillo in the face in the garage at Chittenden after he was seated in the transport vehicle. You struck Carrasquillo in conjunction with a comment, to the effect of, "what you did in that facility was wrong." You deny striking inmate Carrasquillo. This explanation is in conflict with the preponderance of the evidence and appears to be a misrepresentation of the facts during the investigation.

On February 28, 2000, you entered a plea of not guilty to the criminal charge of simple assault arising out of the events described above.

Your actions appear to have violated the following DOC Work Rules: #1 (violation of use of force policy); #4 & 5 (dishonesty during investigation); #6 (inappropriate verbal and physical treatment of offenders); #9 (behavior reflecting discredit on DOC); #10 (violation of law or ordinance, i.e., 13 V.S.A. 1023 (Simple Assault)).

> It appears that your conduct provides just cause for bypassing progressive discipline and for your dismissal. While an assault on an inmate is extremely serious in any instance, your actions are viewed as aggravated because you assaulted inmate Carrasquillo while he was restrained and secured in the transport van and because you took such actions as payback to Carrasquillo for his earlier actions. Finally, the fact that your conduct was criminal in nature further aggravates the seriousness of your offense.
>
> You must notify me within twenty-four (24) hours after receiving this letter whether you wish to respond to the above allegations . . .
>
> (State's Exhibit 3)

51. On April 14, 2000, Charnley and Camley attended a *Loudermill* meeting with Murphy. On the same day, Leclair and his VSEA representative, Richard Lednicky, also attended a *Loudermill* meeting with Murphy. Lednicky advised Murphy of two witnesses, Walter Duncanson and Dennis Jewett, who should be interviewed by the Employer. Subsequent to the meeting, Murphy contacted Cronan and requested that he interview Duncanson and Jewett. Cronan interviewed Duncanson on April 14 and Jewett on April 17.

52. On April 20, 2000, Murphy, Employer Director of Correctional Services Richard Turner and other officials of the Employer met to discuss what discipline to impose on Charnley, Camley and Leclair. It was decided that Charnley and Camley should be dismissed. The decision on Leclair was delayed to consider new information arising from the interviews of Duncanson and Jewett.

53. In deciding to dismiss Charnley and Camley, the Employer determined that their offenses of physically assaulting a restrained offender were among the most serious that can occur given that the actions were malicious, meant to harm and deliberate. Their good prior work record operated in their favor. It was determined they

had fair notice not to engage in the misconduct given their training and experience and clear work rules prohibiting such behavior. Ultimately, the Employer determined that Charnley and Camley could no longer be trusted to perform their duties, and could not be rehabilitated, because they struck an inmate and because they were not forthcoming in admitting their actions. The Employer viewed the notoriety of their offenses as a significant negative factor against them given the media coverage of their actions, and the Employer's need to ensure that the public is aware the Employer does not condone the beating of inmates. The Employer considered the mitigating circumstances of Charnley being stabbed by the inmate, and then being allowed to transport the inmate. The Employer concluded that Charnley should not have been involved in the cell extraction and transport of the inmates. Nonetheless, the Employer did not consider these mitigating circumstances to be sufficient to result in Charnley retaining his job. In Camley's case, the Employer viewed his offense as exacerbated because he was a CERT team leader, trainer and shift supervisor.

54. By letter dated April 21, 2000, Murphy informed Charnley of his "dismissal from the position of Correctional Officer II, effective today" for the "reasons . . . outlined in my letter of March 30, 2000" (State's Exhibit 4).

55. By letter dated April 21, 2000, Murphy informed Camley of his "dismissal from the position of Correctional Officer II, effective today" for the "reasons . . . outlined in my letter of March 30, 2000" (State's Exhibit 4).

56. The Employer decided to dismiss Leclair. In deciding to dismiss him, the Employer determined that his offense of physically assaulting a restrained offender was among the most serious that can occur given that it was malicious, meant to harm and

deliberate. The fact he had no prior discipline and a satisfactory work record operated in his favor. It was determined he had fair notice not to engage in the behavior given clear work rules prohibiting such behavior and sufficient training. Ultimately, the Employer determined that Leclair could no longer be trusted to perform his duties given the striking of the inmate and because he was not forthcoming in admitting his actions. It was determined that he did not have potential for rehabilitation because he did not take responsibility for his actions.

57. By letter dated May 8, 2000, Murphy informed Leclair of his "dismissal from the position of Correctional Officer, effective today" for the "reasons . . . outlined in my letter of March 30, 2000" (State's Exhibit 4).

58. No officers other than Charnley, Camley and Leclair were disciplined for the events of October 24, 1999.

59. On June 16, 1998, a CRCF correctional officer, along with other officers, was involved in moving an inmate from the CRCF gym to a booking area to be stripsearched. The inmate was handcuffed and was walked backward down the hall by two officers. The inmate was verbally belligerent. A correctional officer grabbed the inmate by the throat for several seconds and thrust him up against a set of doors. This correctional officer received a one-day suspension for this incident (Grievant Charnley Exhibit 1, pages 72-78 and videotape).

60. In February 1993, a correctional facility shift supervisor at the Woodstock Correctional Center was suspended for seven days for disobeying a direct order of the facility superintendent by involving himself in the transfer of an inmate to the Rutland Correctional Center, and in the course of the transfer using excessive force on the inmate.

The inmate had grabbed the shift supervisor by the throat. After the inmate was placed in restraints, the shift supervisor punched the inmate in the rib area with a closed fist (Grievant Charnley Exhibit 1, pages 6 –13).

61. In March 1998, a correctional officer at the Marble Valley Regional Correctional Facility was demoted from Correctional Officer II to Correctional Officer I for: a) using unnecessary force on an inmate by holding the inmate's head by his hair, pushing downwards on the facemask of a protective helmet with unnecessary force, and exerting force with his knee on the stomach area of the inmate; b) physical and mental abuse of the inmate by derogatory, abusive and demeaning comments; c) verbal and malicious behavior towards another employee that was malicious and demeaning; and d) verbal references to another employee that were malicious, demeaning, sexually harassing and insulting (Grievant Charnley Exhibit 1, pages 36-45).

62. In April 1999, a work crew supervisor in Bennington struck a member of the work crew on the left side of his head with his open right hand, and said "that's what you get for fucking with my stuff". The work crew supervisor thought the individual was responsible for locking the van in which they were traveling, and plugging in an orange flashing dashboard light, after the work crew supervisor had left the van. The work crew supervisor admitted these actions and conceded they were wrong. The Employer offered the work crew supervisor two disciplinary options as a result of his actions – either a three day suspension and screening by the Vermont Employee Assistance Program; or a written reprimand, apology to the person he struck, completion of the diversion contract and screening by the Employee Assistance Program (Grievant Charnley Exhibit 1, pages 46 – 71).

OPINION

Grievants Thomas Charnley, Scott Camley and Mark Leclair allege that the Employer violated Article 14 of the Contract by dismissing them without just cause, improperly bypassing progressive discipline, failing to apply discipline with a view toward uniformity and consistency, and failing to impose discipline within a reasonable time of the offense.

Imposing Discipline Within a Reasonable Time

We first address the issue of whether the Employer violated the requirement of Article 14 of the Contract that "the State will act promptly to impose discipline . . . within a reasonable time of the offense". Grievants contend that the discipline imposed on them was untimely.[1]

We disagree. The Employer became aware of the alleged misconduct of Grievants in late November 1999. The Employer's investigation of the charges against Grievants was complicated because criminal charges were brought against them. Although Leclair consented to an interview with the Employer's investigator shortly after the Employer became aware of the alleged misconduct, the Employer's investigator was unable to interview Charnley and Camley until receipt of immunity letters requested from the State's Attorney's office. It was reasonable to await receipt of the immunity letters so that Charnley and Camley could be interviewed to ensure a thorough investigation.

The State's Attorney's office did not inform Charnley and Camley until March 2, 2000, that they were granted limited immunity, concerning events in the assault charges brought against them, for purposes of the Employer's investigation. Once these immunity

letters were issued, the Employer proceeded in a reasonable timeframe with the investigation.

Charnley and Camley were both interviewed within two weeks. Two weeks following the conclusion of these interviews, the Employer sent each of the grievants *Loudermill* letters informing them their dismissal was being contemplated. The Employer held a *Loudermill* meeting with each of the grievants approximately two weeks later. Charnley and Camley then were notified of their dismissal a week later. Leclair was notified of his dismissal a few weeks after Charnley and Camley due to the Employer's further investigation of information brought to light by Leclair's representative at the *Loudermill* pre-termination meeting.

Under the circumstances, the Employer acted reasonably in completing its investigation in approximately five months. We conclude the Employer did not violate the requirement of Article 14 to act promptly to impose discipline within a reasonable time of the offense. We turn to discussing the merits.

General Standards

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).

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[1] Grievants made this allegation in the grievance that they filed with this Board. In the briefs they filed after the hearing, Grievants did not discuss this allegation. However, because the allegation has not been withdrawn by Grievants, we address it.

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

Once the employer establishes charges against a 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 the grievants' duties and positions, 2) the grievants' job level, including supervisory role, 3) the effect of the offenses upon supervisors' confidence in the grievants' ability to perform assigned duties, 4) the clarity with which the grievants were on notice of any rules that were violated in committing the offenses, 5) the grievants' past disciplinary records, 6) the grievants' past work records, 7) the consistency of the penalty with those imposed upon other employees for the same or similar offenses, 8) the notoriety of the offense or its impact upon the reputation of the agency, 9) mitigating circumstances surrounding the offenses, 10) the potential for Grievants' rehabilitation, and 11) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

We discuss these standards with respect to each grievant in turn.

Thomas Charnley

The Employer charged Thomas Charnley with assaulting inmate Eddy Carrasquillo on October 24, 1999, while Charnley was on a team that transported Carrasquillo and another inmate from CRCF to NWSCF. Specifically, the Employer charged Charnley with repeatedly kneeing and/or kicking Carrasquillo in his midsection during the course of the transport while he was in restraints; and on one occasion grabbing Carrasquillo by the hair, forcing his head up, and spitting in his face. The Employer further charged Charnley with being dishonest during the investigation of the events of October 24 by providing an explanation of the events that was in conflict with the preponderance of the evidence and appeared to be a misrepresentation of the facts.

The Employer contends that Charnley's actions violated Work Rules that: 1) prohibit employees from violating Employer policies; 2) require employees to be honest and complete in their descriptions to the Employer of events occurring in the workplace; 3) require employees to cooperate with any investigation conducted by the Employer, including answering fully and truthfully any questions related to their employment; 4) prohibit employees from being physically and mentally abusive towards offenders; 5) prohibit employees from comporting themselves in a manner that reflects discredit on the Employer; and 6) prohibit employees from violating any law or ordinance, including any conduct constituting a felony or a misdemeanor.

As detailed in the Findings of Fact, we have concluded by a preponderance of the evidence that the Employer has established its charges that Charnley: 1) repeatedly kneed Carrasquillo in his midsection during the course of the transport while he was in

restraints; 2) on one occasion grabbed Carrasquillo by the hair, forced his head up, and spit in his face; and 3) was dishonest during the investigation concerning his actions towards Carrasquillo on October 24. We have not found credible Charnley's version of events during the Employer's investigation, and during the hearing in this matter, that his use of force on Carrasquillo consisted of using his leg to pick up Carrasquillo after Carrasquillo passively resisted during the transport by collapsing.

We also conclude that Charnley violated each of the Work Rules cited by the Employer with one exception. His assault of Carrasquillo violated Employer policies concerning use of force on inmates, and violated the work rule prohibiting employees from being physically abusive towards offenders. His dishonesty during the investigation violated work rules requiring employees to cooperate with an investigation conducted by the Employer, including answering fully and truthfully any questions. His actions violated the work rule prohibiting employees from comporting themselves in a manner that reflects discredit on the Employer.

The Employer has not established that Charnley violated the work rule prohibiting employees from violating any law or ordinance, including any conduct constituting a felony or a misdemeanor. The Employer charged that Charnley violated this work rule because his behavior violated 13 V.S.A. Section 1023, Vermont's simple assault statute. We conclude that it is not appropriate for us to find that Charnley violated this criminal statute given that the criminal charges against him were dismissed. Thus, the Employer has proven the factual charges made against Charnley, and has demonstrated violations of most of the cited work rules.

We now look to the Colleran and Britt factors to determine whether the proven charges justify dismissal. Charnley's offenses were serious. The Employer is responsible for ensuring the safekeeping of inmates within its custody. Charnley acted contrary to this responsibility by his repeated assaults on Carrasquillo. The offense of repeatedly assaulting a restrained offender is among the most serious that can occur.

Charnley exacerbated his misconduct by being dishonest during the Employer's investigation of the charges against him. The nature of a correctional officer's duties requires accurate and truthful reporting of incidents involving offenders, including providing testimony concerning interactions with offenders in various forums where credibility is crucial. In previous cases, we have upheld dismissals of correctional officers where dishonesty to the employer has been a proven charge. Grievance of Newton, 23 VLRB 172, 195 (2000). Grievance of Corrow, 23 VLRB 101 (2000). Grievance of Pretty, 22 VLRB 260, 269-70. Grievance of Johnson, 9 VLRB 94 (1986); *Affirmed,* Sup. Ct. Docket No. 86-300 (1989).

His actions obviously have an adverse effect on supervisors' confidence in his ability to work with and supervise inmates, and honestly report his interactions with them. He had fair notice through his receipt of the Employer's Work Rules and use of force policies that the misconduct he engaged in would result in disciplinary action. Even absent this express notice, he should have known that his retaliatory assault on Carrasquillo and his dishonesty to his employer were prohibited. Through his experience and extensive training on how to appropriately respond to crisis situations involving inmates, as well as receipt of the Employer's Work Rules and use of force policies, Charnley should have been well aware that his actions were prohibited.

The notoriety of Charnley's offenses is also a negative factor given the media coverage of the assault on Carrasquillo. The Employer understandably felt the need to ensure that the public is aware the Employer does not condone the assaulting of inmates.

There are also Colleran and Britt factors that operate in Charnley's favor. He had a good prior work record. Throughout his employment, he received at least satisfactory overall performance evaluations. Also, prior to being dismissed, Charnley had never been disciplined.

Further, the mitigating circumstances surrounding Charnley's assault of Carrasquillo are particularly significant. Earlier that evening, Carrasquillo had attempted to hold Charnley hostage, and in the ensuing struggle had stabbed Charnley twice in the head. Despite this obviously disturbing event, Charnley was allowed to be involved in the cell extraction and transport of Carrasquillo later that evening. We recognize that the CERT team involved in the cell extraction of Carrasquillo was shorthanded, but placing Charnley in further contact with Carrasquillo that evening was inviting trouble. The Employer has conceded that it was a mistake to have Charnley involved with the cell extraction and transport of Carrasquillo. Although these mitigating circumstances operate in Charnley's favor, this does not justify his retaliatory assaults on a restrained inmate and, most importantly, denying the assaults occurred.

We also have reviewed the consistency of the penalty of dismissal imposed on Charnley with those imposed on other Department of Corrections employees for similar offenses. The repeated nature of Charnley's assaults on Carrasquillo, and just as seriously his subsequent dishonesty, make his offenses more serious than those of other employees who received lesser penalties after inappropriate use of force on offenders. The repeated

assaults on Carrasquillo make his misconduct more comparable to that of the correctional officer in Grievance of Goddard, 142 Vt. 437 (1983), whose dismissal for repeated blows to the arms and shoulders of an inmate during a transport was upheld by the Vermont Supreme Court. There are significant differences between this case and the Goddard case, but the circumstances of the Goddard case are closer to this case than the other cases cited by Charnley.

In weighing all of the relevant factors, we ultimately conclude that just cause existed for Charnley's dismissal. Although he had a good prior work record and there were significant mitigating circumstances, it was reasonable for the Employer to bypass progressive discipline and dismiss him for his offenses. Given his repeated retaliatory assaults on Carrasquillo, taken together with his subsequent dishonesty concerning his actions, the Employer acted reasonably in concluding that he was not a good candidate for rehabilitation and that a lesser sanction than dismissal would not be effective or adequate.

Scott Camley

The Employer charged Scott Camley with assaulting inmate Carrasquillo on October 24, 1999, while Camley was on the team that transported Carrasquillo and another inmate from CRCF to NWSCF. Specifically, the Employer charged Camley with striking Carrasquillo in the face with his fist, after Carrasquillo had been seated and secured in the transport vehicle, in conjunction with a comment to the effect of "nobody assaults my officers." The Employer further charged Camley with being dishonest during the investigation of the events of October 24 by admitting to striking Carrasquillo, but justifying his actions as an attempt to deter Carrasquillo from spitting on him. The

Employer contended that Camley's explanation of events was in conflict with the preponderance of the evidence and appeared to be a misrepresentation of the facts. The Employer contends that Camley's actions violated the same provisions of the Work Rules as cited above for Charnley.

As detailed in the Findings of Fact, we have concluded that the Employer has established only part of its charges against Camley. The Employer charged Camley with striking Carrasquillo in the face with his fist in conjunction with a comment to the effect of "nobody assaults my officers." We have concluded by a preponderance of the evidence that Camley did strike Carrasquillo in the face with his fist. The Employer further charged Camley with being dishonest during the investigation of the events of October 24 by admitting to striking Carrasquillo, but justifying his actions as an attempt to deter Carrasquillo from spitting on him. We have concluded by a preponderance of the evidence that Camley was not being dishonest during the investigation; that he did strike Carrasquillo because he thought Carrasquillo was going to spit on him. We also have concluded that, while Camley made a comment to Carrasquillo to the effect of "do you think you were going to get away with assaulting one of my officers", he did not make the statement in combination with the striking. Therefore, we do not find the striking was an attempt to retaliate against Carrasquillo.

We also conclude that Camley violated only some of the Work Rules cited by the Employer to support his dismissal. His striking of Carrasquillo violated Employer policies concerning use of force on inmates, and violated the work rule prohibiting employees from being physically abusive towards offenders. This action also violated the

work rule prohibiting employees from comporting themselves in a manner reflecting discredit on the Employer.

However, we have concluded that he was not dishonest during the investigation concerning his actions as charged by the Employer, and therefore did not violate work rules in this regard requiring employees to cooperate with an investigation conducted by the Employer, including answering fully and truthfully any questions. Also, the Employer has not established that Camley violated the work rule prohibiting employees from violating any law or ordinance, including any conduct constituting a felony or a misdemeanor. The Employer charged that Camley violated this work rule because his behavior violated 13 V.S.A. Section 1023, Vermont's simple assault statute. As we have concluded with respect to Charnley, it is not appropriate for us to find that Camley violated this criminal statute given that the criminal charges against him were dismissed.

The fact that some of the charges against Camley have not been proven does not necessarily mean that his dismissal lacked just cause. Failure of an employer to prove by a preponderance of the evidence all the particulars of a dismissal letter does not require reversal of a dismissal action. Grievance of McCort, 16 VLRB 70, 121 (1993). In such cases, the Board must determine whether the remaining proven charges justify the penalty. Id. We look to the Colleran and Britt factors to determine whether the proven charges justify dismissal.

Although his misconduct was not as serious as alleged by the Employer, Camley's offense was serious. The Employer is responsible for ensuring the safekeeping of inmates within its custody. Camley acted contrary to this responsibility by striking Carrasquillo. We recognize that he did so because he thought Carrasquillo was going to

spit on him. Nonetheless, striking him in the face with his fist was an inappropriate use of force in responding to the perceived threat. Camley's job level increased the seriousness of his misconduct. He was an experienced correctional officer serving in positions of authority as a shift supervisor, co-leader of the CERT team and trainer of other officers. In such positions, he had extensive training in how to appropriately respond to inmate crisis situations, and was responsible for deterring employees from engaging in the type of inappropriate force he displayed against Carrasquillo.

His action clearly had an adverse effect on supervisors' confidence in his ability to work with and supervise inmates. He concedes he had fair notice he should not engage in such misconduct. His receipt of the Employer's Work Rules and use of force policies, as well as his experience and extensive training, provided fair notice to him that the misconduct he engaged in would result in disciplinary action. Also, the notoriety of Camley's offense is a pertinent factor given the media coverage of the assault on Carrasquillo. The Employer understandably felt the need to ensure that the public is aware the Employer does not condone the assaulting of inmates.

However, Camley's past work record weighs significantly in his favor. He worked nine years for the Employer without any previous discipline and had a consistently good performance record. CRCF Superintendent John Murphy considered Camley to be an outstanding officer. This commendable employment history indicates that his striking of Carrasquillo was an isolated act during a tense situation and was uncharacteristic behavior on Camley's part.

Consideration of the consistency of the penalty of dismissal imposed on Camley, with those imposed on other Department of Corrections employees for alleged similar

offenses, also weighs significantly in Camley's favor. In reviewing the evidence introduced on discipline imposed on other employees of the Employer who received lesser penalties than dismissal after inappropriate use of force on offenders, it is apparent that Camley's dismissal for proven misconduct is disproportionately severe. The most compelling indication of this is the CRCF correctional officer who received a one-day suspension for grabbing an inmate by the throat while transporting him, and thrusting him up against a set of doors. In comparing Camley's misconduct to that of the correctional officer in Grievance of Goddard, supra, whose dismissal for repeated blows to the arms and shoulders of an inmate during a transport was upheld by the Vermont Supreme Court, we consider Camley's single striking of Carrasquillo to be less serious misconduct.

In weighing all of the relevant factors and examining all the circumstances, we ultimately conclude that just cause did not exist for Camley's dismissal. Camley'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, the Employer did not act reasonably in concluding he was not a good candidate for rehabilitation and that a lesser sanction than dismissal would not be effective or adequate. Camley's offense was an uncharacteristic aberration that should not result in his dismissal. It is notable in this regard that Camley has taken responsibility for his misconduct by acknowledging that he should not have approached Carrasquillo in the van and that his punch was not a proper use of force. It is also notable that Camley's proven offense is less severe than charged by the Employer. His striking of Carrasquillo was a serious offense, but it was done in the heat of the moment without time for

reflection to a perceived threat to his health, he immediately backed off, and he did not lie about the incident. When this is considered together with Camley's strong work record, and the inconsistency of the penalty imposed on Camley compared to other employees, we believe it was not appropriate for the Employer to completely bypass progressive discipline and dismiss Camley.

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 Camley 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.

Mark Leclair

The Employer charged Mark Leclair with assaulting inmate Carrasquillo on October 24, 1999, while Leclair was assisting in the preparation for transport of Carrasquillo and another inmate from CRCF to NWSCF. Specifically, the Employer charged Leclair with striking Carrasquillo in the face with his fist, after Carrasquillo had been seated and secured in the transport vehicle. The Employer further charged Leclair with being dishonest during the investigation of the events of October 24 by denying that he struck Carrasquillo. The Employer contended that Leclair's denial was in conflict with the preponderance of the evidence and appeared to be a misrepresentation of the facts. The Employer contends that Leclair's actions violated the same provisions of the Work Rules as cited above for Charnley and Camley.

As detailed in the Findings of Fact, we have concluded by a preponderance of the evidence that the Employer has established its charges that Leclair: 1) struck Carrasquillo in the face with his fist, after Carrasquillo had been seated and secured in the transport vehicle; and 2) was dishonest during the investigation concerning his actions towards Carrasquillo on October 24 by denying that he struck Carrasquillo. We have not found credible Leclair's statement that he did not strike Carrasquillo and his version of events as described during the Employer's investigation, and in his testimony during the hearing in this matter.

We also conclude that Leclair violated each of the Work Rules cited by the Employer with one exception. His assault of Carrasquillo violated Employer policies concerning use of force on inmates, and violated the work rule prohibiting employees from being physically abusive towards offenders. His dishonesty during the investigation violated work rules requiring employees to cooperate with an investigation conducted by the Employer, including answering fully and truthfully any questions. His actions violated the work rule prohibiting employees from comporting themselves in a manner that reflects discredit on the Employer.

The Employer has not established that Leclair violated the work rule prohibiting employees from violating any law or ordinance, including any conduct constituting a felony or a misdemeanor. The Employer charged that Leclair violated this work rule because his behavior violated 13 V.S.A. Section 1023, Vermont's simple assault statute. As we previously concluded with respect to Grievants Charnley and Camley, it is not appropriate for us to find that Leclair violated this criminal statute given that the criminal charges against him were dismissed.

Thus, the Employer has proven the the factual charges made against Leclair, and has demonstrated violations of most of the cited work rules. We now look to the Colleran and Britt factors to determine whether the proven charges justify dismissal. Leclair's offenses were serious. The Employer is responsible for ensuring the safekeeping of inmates within its custody. Leclair acted contrary to this responsibility by his striking of a restrained offender. Leclair exacerbated his misconduct by being dishonest during the Employer's investigation of the charges against him. As previously discussed with respect to Grievant Charnley, the nature of a correctional officer's duties requires accurate and truthful reporting of incidents involving offenders, including providing testimony concerning interactions with offenders in various forums where credibility is crucial, and in previous cases we have upheld dismissals of correctional officers where their dishonesty to the employer has been a proven charge.

His actions obviously have an adverse effect on supervisors' confidence in Leclair's ability to work with and supervise inmates, and honestly report his interactions with them. He had fair notice through his receipt of the Employer's Work Rules and use of force policies that the misconduct he engaged in would result in disciplinary action. Even absent this express notice, he should have known that his striking of Carrasquillo and his dishonesty to his employer were prohibited. The notoriety of Leclair's offense is a factor working against him given the media coverage of the assault on Carrasquillo. The Employer understandably felt the need to ensure that the public is aware the Employer does not condone the assaulting of inmates.

In considering whether the Employer inappropriately bypassed progressive discipline by dismissing Leclair, we recognize that Leclair had a satisfactory performance

record and had not been previously disciplined. However, the significance of this work record in Leclair's favor is substantially lessened given the short duration of Leclair's employment. He had been employed less than two years when he struck Carrasquillo.

Mitigating circumstances do not operate in Leclair's favor. He was not involved in the hostage incident in which Charnley was stabbed by Carrasquillo, and did not have any prior contact with the inmates perpetrating the hostage situation. Absent any mitigating circumstances, his gratuitous striking of Carrasquillo was an even more serious act of misconduct.

We have reviewed the consistency of the penalty of dismissal imposed on Leclair with those imposed on other Department of Corrections employees for alleged similar offenses. We conclude that Leclair's offenses were more serious than those of other employees who received lesser penalties than dismissal after inappropriate use of force on offenders. The inappropriate use of force by the other employees occurred in the midst of unpleasant interactions they were having with offenders. To the contrary, Leclair's use of force was a gratuitous act against an offender with whom he had no prior contact. Further, Leclair was dishonest during the Employer's investigation of the charges against him. The evidence before us does not indicate that the other employees were dishonest about their actions.

In sum, we conclude that it was reasonable for the Employer to bypass progressive discipline and dismiss Leclair for his offenses. Given his gratuitous striking of Carrasquillo, taken together with his subsequent dishonesty concerning his actions, the Employer acted reasonably in concluding that he was not a good candidate for rehabilitation and that a lesser sanction than dismissal would not be effective or adequate.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is hereby ordered:

1. The grievance of Thomas Charnley is dismissed;

2. The grievance of Mark Leclair is dismissed;

3. The grievance of Scott Camley is sustained in part;

4. Camley shall be reinstated to his position as a shift supervisor at the Chittenden Regional Correctional Facility;

5. Camley 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 Camley in the interim;

6. The interest due Camley 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 Camley'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 Camley during the payroll period;

7. The parties shall file with the Board by September 27, 2001, a proposed order indicating the specific amount of back pay and other benefits due Camley; 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 October 4, 2001, at 9:00 a.m., in the Labor Relations Board hearing room; and

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

Dated this 6th day of September, 2001, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

_____
Catherine L. Frank, Chairperson

_____
Richard W. Park

_____
Edward R. Zuccaro