VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 05-16
DEBORAH KERR	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On June 15, 2005, Deborah Kerr ("Grievant") filed a grievance with the Labor Relations Board contesting her dismissal from the State Department of Corrections ("Employer"). Grievant alleges that the Employer, in dismissing her, violated Articles 5, 14 and 15 of the collective bargaining agreement between the State of Vermont and the Vermont State Employees' Association ("VSEA") for the Corrections Unit, effective for the period July 1, 2003 – June 30, 2005("Contract").

Grievant contended that her dismissal violates Articles 5 and 16 because it constituted discrimination against her based on her complaint and grievance activity. She contended that Article 14 was violated because: a) the dismissal was not based in fact or supported by just cause, b) the Employer improperly bypassed progressive discipline, c) the Employer failed to apply discipline with a view toward uniformity and consistency, and d) the Employer failed to apply discipline within a reasonable time of the alleged offense.

Hearings were held in the Labor Relations Board hearing room in Montpelier on February 16 and 22, 2006, before Board Members Richard Park, Acting Chairperson; Carroll Comstock and Joan Wilson. Michael Casey, Associate General Counsel of the VSEA, represented Grievant. Assistant Attorney General William Reynolds represented the Employer. The Employer and Grievant filed post-hearing briefs on March 17, 2006.

FINDINGS OF FACT

1. The Contract provides in pertinent part as follows:

ARTICLE 5
NO DISCRIMINATION OR HARASSMENT; and AFFIRMATIVE ACTION

1. In order to achieve work relationships among employees, supervisors and managers at every level which are free of any form of discrimination, neither party shall discriminate against, intimidate, nor harass any employee because of . . . filing a complaint or grievance . . .

. . .

ARTICLE 14
DISCIPLINARY ACTION

1. No permanent or limited status 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 (2) weeks' notice or two (2) 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. Grievant was a permanent status correctional officer at the Northern State Correctional Facility in Newport from 1995 until she was dismissed in 2005. At the time of her dismissal, she was a Correctional Officer II.

3. During her tenure as a permanent correctional officer, Grievant always received overall annual performance evaluations of "excellent". An "excellent" rating is the second highest rating out of four rating categories, exceeded only by an "outstanding" rating. An "excellent" rating is defined as " the employee's overall performance in all areas frequently exceeds the performance standards for the position". Among the areas in which Grievant was commended on evaluations were interacting well with inmates, holding inmates accountable to following rules, enforcing rules fairly and consistently, and active and visible monitoring of inmates' behavior. Prior to being dismissed, Grievant had received no discipline during her employment with the Employer (Grievant's Exhibit 12).

4. Grievant certified on July 13, 1995, that she read and fully understood the Work Rules of the Employer. The Work Rules provide in pertinent part:

> . . .
> 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 fully 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, while on duty . . . engage in verbal or physical behavior towards employees, volunteers or members of the public, which is malicious, demeaning, harassing or insulting. Such behaviors include . . . treating inmates in a demeaning manner with no legitimate rehabilitative justification. 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 Exhibit 1)

5. Prior to November 2, 2004, Grievant read and received training on Directive 413.02 of the Employer on the use of force. At all times relevant, Directive 413.02 provided in pertinent part:

. . .

PURPOSE

The Vermont Department of Corrections believes in non-violent conflict resolution, although on occasion physical force becomes the only alternative. This directive provides clear direction for Vermont Department of Corrections employees regarding the use of force.

APPLICABILITY/ACCESSIBILITY

This directive applies and is accessible to Department of Corrections staff and volunteers only.

It is essential that all direct service staff be involved in the assessment, prevention and management of dangerous behavior. The Department of Corrections is committed to non-violent conflict resolution and to the principle of 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.

. . .

DIRECTIVE/FACILITIES

A. SITUATIONS WHERE FORCE CAN BE USED

1. Escapes

. . .

2. Assault by an Offender

. . .

3. Maintaining Order

When an offender's behavior represents a danger to people or the safe operation of the facility, staff have a responsibility to respond. In response to dangerous behavior, force may be employed consistent with the intervention continuum as outlined in Departmental Directive 413.01 "Conflict Resolution".

Dangerous Behavior includes assault, self mutilation, situations that require staff to physically move an offender, and offender behaviors that prevent the safe operation of the facility.

Prior to the use of force, an offender shall be given clear directions and a choice to cooperate. Physical force should only be used when there is a control advantage. Management strategies should be utilized that minimize the likelihood of injury.

. . .

(State's Exhibit 3)

6. Grievant received training on the appropriate use of force at the Vermont Corrections Academy when she began employment as a correctional officer. During her employment, she received training on advanced physical control techniques. She received training that stressed the use of verbal communications skills rather than resorting to the use of force when interacting with inmates. Grievant was never instructed that it would be appropriate to strike an inmate when the inmate was not engaging in dangerous behavior.

7. On November 2, 2004, Grievant worked the first shift, 6 a.m. to 2 p.m., as the Correctional Officer II assigned to "Charlie Building". Charlie Building consists of two living units, Charlie Alpha Unit and Charlie Bravo Unit. Grievant worked as a "float" on November 2, which allowed her to leave the Charlie Building and check on inmates. It would have taken Grievant two – three minutes to walk from the Charlie Building to the "B" Building, the educational building at NSCF.

8. At approximately 10 a.m. on November 2, 2004, NSCF inmate Leroy Hughes was standing in the hallway of the "B" Building, waiting for the beginning of his Spanish class outside the door to the classroom. Hughes was approximately 20 years old. Hughes observed Grievant walking up the hallway, and said something loudly to the effect of "here comes Deb Kerr". Hughes then momentarily ducked inside the library adjacent to the classroom, and then came back out of the library. Grievant approached Hughes and made a comment to the effect that Hughes was "trying to hide from" Grievant. Grievant then slapped Hughes on the left side of his head with her right, open hand. Hughes felt ringing in his left ear and stinging on his face from the slap. The incident was witnessed by inmate Eric Rundstrom and Correctional Instructor Anna Jeffrey, Grievant's Spanish teacher. After Grievant struck Hughes, Hughes walked into the Spanish classroom holding the side of his face where Grievant had struck him. Hughes stayed for the entire Spanish class. He did not seek any medical attention due to being slapped by Grievant. Jeffrey did not report the slapping incident.

9. On the evening of November 2, 2004, Hughes filled out, and submitted to a correctional officer on duty in his living unit, a grievance form which stated:

> On the above date, I was in the B Building hallway going to my Spanish class, when COII Deb Kerr came down the hall. I acted like I was avoiding her. I came

> back to the hallway and she said "trying to hide from me". That's when she slapped me on the side of the head making my ear ring. I have my Spanish teacher Anna Jeffrey and classmate Eric Runstrom as witnesses. (State's Exhibit 10)

10. On November 3, 2004, Hughes' grievance was assigned to staff member Scott Morley for investigation. Morley interviewed Hughes. Morley also interviewed Jeffrey at some point prior to December 10, 2004, and asked her to submit a written statement. Jeffrey submitted an undated statement to Morley which provided:

> On approximately November 10, I was in B Building, Room 29 waiting for my 10:00 a.m. class to begin. I was facing the door and looking out of the window into the hallway. I observed Officer Kerr walking down the hall. She stopped in front of Room 29, and then turned her back toward the door. Inmate Leroy Hughes was walking toward her, on his way into the classroom. He stopped in front of Officer Kerr at which point she hit him across the face and head with an open palm. Inmate Hughes then proceeded into the classroom clutching his face.
> (State's Exhibits 10, 13)

11. Morley submitted a report to Superintendent Celeste Girrell on December 10, 2004, on the allegation by Hughes against Grievant. On that day, Grievant was reassigned to work in Main Control, where she would have no contact with inmates. Grievant was not told why she was reassigned (State's Exhibit 10).

12. Superintendent Girrell sent Grievant a letter dated December 10, 2004. The letter stated in part:

> I have received allegations about actions on your part that may have violated DOC Work Rule #6 in your interactions with specific inmates. The Department will institute an investigation of these allegations shortly. You will be informed at a later date if there is a need to interview you with regard to these allegations. Should that need arise, you have the right to be represented by the VSEA or private counsel, at no expense to the State, in any department-conducted interviews conducted with this investigation.
>
> In accordance with Personnel Policy number 17.0: "State employees have an obligation to cooperate with their employer regarding employment investigations. It is part of the responsibility of an employee to answer truthfully and fully the work-related inquiries of the State. Refusing to answer, answering incompletely,

> or answering untruthfully, questions relating to work is a misconduct offense for which an employee may be disciplined up to and including dismissal." Department of Corrections Work Rules Number 4 and 5 also speak to this issue.
>
> Pending the completion of this investigation it has been determined that you will be reassigned to a post as directed by the Shift Supervisor. During this time, you will retain your current shift and work schedule. This temporary change is being made to best meet the operating needs of the facility. This action is being taken pursuant to Articles 14 and 20 of the Contract. This is not a disciplinary action, nor should it be construed as such.
> . . .
> (State's Exhibit 16)

13. Shortly after receiving this letter, Grievant spoke with Superintendent Girrell. Grievant spoke with Girrell prior to December 21, 2004. Girrell told Grievant that she had been reassigned to Main Control because Hughes had alleged that Grievant had slapped him in the face. Girrell also informed Grievant that she should not talk to anyone about the incident and that she should contact a VSEA representative.

14. The Employer assigned Peter Canales, Agency of Human Services Investigations Unit Chief, to investigate the allegation by Hughes. On December 13, 2004, Canales traveled to NSCF where he interviewed Jeffrey and inmates Hughes, Perez and Rundstrom.

15. On December 21, 2004, Canales interviewed Grievant. VSEA Senior Field Representative Gary Hoadley was present to represent Grievant. Prior to beginning the interview, Hoadley had met privately with Grievant in a NSCF conference room. Canales did not record the interview because he did not know how to use new recording equipment. Canales chose not to postpone the interview due to the lack of a recorder. Prior to the interview, Canales gave Grievant a written "Garrity Warning" which provided in part: "The purpose of this meeting is to obtain your response to questions that arise from allegations of misconduct relating to your job. . . it is extremely important that

you understand you have a duty as an employee of the State of Vermont to cooperate with an investigation by your employer and to answer relevant and material questions that relate to your official duties. **Your failure to cooperate with this investigation, and your refusal to answer questions that relate to your job, may cause you to be subjected to discipline, including possible dismissal by the State of Vermont**" (emphasis in original). Grievant signed the "Garrity Warning" (State's Exhibit 17).

16. At the outset of the interview, Grievant told Canales that she had no recollection of an interaction with Hughes in which she slapped him. Grievant stated she would not have slapped Hughes because she never slapped an inmate. Grievant also told Canales that she had never placed her hands on an inmate in a joking manner. Upon further questioning by Canales, Grievant told him that she would sometimes put her hands on the upper back or shoulder of an inmate to show encouragement if they had done something well. She indicated to Canales that there were occasions when inmates had said something "smart" to her, and she hit them on the back of the head. She demonstrated how she had done this by slapping Hoadley on the back of the head and neck with an audible slap. After doing this, Grievant said "I know I am totally wrong and not supposed to touch any of them but sometimes they need it", or words to that effect.

17. During the interview with Canales, Grievant told him that she thought she was being set up because she did not get along with the art teacher. Grievant identified the art teacher as Anna Jeffrey. Grievant told Canales that she had to confront Jeffrey about Jeffrey improperly allowing inmate Richard Donner to bring art supplies such as pens, pencils, paper and scissors back to his cell.

18. Jeffrey had never taught art at NSCF and had never had an altercation with Grievant concerning inmates bringing art supplies back to their cells. During 2004 and 2005, Deborah Crane-Foote taught art at NSCF. Crane-Foote had supervised Donner on his art project and gave Donner permission to take certain art supplies back to his cell. Grievant confronted Crane-Foote about allowing Donner to bring art supplies back to his cell.

19. On or about December 29, 2004, Canales submitted his investigation report to Department of Corrections Commissioner Steven Gold (State's Exhibit 17).

20. NSCF Superintendent Girrell sent Grievant a Loudermill letter dated January 28, 2005. The letter provided in pertinent part:

> As a result of your behavior described below, the Department of Corrections ("DOC") is contemplating a serious disciplinary action up to your dismissal from the position of Correctional Officer II. . .
>
> This action is contemplated for the following reasons:
>
> . . .
>
> **I. Violation of DOC Work Rules 6, 9, & 10, and DOC Directive 413.02 – Use of Force – Slapping of Offender LH:**
>
> . . .
>
> 13 VSA 1023. Simple Assault
>
> (a) A person is guilty of simple assault if he:
> (1) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another . . .
>
> 13 VSA 1021(a) defines "bodily injury" as "physical pain, illness or any impairment of physical condition."
>
> DOC's Directive 413.02 on Use of Force makes it clear that using force is appropriate only when an offender commits an assault or escapes, or when it is otherwise necessary to maintain order. It states that force may be used against offenders engaging in dangerous behavior consistent with the intervention continuum outlined in DOC Directive 413.01 "Conflict Resolution," which provides for the graduated use of force but only where verbal intervention has failed. Slapping of offenders is not authorized by such Directives.

On November 2, 2004, you approached offender LH in the hallway of B building and said something to him to the effect of, "trying to hide from me." With no apparent provocation from offender LH, you then slapped him on the side of his face, causing him physical pain and causing his ear to ring. Your actions were witnessed by Anna Jeffrey, the Spanish teacher, and offenders ER and GP.

You categorically deny slapping offender LH and do not claim that he did anything to provoke you on November 2, 2004. Even if he had provoked you, slapping his face would violate DOC policies on use of force and conflict resolution. There is no justification, rehabilitative or otherwise, for slapping an offender under the circumstances outlined above. It appears that you violated DOC Work Rule #6 because your actions were malicious, harassing and demeaning, they lacked any conceivable rehabilitative justification, and they were physically abusive. Your actions violated DOC Work Rule # 9 because they reflect discredit on DOC. It also appears your actions constitute a simple assault under 13 VSA 1023, and, therefore, also violated DOC Work Rule #10.

II. Violation of Policy and Training – Inappropriate Touching of Offenders:

While insisting that you did not strike offender LH on November 2, 2004, you admitted to touching offenders in the past as a form of positive feedback. You described that you sometimes pat the shoulders or upper back of offenders to encourage their good behavior. You also indicated that, if the offender said something "smart" to you, you may slap them on the back of the head and/or neck. After describing this practice, you admitted in your investigative interview that, "I know I am totally wrong and [am] not supposed to touch any of them but sometimes they need it."

Therefore, you have admitted to touching offenders in a manner that you know to be prohibited by DOC, and appear to have done so repeatedly without excuse. Your actions appear to violate DOC Work Rule #6, and also DOC Directives 413.01 and 413.02.

III. Violation of DOC Work Rules 4 & 5 – Dishonesty During Investigation

…

On December 21, 2004, you were interviewed by Mr. Canales with VSEA Senior Field Representative Gary Hoadley present. It appears you were dishonest when you made the following claims:

a. That you did not strike an inmate on or about November 2, 2004;
b. That you would never slap an inmate;
c. That you had never in your career placed your hands on an inmate in a joking manner.

> It appears that your conduct provides just cause for bypassing progressive discipline and for your dismissal.
>
> You must notify me . . . whether you wish to respond to the above allegations . . .
> (State's Exhibit 18)

21. On February 1, 2005, the Employer placed Grievant on temporary relief from duty with pay pursuant to Article 14, Section 9 of the Contract, pending investigation of whether she had committed misconduct. The Employer originally scheduled a Loudermill meeting for February 4, but the meeting was delayed until February 15 at the request of Grievant's representative, VSEA Senior Field Representative Gary Hoadley (State's Exhibit 19, 23).

22. There was a lengthy delay between the February 15 Loudermill meeting and the final determination by the Employer of the decision whether to discipline Grievant. Much of the delay was caused by a disagreement between Grievant's representative Gary Hoadley and the Employer as to information that the Employer would provide to Grievant in conjunction with a Loudermill meeting. Hoadley filed a grievance on behalf of Grievant concerning the requested information. Ultimately, in April, the disagreement between the parties on the requested information was resolved. The holding of a second Loudermill meeting was then delayed for nearly four weeks due primarily to Hoadley's unavailability for the meeting and Hoadley's delay in informing the Employer whether Grievant would be submitting additional information to the Employer and/or requesting a second Loudermill meeting. Ultimately, on May 10, 2005, a Loudermill meeting was held to provide Grievant with an opportunity to respond to the allegations against her (State's Exhibits 20, 21, 22, 24, 25, 26, 28, 29, 31, 32).

23. Superintendent Stuart Gladding, who had become NSCF Superintendent in February 2005, informed Grievant by letter dated May 20, 2005, that she was dismissed effective that date for "(t)he reasons . . . enumerated" in the "letter of January 28, 2005" (State's Exhibit 35).

24. Superintendent Gladding viewed Grievant's offenses of slapping inmates as a violation of her training and the Employer's Work Rules that had serious implications given the power differential between officers and inmates. He also viewed her dishonesty as important because the Employer relies on the reports of correctional officers in court proceedings and in imposing disciplinary action on inmates. He viewed the credibility of officers as essential. Gladding concluded that Grievant was not a good candidate for rehabilitation and that sanctions less than dismissal were not adequate.

OPINION

Grievant alleges that the Employer violated Article 14 of the Contract by dismissing her. Specifically, Grievant contends that the Employer failed to apply discipline in a timely manner, failed to apply discipline with a view toward uniformity and consistency, improperly bypassed progressive discipline, and dismissed her without just cause.

A threshold issue is 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". Grievant contends that the discipline imposed on her was untimely because the alleged conduct engaged in by Grievant resulting in her dismissal occurred approximately six and one-half months prior to her dismissal.

We disagree. There was a delay of more than three months between the issuance of the Loudermill letter and a second Loudermill meeting preceding the Employer's decision to dismiss Grievant. The delay was primarily caused by: 1) a disagreement between Grievant's representative and the Employer as to information that the Employer would provide to Grievant prior to a Loudermill meeting, which disagreement worked its way through the grievance procedure before being resolved; and 2) the unavailability of Grievant's representative for Loudermill meetings and the representative's delay in informing the Employer whether Grievant would be submitting additional information to the Employer and/or requesting a second Loudermill meeting. Once these factors causing delay are accounted for, we conclude that the Employer disciplined Grievant within a reasonable time of her alleged offenses.

We turn to addressing the merits. In fulfilling our duty of deciding whether just cause exists for an employee's dismissal, the Board has power to police the exercise of discretion by the employer and to keep such action within legal limits. In re Goddard, 142 Vt. 437, 444-45 (1983). The ultimate criterion of just cause is whether an employer acted reasonably in discharging an employee for misconduct. In re Grievance of Brooks, 135 Vt. 563, 568 (1977). There are two requisite elements which establish just cause for dismissal: 1) it is reasonable to discharge an employee because of certain conduct, and 2) the employee had fair notice, express or fairly implied, that such conduct would be grounds for discharge. Id. In re Grievance of Yashko, 138 Vt. 364 (1980).

The burden of proof on all issues of fact required to establish just cause is on the employer, and that burden must be met by a preponderance of the evidence. Colleran and Britt, 6 VLRB 235, 265 (1983). Once the underlying facts have been proven, we must

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

The Employer has made various charges against Grievant, as detailed in Finding of Fact No. 20. The Employer first charges Grievant with an unprovoked slap of inmate Leroy Hughes on the side of his face, causing him pain and ringing in his ear. We ultimately determine after careful review of the evidence that the Employer has proven this charge by a preponderance of the evidence. We conclude that the evidence presented by the Employer is more credible on this charge than is Grievant's evidence. Grievant was not a convincing witness, and she has presented no satisfactory explanation as to why the three witnesses who testified that she struck Hughes would fabricate such a story against her. Although there were minor inconsistencies by the Employer's witnesses in their versions of the incident, their testimony that Grievant engaged in an unprovoked slap of Hughes was consistent and credible.

The Employer has established that this misconduct by Grievant violated Employer Work Rules 6, 9 and 10, as well as Employer Directive 413.02. The striking of Hughes was not necessary to prevent an escape, maintain order or respond to an assault by Hughes; accordingly such action violated Employer Directive 413.02 on the use of force. She treated Hughes in a demeaning manner with no rehabilitative justification, and physically abused him, in violation of Work Rule 6. Her actions reflected discredit on the Employer in violation of Work Rule 9. She violated Work Rule 10's prohibition on violating any law by engaging in this simple assault.

The Employer next charges Grievant with inappropriate touching of offenders by admitting to slapping offenders on the back of the head and/or neck if they said

something “smart” to her. We conclude by a preponderance of the evidence that the Employer has proven this charge to the extent of establishing that Grievant violated Employer Directive 413.02 in engaging in inappropriate use of force.

Finally, the Employer charges Grievant with being dishonest with the Employer’s investigator by making the following claims: a) that she did not strike an inmate on or about November 2, 2004; b) that she would never slap an inmate; and c) that she had never in her career placed her hands on an inmate in a joking manner. The Employer has established that Grievant made each of these claims during her interview with the Employer’s investigator.

The Employer has further established that two of these three claims indicate dishonesty by Grievant. We conclude by a preponderance of the evidence that she was dishonest in claiming that she did not strike an inmate on November 2, 2004, because we conclude that she did strike inmate Hughes on that date. Grievant attempts to mitigate her offense in this regard by contending that the Employer’s unwarranted delay in waiting 7 weeks to question her about the November 2 incident compromised her ability to recall events on that date. We do not find this argument persuasive. It is not credible that Grievant would have had trouble recalling such an event that is so contrary to proper treatment of inmates.

The Employer also has established that she was dishonest in claiming during the interview with the investigator that she would never slap an inmate. Her dishonesty in this regard is indicated both by her slapping of inmate Hughes and her later admission in the interview that there were occasions when she had hit inmates on the back of the head

after they had said something “smart” to her. Her later admission of striking inmates does not erase her earlier dishonesty in denying striking of inmates.

The Employer has not established its charge that Grievant was dishonest in claiming that she had never placed her hands on an inmate in a joking manner. This is because the evidence does not demonstrate that there were occasions where Grievant placed her hands on an inmate in a joking manner. There is evidence that Grievant placed her hands on inmates in an encouraging manner which is fundamentally different than doing so in a joking manner.

In sum, the bulk of the charges against Grievant have been established. The fact that all of the charges against her have not been proven in their entirety 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 proven charges justify the penalty. Id.

We look to the factors articulated in Colleran and Britt to determine whether the Employer exercised its discretion within tolerable limits of reasonableness. 6 VLRB at 268-69. The pertinent factors here are: 1) the nature and seriousness of the offenses and their relation to Grievant’s duties and position, 2) the clarity with which Grievant was on notice of any rules that were violated in committing the offenses, 3) the effect of the offenses upon supervisors’ confidence in Grievant’s ability to perform assigned duties, 4) Grievant’s past disciplinary record, 5) Grievant’s past work record, including performance on the job, 6) the consistency of the penalty with those imposed upon other employees for the same or similar offenses, 7) the potential for Grievant’s rehabilitation,

and 8) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

Grievant committed serious offenses. The Employer is responsible for ensuring the safekeeping of inmates within its custody. Grievant acted contrary to this important responsibility by her serious misconduct of assaulting inmate Hughes on November 2, 2004. Grievances of Charnley, Camley and Leclair, 24 VLRB 119, 146, 150-51, 155 (2001).

Grievant exacerbated her misconduct by her dishonesty during the Employer's investigation of the charges against her. Dishonesty is a serious offense by an employee against an employer. In re Carlson, 140 Vt. 555, 559 (1982). 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. Charnley and Leclair, 24 VLRB at 146, 155. Grievance of Johnson, 9 VLRB 94 (1986). Grievance of Pretty, 22 VLRB 260 (1999). Grievance of Corrow, 23 VLRB 101 (2000). Grievance of Newton, 23 VLRB 172 (2000).

Grievant had fair notice that her offenses could result in her dismissal. Fair notice exists when the employee knew or should have known that the conduct was prohibited. Grievance of Towle, 164 Vt. 145, 150 (1995). Grievance of Brooks, 135 Vt. 563, 568 (1977). Knowledge that certain behavior is prohibited and subject to discipline is notice of the possibility of dismissal. Towle, 164 Vt. At 150. Grievant had fair notice through her training and receipt of the Employer's use of force policies, and her receipt of

Employer Work Rules, that the striking of inmates was prohibited and would result in disciplinary action.

Grievant also should have known that her dishonesty was prohibited. Honesty is an implicit duty of every employee, and thus an employee should know that dishonest conduct is prohibited. Carlson, 140 Vt. at 560. Moreover, Grievant had explicit notice through Employer Work Rule 4 that dishonesty was prohibited.

Grievant's offenses undermined supervisors' confidence in her ability to perform assigned duties. Her actions obviously had an adverse effect on supervisors' confidence in her ability to work with and supervise inmates, and honestly report her interactions with them.

Grievant's past disciplinary record and work record operate in her favor. Prior to being dismissed, she had not been disciplined during her ten years of employment. Moreover, she always had received overall annual performance evaluations of "excellent". Among the areas in which Grievant was commended on evaluations were interacting well with inmates, holding inmates accountable to following rules, enforcing rules fairly and consistently, and actively and visibly monitoring inmates' behavior.

In examining the consistency of the penalty imposed on Grievant with those imposed upon other employees for similar offenses, we conclude that the Employer committed no violation of the Contract in this regard. The evidence does not indicate other correctional officers engaging in similar striking of inmates and dishonesty whom received lesser penalties than dismissal from the Employer. The dismissal of Grievant is consistent with our past decisions concerning dismissals of correctional officers who have committed serious acts of misconduct and then been dishonest during the

Employer's investigation of allegations. Charnley and Leclair, supra. Pretty, supra Corrow, supra. Newton, supra.

In weighing all the relevant factors, we ultimately conclude that just cause existed for Grievant's dismissal. It is difficult when an employee with Grievant's strong work record is dismissed. Nonetheless, it was reasonable for the Employer to bypass progressive discipline and dismiss her for her offenses. Given her striking of inmate Hughes, taken together with her subsequent dishonesty concerning her actions, the Employer acted reasonably in concluding that she was not a good candidate for rehabilitation and that a lesser sanction than dismissal would not be effective or adequate.

Finally, we note that Grievant alleged in her grievance that her dismissal was the result of discrimination against her based on her complaint and grievance activity. Grievant presented no evidence to support such a claim and did not pursue such claim in her post-hearing brief. Accordingly, we conclude that such claim is without merit.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the Grievance of Deborah Kerr is dismissed.

Dated this 17th day of May, 2006, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

_____
Richard W. Park, Acting Chairperson

_____
Carroll P. Comstock

_____
Joan B. Wilson