

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 06-28
DENNIS JEWETT)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On July 21, 2006, Dennis Jewett (“Grievant”) filed a grievance through attorney Norman Blais, contending that the State of Vermont Department of Corrections (“Employer”) violated Article 14 of the collective bargaining contract between the State and the Vermont State Employees’ Association (“VSEA”) for the Corrections Bargaining Unit, effective July 1, 2005 – June 30, 2007 (“Contract”), by dismissing Grievant from his position as a Correctional Officer II at the Chittenden Regional Correctional Facility. Grievant contends that Article 14 was violated because: a) the dismissal was not supported by just cause, b) the Employer improperly bypassed progressive discipline, and c) the Employer failed to apply discipline with a view toward uniformity and consistency.

Hearings were held in the Labor Relations Board hearing room in Montpelier on May 3 and June 14, 2007, before Board Members Edward Zuccaro, Chairperson; John Zampieri and Leonard Berliner. Attorney Blais represented Grievant. Assistant Attorney General Julio Thompson represented the Employer. The Employer and Grievant filed post-hearing briefs on June 28, 2007.

FINDINGS OF FACT

1. The Contract provides in pertinent part as follows:

...

**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. . .
- ...
3. Notwithstanding the provisions of paragraph 2 above, the appointing authority or authorized representative . . . may dismiss an employee immediately without two (2) weeks' notice or two (2) weeks' pay in lieu of notice for any of the following reasons:
 - (a) gross neglect of duty;
 - (b) gross misconduct;
 - ...
 - (e) conduct which places in jeopardy the life or health of . . . a person under the employee's care.
- ...
8. The appointing authority or authorized designee may suspend an employee without pay for reasons for a period not to exceed thirty (30) workdays.
- ...
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. In March 1998, Grievant began working as a temporary employee at the Chittenden Regional Correctional Facility ("CRCF") in South Burlington. In April 1998,

he completed correctional officer training at the Vermont Correctional Academy in Pittsford. While attending the Academy, Grievant received conflict resolution training, training in physical intervention techniques and suicide prevention training. The suicide prevention training materials used at the Academy provided that “(a)ctions should be taken as soon as it is possible to stop (a person attempting suicide) from harming themselves, but safety of staff and bystanders must also be considered” (State’s Exhibits 9, 10, 19).

3. During the course of his employment at CRCF, Grievant received instruction in Advanced Communications Techniques “(ACT)”. During ACT training, correctional officers are instructed to pay attention to an offender’s verbal and non-verbal cues, taught how to respond to offender behavior with a variety of active listening and communications skills, and are taught how to verbally de-escalate and re-focus an agitated offender. As part of ACT training, correctional officers are taught not to use physical force against an offender unless the offender is actively harming others or himself or herself, and verbal interventions have been exhausted. The Employer considers ACT and suicide prevention to be “core competencies” of correctional officers. Grievant received training in these subjects during his employment (State’s Exhibits 9, 20).

4. In August 1998, Grievant became a permanent Correctional Officer I. He successfully completed his probationary period in February 1999. As a Correctional Officer I, Grievant became a Field Training Officer (“FTO”). As a FTO, Grievant provided on the job training to newly hired correctional officers at CRCF. Grievant’s duties as a FTO required him to attend training designed to assist him in evaluating new

officers' proficiencies in core competencies including ACT and suicide prevention. In March 2001, Grievant was promoted to the position of Correctional Officer II. By November 2005, Grievant had completed the training that allowed him to perform the duties of an acting shift supervisor (State's Exhibits 9, 10).

5. Grievant received three performance evaluations during his employment. He received two overall evaluations of "satisfactory", and one overall evaluation of "excellent". Grievant received no discipline prior to his dismissal. He received no commendations during his tenure of employment (State's Exhibit 10, Grievant's Exhibits B-1, B-2).

6. DOC Directive 413.02, Use of Force, provides in pertinent part:

PURPOSE

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

APPLICABILITY/ACCESSIBILITY

...

It is essential that all direct level 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 (sic) 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 creates a situation where there is a risk of injury to staff or offenders.

....

DIRECTIVE/FACILITIES

A. SITUATIONS WHERE FORCE CAN BE USED

...

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 S-1, p. 162-64).

7. CRCF Directive 321, Use of Force, states in pertinent part:

Introduction

The use of force is sometimes a legitimate and necessary means of upholding order and discipline within a Correctional setting. It can also be utilized when dealing with an inmate that has a clear intent to cause harm to him or herself or others. The following are some guidelines when a decision has to be reached as to when force should be utilized.

...

C. Correctional Staff has the responsibility to protect inmates from harming themselves.

...

Definition:

Necessary force is defined as only the amount of force required to subdue the inmate to prevent injury, damage, or to affect the legal order.

Types of Force Used:

A. Physical Handling – The first level of force for a Correctional staff member should be to use to his or her hands by using APCT skills. . . Physical handling can . . be utilized to prevent an inmate from causing physical harm to themselves or to enforce a lawful order. Minimal amount of force will be used to control the situation.

B. Chemical Spray - .

...

2. The use of spray can . . be utilized by the Shift Supervisor during the shift during a use of force . . . during a code 10-33. It is to be utilized in order to keep the use of physical force, use of impact weapons, or the possibility of physical harm at its lowest point.

3. Spray may also be utilized during transports in order to keep the use of physical force, use of impact weapons, or the possibility of physical harm at its lowest point.

...

(State's Exhibit 6).

8. On December 19, 2005, Grievant was working at CRCF as a transport officer. At approximately 4 p.m., Grievant was in CRCF's booking area, preparing to transport a number of inmates to the Northern State Correctional Facility ("NSCF") in Newport. Also in the booking area at this time were Correctional Officer I Zachary Edgerley, who had recently completed probation, and Correctional Officer II Allen Giddings (State's Exhibit 11, page 55).

9. One of the inmates scheduled for transport, Kevin Donaldson, entered the booking area and announced that he was not going to be transported anywhere. Donaldson displayed two razor blades broken off from plastic razors, one in his hand and the other in his mouth. Shift Supervisor Michael Miller was summoned to the scene. Miller was aware that Donaldson had inappropriately produced razor blades on past occasions. Donaldson sat on a wooden pallet located near holding cells. He did not make any gestures to cut himself or anyone else at the time. Donaldson was not restrained. At some point, Donaldson tied a rubber glove around his arm.

10. When Miller arrived on the scene, he positioned himself about 10 feet away from Donaldson and began speaking to him. Donaldson engaged in a dialogue with

Miller. Grievant was present during this discussion. During this initial dialogue, which lasted about 15 minutes, Donaldson repeatedly stated that he did not wish to be transported. Miller responded by telling Donaldson that he would have to surrender the razor blades, submit to a strip search, allow himself to be waist-chained and placed into leg irons, and then be transported.

11. After about 15 minutes of discussion between Miller and Donaldson, Miller went to the booking desk in the booking area and asked Edgerley to retrieve a video camera and begin recording the incident. Shortly after Miller made this request but prior to the camera being activated, Donaldson made a single cut just above his left elbow with one of the razors. The cut began to bleed visibly, but not profusely. Shortly thereafter, Edgerley began recording the scene with a video camera with audio capabilities (Grievant's Exhibit A).

12. Miller then engaged Donaldson in further conversation, seeking to persuade him to drop the razor blade and submit to a strip search and restraining. Donaldson continued to keep the razor blade he had in his hand and told Miller that he had swallowed the razor blade that he had in his mouth. A mental health worker reported to the scene. The mental health worker, Miller and Donaldson engaged in discussion for about 45 minutes. Grievant was present during this discussion. Edgerley, who was operating a handheld video camera, recorded the final several minutes of this discussion. Donaldson remained seated on the pallet during this discussion. Donaldson did not cut himself further or threaten the employees present during this period. Donaldson told Miller that he would need someone to look at the cut on his arm. Miller told Donaldson that his arm would be examined as soon as he dropped the razor blade and submitted to a

search. Donaldson responded that Miller was trying to trick him into going to NSCF. Miller told Donaldson that he was not trying to trick him because Donaldson was going to be transported to NSCF. Miller ultimately asked Donaldson if he was or was not going to submit to a strip search and restraints. Donaldson agreed to comply (Grievant's Exhibit A).

13. Donaldson walked over to the strip search area in the booking area. He took off his clothes, which were checked by Grievant. As part of the strip search, Giddings inspected Donaldson's mouth but did not find any other razor blade. Giddings did a quick, inadequate search of Donaldson's mouth. Miller remained in the booking area during the strip search. Edgerley recorded the strip search on the video camera (Grievant's Exhibit A).

14. After the completion of the strip search, Donaldson dressed himself and complied with directions to sit in a blue plastic chair located several feet away from the booking desk. Grievant retrieved leg irons, handcuffs and a waist chain. Donaldson remained seated in the chair while Grievant placed leg irons on him. The effect of the leg irons was to significantly reduce Donaldson's ability to move his legs apart, thereby limiting mobility and his ability to kick. Grievant then handcuffed Donaldson's hands in front of him and attached the handcuffs to a waist chain. This resulted in Donaldson being able to move his hands only six to eight inches away from his waist (Grievant's Exhibit A).

15. Nurse Mary Lou DeCosta examined and cleaned the cut to Donaldson's upper left arm. DeCosta indicated that the cut likely would not require sutures. Donaldson indicated that he still needed to go to the hospital. After the examination was

completed, Miller and the mental health worker left the booking room to discuss whether Donaldson still could be transported that evening. Miller did not announce that he was leaving the booking room, and did not tell Grievant he was now in charge. Grievant thought that Miller was still in the general area. Miller, who had a canister of OC spray on him, did not leave the OC spray with any of the officers remaining at the scene. None of the officers remaining with Donaldson were carrying OC spray. DeCosta, Grievant, Giddings and Edgerley were left with Donaldson. Grievant was the most senior correctional officer. Edgerley continued to operate the handheld video camera. He kept the camera focused on Donaldson (Grievant's Exhibit A).

16. Shortly after Miller and the mental health worker left the booking area, Edgerley asked Donaldson if he had swallowed the razor blade he had in his mouth. Donaldson responded: "Does it really matter? Nah, don't try to get slick with me, rookie." Grievant was standing a few feet from Donaldson at this point. Donaldson then rose suddenly from the blue plastic chair, made a comment to the effect that he felt restricted, walked over to the area he had been prior to the strip search, and sat down on the same pallet. Grievant or Giddings did not attempt to prevent Donaldson from moving to the pallet, and did not attempt to get him to return to the blue chair. Donaldson made a comment: "I know you guys would try to trick me if I'm sitting right there". Grievant responded: "who's going to trick you?" (Grievant's Exhibit A, State's Exhibit S-3).

17. Within approximately 10 seconds of sitting on the pallet, Donaldson bent his head down and spat out a razor blade into one of his hands. Donaldson then stood up from the pallet, made a comment to the effect that Miller wasn't as smart as he thought he was and stated: "You think I'd give up my only weapon? Ha. I'm not giving up my only

fucking weapon, dude.” Grievant did not radio for assistance at this point, and did not ask Donaldson to drop the razor blade. Grievant already had plastic gloves on at this point and made no attempt to retrieve plastic gloves (Grievant’s Exhibit A, State’s Exhibit S-3).

18. Donaldson then positioned the razor blade between the fingers on his right hand and began slicing his left wrist. Donaldson, over the course of about 35 to 45 seconds, made several cuts to his wrist. An offender in the booking area’s holding cells called out to Grievant: “Jewett, what are you going to do?” Grievant replied: “Nothing, not if he’s got another razor”, and made a sound which may have been a nervous laugh. Nurse DeCosta stated: “This is so against everything” (Grievant’s Exhibit A).

19. During the period that Donaldson was cutting his wrist, a fixed security camera operating at the time indicates that Grievant took two steps forward and to the right of Donaldson. He did not attempt to get closer than about 10 feet from Donaldson. Grievant did not attempt to enlist the assistance of Giddings and use a team approach to flank Donaldson to get the razor blade from him. On Donaldson’s final cut to his wrist, he opened a vein and began to bleed profusely. Donaldson began yelling loudly words to the effect of “Yeah, that’s the one I was looking for the whole fucking time” and “pump baby pump”. Donaldson then dropped the razor blade to the ground. The audio of the handheld video camera operated by Edgerley did not pick up Grievant giving Donaldson any directives to drop the razor blade during the period he was cutting his wrist (State’s Exhibit S-3; Grievant’s Exhibit A).

20. A few seconds after Donaldson made the final cut to his wrist, Grievant drew his radio from his belt, brought it to his mouth and then returned it to his belt. Grievant claims he spoke into the radio. However, the audio of the handheld video camera operated by Edgerley did not pick up Grievant speaking into the radio. Grievant was several feet away from Edgerley at this point. It is possible that Grievant spoke into the radio and it was not picked up by Edgerley's camera. Giddings or Grievant contacted the CRCF control room to summon Miller to the scene. The control room operator then made a radio broadcast for Miller to come to the booking room (State's Exhibit S-3, Grievant's Exhibit A).

21. After Donaldson dropped the razor blade to the ground, and approximately 75 seconds after Donaldson began to cut himself with the razor blade, Grievant crossed in front of the hand-held camera operated by Edgerley and walked to the booking desk to retrieve gauze. Grievant then approached Donaldson with the gauze (approximately 80 seconds after Donaldson began cutting himself). Donaldson told Grievant to back away. Grievant said "Kevin, "Kevin" as he approached Donaldson. Giddings approached Donaldson from another angle. Grievant pressed the gauze against Donaldson's wrist wound approximately 100 seconds after Donaldson began cutting himself. Miller arrived on the scene and attempted to persuade Donaldson to return to the blue plastic chair. Ultimately, Donaldson allowed Grievant and Giddings to escort him to the chair (State's Exhibit S-3, Grievant's Exhibit A).

22. Nurse DeCosta examined Donaldson's wrist wounds and determined they were sufficiently serious to warrant a trip to the hospital. Paramedics were summoned to the facility, and they transported Donaldson to Fletcher Allen Hospital. Grievant and

Correctional Officer II Morrell Bunbury escorted Donaldson to the hospital. Donaldson received medical treatment for the cuts he had sustained.

23. Grievant and Bunbury then returned Donaldson to CRCF. Bunbury and another correctional officer escorted Donaldson to the transport van, which had already been loaded with other offenders being transferred to NSCF. Donaldson was restrained with leg irons, handcuffs, belly chain and a seatbelt in the van. When Donaldson was in the van, a correctional officer announced that Donaldson had a razor blade. Bunbury, who was situated close to Donaldson, held Donaldson down. Bunbury directed Donaldson to drop the razor blade, but Donaldson did not comply. Miller authorized Bunbury to use OC spray on Donaldson. Bunbury sprayed Donaldson who then dropped the razor blade in a correctional officer's hand. Shortly thereafter, Bunbury and Grievant transported Donaldson and the other offenders to NCSF without further incident.

24. On the day following these incidents involving Donaldson, CRCF Superintendent Jay Simons viewed the handheld and fixed camera footage of the incidents. Simons then placed Grievant, Giddings and Edgerley on temporary relief from duty with pay, and he requested an investigation of their conduct.

25. Peter Canales, Chief of the Investigations Unit of the Agency of Human Services, conducted the investigation. Prior to the conclusion of the investigation, Giddings resigned from employment.

26. Canales conducted an interview of Grievant on February 3, 2006, at the Waterbury State Complex. VSEA Field Representative Jonathan Goddard represented Grievant during the interview. The following exchanges occurred between Canales and

Grievant during the interview concerning the December 19, 2005, incident with inmate Kevin Donaldson after Miller had persuaded Donaldson to be subject to a strip-search:

. . .

Canales: So at that point you believed he swallowed that razor?

Grievant: Yes

Canales: Okay, the one that was in his hand, where did that one end up?

Grievant: That one I believe he threw on the floor, I'm not sure exactly what happened to that one now, its been so long. But after that, we were in the strip search room, it was myself, S1 Miller, CO Giddings . . .

. . .

Grievant: Went through and did my check, they did their check, had Donaldson get dressed and brought him out and proceeded to put handcuffs and shackles, belly chains, and sat him down in the, in the blue chair, there's a blue chair that's always in booking, its right by the booking desk. Sat him down there, had the nurse come down, she checked him over and said she believed that there was no, he didn't need to go to the hospital, she was going to put sterry strips on him. And she said that's what the hospital would do with him up there.

Canales: Okay.

Grievant: And shortly after that, Kurt, which is mental health, and that's when Miller went around the corner through our three door in the hallway, just in the hallway right in front of the booking area . I believe I was going through another package, I can't remember, I was doing something over by the fingerprint stand there

Canales: Describe in the room to those where that is, compared to where he's sitting now in the blue chair

Grievant: Where he's sitting now in the blue chair is right across, right straight across from the

Canales: If my memory is correct, you're 10-12 feet in front of him

Grievant: Probably eight

Canales: Eight feet?

Grievant: nine, eight-ten, yeah . . . right in front of him. Actually I believe that I was washing my hands to get the powder off from my hands at that point or taking my gloves off, one or the other, I can't, like I said its been so long . . . Anyway, and then Donaldson stood and moved to his right, over by the cart again and he sat down and he leaned over with his head, pulled the razor blade out of his mouth and said something to the effect that Miller's not as smart as he thinks he is or something of that nature. And at that point we were talking with him you know why you doing this . . . And at that point, we were talking with him. Edgerley was trying to talk with him at that point and then you know I started moving towards the booking desk so I could get some more gloves

Canales: And you said we're talking to him and then

Grievant: Edgerley and myself

Canales: Okay

Grievant: we're talking with him

Canales: what are you saying?

Grievant: Ah, boy, not sure exactly what it was, I don't really remember what it was. Oh he said something to me to the effect of you know you guys might move in on me over there or something and I'm like . . . why would we move in on you? Something to that effect and at that point is when I went over and started to try to get some more gloves

Canales: Why, why do you need more gloves at this point?

Grievant: Well he's got another razor

Canales: Okay and what type of gloves are you referring to?

Grievant: Ah rubber gloves, latex rubber gloves

. . .

Canales: But you need rubber gloves for what reason?

Grievant: To keep from blood borne pathogens, stuff like that

...

Grievant: When I started to the booking desk to get more gloves Kevin jumped up in front of Edgerley, Edgerley's standing in front of me, still talking with Donaldson, and Donaldson jumped up and started slashing his wrist with the razor blade and went over to the booking desk and right behind the booking desk is more gloves and got some more gloves and went over and I'm looking to see if I can get around this guy somehow, you know, get in behind him, or you know, without getting hurt, without getting cut, or you know anything. At that point Edgerley had moved back and . . . I believe he's got the camera going at that point and I'm trying to figure out how to get on this guy, I had no OC you know to spray him with, I had no equipment to go in on him with

...

Grievant: So can't remember exactly where I mean I was there I was by the booking desk, I can't remember exactly. CO Giddings had motioned to somebody in the hall and I'm thinking its Miller, you know I didn't realize he had taken off at that point, so I'm waiting for Miller to come around the corner with OC, meanwhile I'm looking to see if I can get on this guy so I move around to his right and he's backed up toward the, I said in my report, it was the AC1, but it was the AC2 door, so

...

Grievant: He was between the AC2 cell and the book, the cart, I mean he's standing kind of diagonal with the cart. When I moved around to his right, to see if I could get around behind him, he kind of turned slightly so then I kind of like well, kind of backed off a little bit thinking you know if I moved in . . . from that direction that he could swing around and cut me with the razor blade

...

Grievant: . . . he was still cutting his wrist and eventually he'd gotten a vein which was really starting to bleed, he was bleeding pretty good all over the place, you know I'm waiting for an opportunity you know if he drops the razor blade or something like that get in on him but it never happened until after he cut himself good and blood was . . . coming everywhere

Canales: I'm gonna interrupt you there; you said that you were waiting for an opportunity for him to drop the blade; at any point did you instruct him to drop the blade?

Grievant: Yes, yes I did

Canales: When was that?

Grievant: I'm not sure

Canales: 'Cause that's not stated in your report

Grievant: No, the detail was not very good in that report

...

Canales: ... What, what did you say to him and when did you say it?

Grievant: When I was standing over by him, of course there was, I mean everybody, there's guys in the cell yelling at him, there's guys at the booking desk yelling at him, and I'm trying to talk to him, you know everybody's at the same time here, and so I told him I said Kevin drop the blade, the nurse is standing over off to my right saying somebody's gotta do something you know, this goes against everything, I'm like well he's got a blade I can't just jump on him. So ... eventually after he cut himself he had dropped the blade on the floor, and at that point, I went over to grab the ... gauze off the booking desk ... and I went over to Kevin and I tried to put pressure on ... his wound and he pulled away from me and he said I'll get blood on you, you don't know what I've got, so he moved over more, moved over to the fingerprint desk or fingerprint stand and that's when CO Giddings came in from his other side and distracted him a little bit and I was able to get pressure on his arm to stop the bleeding and we escorted him over and sat him in the chair

...

Canales: From the time that he left the blue chair, he sat down on the push cart, he presented with a razor, as soon as he presented with a razor, and correct me if I'm wrong, you're telling me that you were engaged with him to stop this behavior, did I hear that correctly or am I not accurate with that?

Grievant: When he was, when he had the razor blade

Canales: Yup

Grievant: We were talking to him, this is when, you know I was talking to him when he moved over there is when I was talking to him and sat on the thing . . . and that's when he pulled out the razor blade . . . At that point Edgerley was talking with him, you know they teach you, you know somebody else is talking you don't talk or anything, you know you don't keep going back and forth 'cause that just confuses everybody, you know confuses the inmate.

Canales: Who, whose the officer in charge of this scene?

Grievant: I guess that would be me 'cause I had been there the longest

Canales: And you said that, that people were yelling to him from the, from the booking desk and the offenders were yelling as well

Grievant: Yes

Canales: What are the offenders yelling, can you recall that?

Grievant: Kevin stop, Kevin stop, what are you doing. I believe something to that nature, and the nurse saying you gotta do something, you gotta do something and . . .

Canales: Tell me about that. They're yelling you gotta do something, who are they yelling that to?

Grievant: One of them was yelling it at me. Hey Jewett you gotta do something, its like, and I'm moving around to this guy's side to try to get in on him and . . .

Canales: And you're moving quickly or slowly or are you watching, are you guarded . . .?

Grievant: Well at that, I mean I was by myself at that point, everybody else was standing back by the booking desk and I moved around to his right to try to get around him and it, you know I mean he turned slightly on me, so at that point I'm thinking you know safety-wise, you know kind of back off 'cause he's still got movement and he's got a razor blade in his hand.

Canales: Okay, when the, when the offenders were yelling at you, you said they were yelling at you to do something, did you respond to them?

Grievant: Yes.

Canales: How so?

Grievant: I said, I can't jump on him because he's got a he's got a blade and I can't, I can't get on him if he's got a blade

Canales: Okay

Grievant: Something to that nature, I mean I'm not sure exactly, I mean, like I said its been like a month and a half

...

Canales: What I want to do now is . . . Edgerley was there, he had the camera? . . . I've got that footage here, I want to, I want to play that and kind of walk you through everything. At some points I'm going to do some interrupting here, pause and stop and all that stuff and then pose some questions to you. . .

...

Canales: Can you hear that? You've got the offenders in HC02 I believe yelling you know, dude, what are you doing, Jewett, are you going to do something and what I'm hearing is you laughing and saying not if he's got another razor. I'm gonna rewind that and ask you to listen to it again. . . But to this point I've yet to hear you interject in any way, drop the razor, don't do that, sit down, I don't hear any interjection at all. And tell me if I'm wrong if you hear something in there. We'll stop here. Now I want to pay close attention to, as you said earlier, the offender said something to you about intervention . . . He's taken several slashes, the offenders are yelling at him to stop, the offenders are yelling, you know, Jewett what are you going to do, or Jewett stop him, there's no response. Jewett aren't you going to do something and what I'm hearing is a chuckle out of you in the response, not if he's got a razor. Tell me about that.

Grievant: Well I was, I wasn't gonna jump on him if he's got a razor blade in his hand.

Canales: Okay, why the, why the chuckle?

Grievant: I don't know

Canales: okay

Grievant: Just nervous I guess

Canales: Okay, why haven't you yelled to him, why haven't you approached him, why haven't you done some sort of intervention?

Grievant: I don't know. I thought that I had talked to him by then, by this time, now if we go back some. Can we go back some?

Canales: Yes, we can go back as much as you want, absolutely

Canales: Now I think what you're going to hear is, is Giddings calling numbers . . . Okay and again I apologize it rewinds real slow like this.

Grievant: See at this point, you know I'm thinking Miller's coming around the corner with the OC

Canales: Why would you think that?

Grievant: Because Giddings earlier had motioned in the hallway and I didn't know that Miller had taken off, I thought he was still standing there talking to Kurt in the hallway . . . So I'm thinking Miller's coming around the corner any minute

...

(At this point on the tape that Grievant and Canales are watching, Donaldson has just started to cut himself with the razor blade.)

Grievant: See and somewhere in here is where I went to get my gloves

Canales: Yup, you'll see that coming up.

Grievant: Now see this; I was already on this side at this point

Canales: Yup

Grievant: I wasn't, I guess I'm, maybe I'm confused at the time, keep going.

(At this point on the tape that Grievant and Canales are watching, Donaldson has made his "pump, baby, pump" statement.)

Grievant: See that, that whole deal is when I'm trying to talk to him

Canales: Okay, no I could hear you very clearly

Grievant: Now see I've got my gloves on . . . and I'm going over to get the gauze. Before that, I was over getting my gloves

Canales: Okay, but you're saying you were talking to him, I could very clearly hear you respond to the offenders when they ask you if you were going to do something, and you said, and not a raised voice or an elevated voice, not if he's got a razor blade. So I can't believe that it, that you said anything to him at that point, he at no point looked at you

Grievant: At that, after that point I was trying to talk to him, but like I said everybody in the room was trying to yell at him at the same time

Canales: No one's yelled at him yet

Grievant: The inmates are in there

Canales: The inmates are yelling

Grievant: Yeah

Canales: But there's been no DOC staff that has said stop, put it down

Grievant: Yeah there was, I think, I believe Edgerley and the nurse had said something at one point. I mean you can . . . I mean this is what I remember, I mean I, I don't know why . . .

Canales: . . . So at this point he's dropped it . . .

Grievant: Now that point was when I went to get the gauze

Canales: Right

Grievant: Before that I was getting my gloves

Canales: Okay, from this point, it's you bring him over and you tend to the wounds and the, and rescue folks show up and all that other. My concern, we've watched it a couple of times, is I'm not hearing any response from you

Grievant: I did, I did say something, whether it was when the inmates were hollering, I don't know exactly when

Canales: What'd you say . . . ?

Grievant: I said Kevin, Kevin and I said drop the blade and I called numbers on the radio because I didn't see Miller coming down

...

(State's Exhibits 12, 13)

27. Superintendent Jay Simons sent a Loudermill letter to Grievant dated June 1, 2006, that provided in pertinent part:

As a result of your behavior described below, the Department of Corrections ("DOC") is contemplating serious disciplinary action up to and including your dismissal from the position of Correctional Officer II. . .

This action is contemplated for the following reasons:

These charges are based on a March 17, 2006, Investigative Report by Peter Canales, AHS Investigation Unit Chief, which is attached and may be consulted for additional information regarding the following charges.

I. Violation of DOC Work Rules 1, 3 & 9, Gross Neglect of Duty, Conduct that Jeopardized the Life of Health of Offender KD on December 19, 2005:

DOC Work Rule #1 provides that:

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.

DOC Work Rule #3 provides that:

No employee shall, while on duty or engaged in activity associated with the Department of Corrections, endanger the safety of any member of the public. Employees shall be responsible to promptly report, to their immediate supervisor, any such conduct by another employee, volunteer or offender which endangers the safety of others.

DOC Work Rule #9 provides that:

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

Article 14, Section 3 of the Corrections Unit Agreement provides that an employee may be dismissed

. . . immediately without 2 weeks' notice or 2 weeks' pay in lieu of notice for (a) gross neglect of duty; (b) gross misconduct; (e) conduct which places in jeopardy the life or health of a . . . person under the employee's care.

Vermont Personnel Policy 5.6, Employee Conduct, provides, in pertinent part:

Prohibited Conduct

4. Employees shall not engage in any employment, activity, or enterprise which has been or may be determined by the appointing authority to be inconsistent, incompatible, or in conflict with their duties as a State employee or with the duties, functions or responsibilities of the agency by which they are employed.

On December 19, 2005, you were the CO2 Transport Officer at the Chittenden Facility. Offender KD was scheduled to be transported that day to another facility. KD attempted to avoid that transport by presenting himself with one or more razor blades in his possession, including at least one in his mouth. Shift Supervisor Miller and Mental Health Worker Kurt Randall engaged in a lengthy conversation with KD and attempted to cause KD to surrender the razor blades. KD threatened to harm himself on one or more occasions during that conversation. Ultimately, KD tied a latex glove to his arm and cut the inside of his left bicep. He then surrendered one razor blade.

After KD first cut himself, SS Miller instructed CO I Edgerley to video tape KD's actions. SS Miller and CO II Giddings then conducted a strip search of KD and you searched his clothing. After the search, KD was placed in handcuffs and leg shackles and was seated on a blue chair just outside the search room. SS Miller and Mr. Randall left the booking area.

At this point, KD was sitting on the blue chair outside the search room, with CO Edgerley videotaping his actions. You and CO II Giddings remained in the area and you were the senior officer in the Booking Area. KD then said he felt restricted or constricted in the blue chair, stood up, and walked over to and sat down on the cart where he had cut himself the first time. You did nothing to prevent KD from vacating the blue chair or to cause him to return to it. Then, while you and the other officers watched, KD removed a razor blade from his mouth and made a comment to the effect that you were crazy if you thought he was getting on the bus and that he had not given up his only weapon. KD then stood up, and began to cut his wrist.

KD's actions were observed by other offenders in the area, who loudly asked you to intervene. At one point, an offender asked you what you were going to do about KD's actions. To that offender, you responded, "nothing." To another offender's similar question, you laughed and indicated, "not if he's got other razors." You did not speak to KD in an effort to get him to stop cutting himself and/or drop the razor blade, nor did you do anything physically to cause him to cease or desist.

After he inflicted a cut that caused substantial bleeding, KD shouted, in substance, "Yeah, that's the one I was looking for the whole fucking time!" He then loudly yelled, "pump baby pump!" As he yelled, "pump baby pump," he threw the razor blade down on the floor.

It was about 88 seconds between the time that KD stood up and moved from the blue chair until the time that you first attempted to intervene in his actions. Your first intervention came about 65 seconds after KD began to cut himself. Prior to that time, you had taken no verbal or physical actions to stop KD from harming himself. You and CO II Giddings ultimately took control of KD, but only after an inexcusable delay.

One of your most important duties is to protect the health and safety of offenders under DOC supervision. This includes taking measures to ensure offenders do not harm themselves.

It appears that you acted with utter indifference for the health and safety of offender KD. Your actions constitute gross neglect, gross misconduct, and/or conduct that jeopardized the health and/or life of Offender KD under Article 14, Section 3, of the Corrections Unit Agreement. Your conduct also violated State Personnel Policy 5.6, because it was inconsistent, incompatible, or in conflict with your duties as a Correctional Officer. As a result of his self-harming actions, Offender KD needed emergency medical treatment at the hospital. Your actions also appear to have violated Work Rules #3 (endangering KD's safety) and 9 (actions reflecting discredit on DOC).

II. Violation of DOC Work Rules 4 & 5 – Dishonest Responses During Investigation re:

DOC Work Rule #4 states that,

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.

DOC Work Rule #5 states that,

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.

You were interviewed by investigator Peter Canales on February 3, 2006. VSEA Field Representative Jonathan Goddard represented you during that interview. It appears that you were dishonest in that interview when you made the following claims:

- That you and other officers were talking with offender KD between the time he (KD) left the blue chair and the time that you and CO II Giddings approached him 88 seconds later;
- That you instructed KD to “drop the blade,” or words to that effect;
- That you stopped speaking to KD while CO I Edgerley was speaking with him so KD would not be confused;
- That other officers on the scene were talking to KD at the same time you were talking to him;
- That your response to KD’s actions was delayed because you had to get rubber gloves;
- That you delayed your response to KD’s actions out of concern for officer safety;
- That KD was still holding the razor blade when you approached him 88 seconds after he left the blue chair;

Mr. Canales played the DVD of the hand-held video footage of the incident during your investigative interview. He gave you the opportunity to identify the points at which you verbally intervened with Offender KD, but you were unable to do so. Even after listening to the DVD, however, you maintained that you had verbally intervened. No such intervention is audible on the DVD, and, in addition, Offender KD does not appear to respond to any verbal intervention by you or other officers. Enclosed with this letter is a copy of the DVD for your further review in the preparation of any response you wish to provide to these charges.

It appears that your conduct provides just cause for bypassing progressive discipline and for the imposition of serious discipline up to and including your dismissal from employment. Failing to act to protect the health and safety of an inmate is an extremely serious offense. Providing untruthful information during the investigation of that earlier offense is also an extremely serious 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 15)

28. Superintendent Simons sent a letter to Grievant dated July 11, 2006, providing in part:

This is to notify you of your dismissal from the position of Correctional Officer II, effective July 11, 2006. You will not receive two weeks pay in lieu of two weeks notice. By letter dated June 1, 2006, you were notified that DOC was contemplating your dismissal, and were given an opportunity to respond to charges of misconduct. On June 27, 2006, I met with you and Norman Blais, Esq., to hear your response. In addition to his oral presentation at that meeting, Mr. Blais also provided a written response dated June 27, 2006. In making my final decision, I have considered both the oral and written responses provided on your behalf.

The reasons for this action are those that are outlined in the letter of June 1, 2006, . . . which are incorporated herein by reference.

. . .

(State's Exhibit 16)

29. Superintendent Simons did not review Grievant's performance evaluations before deciding to dismiss him.

30. Superintendent Simons decided not to discipline Edgerley concerning the December 19 incident involving Donaldson. He made this decision because Edgerley was a new, inexperienced officer in the presence of senior officers, and he had complied with orders from Miller to videotape the incident. Simons provided Edgerley with performance feedback, informing him that he would be expected to take action on his own if a similar incident occurred in the future where there was a lack of leadership.

31. The Chittenden Regional Correctional Facility does not have a policy generally denying inmates access to razor blades if they have a history of using razor blades inappropriately. If inmates use a razor blade to harm themselves due to a mental health issue, the Employer may restrict their access to razors for a short period of time but they ultimately are allowed to use razors. There is a segregated unit in the facility, the Alpha Unit, in which inmates do not have access to razors.

OPINION

Grievant alleges that the Employer violated Article 14 of the Contract by dismissing him. Specifically, Grievant contends that: a) his dismissal was not supported by just cause, b) the Employer improperly bypassed progressive discipline, and c) the Employer failed to apply discipline with a view toward uniformity and consistency.

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. Grievance of 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. 27. The Employer first charges Grievant with gross neglect, gross misconduct, and/or conduct that placed in jeopardy the health and/or life of an offender on December 19, 2005. Specifically, the Employer charges Grievant with misconduct by:

a) doing nothing to prevent inmate Kevin Donaldson from leaving a chair in the booking room or to cause him to return to it, and b) taking no verbal or physical actions to stop Donaldson from harming himself with a razor blade until after an inexcusable delay. The Employer alleges in sum that Grievant “acted with utter indifference for the health and safety of” Donaldson.

We conclude that the Employer’s charge that Grievant “acted with utter indifference for the health and safety” of Donaldson is not supported by the preponderance of the evidence, although Grievant was at fault for not asserting himself more in this situation. The Employer’s charges overstate the seriousness of Grievant’s misconduct.

The Employer has not demonstrated by a preponderance of the evidence that Grievant committed misconduct warranting discipline due to Donaldson leaving the chair in the booking room. Shift Supervisor Miller; who had directed the activities resulting in Donaldson sitting in the chair with leg irons, handcuffs and a waist chain after a strip search; had just left the booking room unannounced to Grievant and did not tell Grievant he was now in charge. There is no evidence of Miller providing any directions to Grievant or any other officer on further handling of Donaldson. Under these circumstances, it was not reasonable to fault Grievant for Donaldson suddenly getting up from the chair and walking over to the pallet.

Once Donaldson left the chair and moved to the pallet, Grievant should have engaged in more verbal interaction with Donaldson to attempt to have him return to the chair in the booking room. Once he had moved to the pallet which was in a less restrictive area of the booking room, it was easier for Donaldson to cut himself with a

razor blade without effective intervention by correctional officers. Grievant had a responsibility under the policies of the Employer and training he had received to provide direction to Donaldson to return to the chair and give him the chance to cooperate to try to resolve a potentially dangerous situation. Grievant's response here did not meet his responsibility.

However, Grievant did not display "utter indifference" for the health and safety of Donaldson in this regard. He did have a brief verbal interchange with Donaldson after he left the chair. Donaldson made a comment: "I know you guys would try to trick me if I'm sitting right there". Grievant responded: "who's going to trick you?" Donaldson began cutting himself within approximately 10 seconds of this interchange. Although Grievant can be faulted for not taking control of the situation more quickly, he did not demonstrate indifference for Donaldson's health and safety.

The Employer contends that Grievant's indifference to Donaldson's health and safety is further demonstrated by Grievant's response to another offender in the booking area questioning Grievant what he was going to do after Donaldson began cutting his wrist. The Employer faults Grievant for stating "nothing, not if he's got another razor", and laughing. The Employer has not demonstrated by a preponderance of the evidence that Grievant's laugh indicated a callous disregard for Donaldson's well-being. Grievant explained the laugh as a nervous laugh. We conclude after reviewing the videotape that this explanation is both plausible and reasonable.

Again, Grievant should have asserted himself more vigorously by verbally interacting with Donaldson to attempt to get him to stop harming himself. Grievant had a responsibility pursuant to policies of the Employer and training he had received to

attempt to dissuade Donaldson from his harmful behavior. However, we conclude that this demonstrated unwarranted passivity on Grievant's part apparently caused by indecision and caution in a volatile situation, rather than indifference for Donaldson's health and safety.

The Employer charges Grievant with misconduct for taking no physical actions to stop Donaldson from harming himself. The Employer has not demonstrated by a preponderance of the evidence that there were appropriate physical actions available to Grievant during the time that Donaldson held a razor blade. A canister of OC spray may have been useful, but Miller did not leave the OC spray he had on him with any of the officers remaining at the scene. Any physical actions taken by Grievant during this period would have endangered his safety and perhaps the safety of others. Grievant acted consistent with his training and department policies regarding safety concerns by not taking physical actions. Once Donaldson dropped the razor blade, Grievant acted appropriately by quickly retrieving gauze and approaching Donaldson to staunch the blood flowing from his self-inflicted cuts.

In sum, the Employer has not established its charges that Grievant acted with utter indifference for the health and safety of Donaldson. We conclude that the Employer has proven its charges only to the extent of establishing by a preponderance of the evidence that Grievant committed misconduct by: a) failing to engage in more verbal interaction with Donaldson to attempt to have him return to the chair in the booking room; and b) failing to verbally interact with Donaldson to attempt to get him to stop harming himself.

The Employer next charges Grievant with violation of Employer Work Rule #4, which requires employees to be honest with the employer of events occurring in the

workplace, and Work Rule #5, which provides that employees shall answer fully and truthfully any questions during an investigation conducted by the Employer. The Employer contends that Grievant violated these rules by being dishonest in an interview conducted by Peter Canales during the Employer's investigation.

The Employer charges Grievant with seven counts of dishonesty. Some of these counts can be summarily dismissed. The Employer contends that Grievant was being dishonest by claiming that Donaldson was still holding the razor blade when Grievant approached him 88 seconds after he left the chair. A review of the interview indicates that Grievant made no such claim. Thus, this count is not supported by the evidence. The Employer alleges that Grievant claimed that he delayed his response to Donaldson's actions out of concern for officer safety. It is true that Grievant claimed during the interview that his response was delayed due to safety concerns. However, the evidence does not indicate that this was a dishonest claim. We conclude that Grievant did delay approaching Donaldson due to concern for his own safety.

The Employer further alleges the following counts of dishonesty: a) Grievant claimed that he stopped speaking to Donaldson while Edgerley was speaking to him so that Donaldson would not be confused; b) Grievant claimed that other officers on the scene were talking to Donaldson at the same time he was talking to them; c) Grievant claimed that he and other officers spoke with Donaldson between the time Donaldson left the chair and the time Grievant approached him; d) Grievant claimed that his response to Donaldson's actions was delayed because he had to get rubber gloves; and e) Grievant claimed that he instructed Donaldson to "drop the blade", or words to that effect.

The videotapes of the incident do not support these claims by Grievant. It is possible that Grievant and other officers may have directed a few comments to Donaldson in low voices that were not picked up on the audio portion of the handheld camera operated by Edgerley videotape. Nonetheless, it is apparent that, if there were any such attempted communications, they were ineffectual and not pursued vigorously. There is no indication on the videotape that Donaldson reacted to any such comments. Further, the videotape of the fixed security camera demonstrates that Grievant did not retrieve rubber gloves during the incident. We conclude by a preponderance of the evidence that Grievant's claims were inaccurate.

Nonetheless, the Employer has not demonstrated by a preponderance of the evidence that these inaccurate claims by Grievant resulted from dishonesty on his part. We conclude after a review of the interview that these comments made by Grievant resulted from faulty memory on Grievant's part arising from the confusion and commotion of a fast-moving incident along with a 46 day delay between the incident and the interview with Canales. There were several occasions during the interview with Canales when Grievant mentioned that he was having difficulty recalling details of the incident due to the length of time between the incident and the interview. Such claims of memory difficulties are credible. In sum, we conclude that Grievant's inaccurate claims concerning these matters were caused by faulty memory on Grievant's part rather than dishonesty.

In sum, the Employer has established only some of the charges against Grievant . The fact that all of the charges against Grievant have not been proven in their entirety does not necessarily mean that his dismissal was without 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 Grievant's ability to perform at a satisfactory level and their effect on supervisors' confidence in Grievant's ability to perform assigned duties, 4) Grievant's past disciplinary record, 5) Grievant's past work record, including length of service and 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.

Although we have concluded that Grievant's offenses were not as serious as alleged by the Employer, Grievant's offenses were serious. The Employer is responsible for ensuring the safekeeping of inmates within its custody. Grievance of Camley, 24 VLRB 119, 150 (2001). Grievance of Lilly, 23 VLRB 25, 48 (2000). Grievance of Pretty, 22 VLRB 260, 269 (1999). Grievant acted contrary to this responsibility by failing to engage in more verbal interaction with Donaldson to attempt to have him return to the

chair in the booking room; and failing to verbally interact with Donaldson to attempt to get him to stop harming himself.

Grievant had fair notice that his offenses could result in his 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. at 568.

Grievant knew from Employer policies and training he received that he had the responsibility to verbally interact with Donaldson to attempt to dissuade him from his self-harming behavior.

His offenses had an adverse effect on his ability to perform at a satisfactory level and on supervisors' confidence in his ability to perform assigned duties. He performed unsatisfactorily in the important duty of preventing and stopping inmates from harming themselves. This understandably impacted supervisors' confidence in his ability to supervise inmates in dangerous situations.

However, Grievant's past work record and disciplinary record weigh significantly in his favor. He worked nearly eight years for the Employer without any previous discipline and had a satisfactory performance record. It is apparent that the Employer did not give Grievant's record appropriate consideration since Superintendent Simons, the person who made the ultimate decision to dismiss him, did not review Grievant's performance evaluations.

Consideration of the consistency of the penalty of dismissal imposed on Grievant compared to the treatment of other employees also weighs significantly in Grievant's favor. In reviewing the evidence, it is apparent that Grievant's dismissal is disproportionately severe. It is most notable in this regard that no disciplinary action was

taken against Shift Supervisor Michael Miller despite deficiencies he exhibited in this incident. Although Miller did a good job using verbal communication skills to persuade Donaldson to agree to a strip search and use of restraints, he did not appropriately follow through on the strip search and its aftermath.

He supervised a strip search that included a cursory and inadequate examination of Donaldson's mouth. As a result, Donaldson was able to conceal two razor blades, one of which he used to harm himself in the incident for which Grievant was dismissed. He displayed the other razor blade subsequently that evening in a further attempt to avoid transport to another correctional facility. It was inconsistent for the Employer to dismiss Grievant for his offenses while taking no disciplinary action against the supervisor of an inadequate strip search which subsequently resulted in two serious incidents.

Miller also can be faulted for leaving the booking room area after the strip search without announcing that he was leaving and not telling Grievant that he was in charge. Donaldson had already engaged in self-destructive behavior and made it evident that he still did not wish to be transported. Given such circumstances, Miller should have been more explicit in ensuring the safe handling of the situation. His failure to do so contributed to the seriousness of the resulting incident. Again, it was inconsistent for the Employer to dismiss Grievant for his role in the incident while not disciplining the supervisor who also demonstrated deficiencies.

Further, the lack of effective policies by the Employer to deal with inmates who had a practice of inappropriately producing razor blades contributed to the events resulting in Grievant's dismissal. The Employer was aware that Donaldson had inappropriately produced razor blades on past occasions. Nonetheless, there was no

policy in place to regulate access to razors for inmates such as Donaldson. On the day in question, he was able to successfully conceal three razor blades on his person and produce them on three separate occasions. The failure of the Employer to have policies in place to prevent this from happening placed correctional officers such as Grievant in a position to fail.

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

However, 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. It is notable in this regard that Grievant's proven offenses are less severe than charged by the Employer. When this is considered together with Grievant's good work record, the inconsistency of the penalty imposed on Grievant compared to other employees, and the lack of effective policies by the Employer to deal with these kinds of situations, we conclude that it was not appropriate for the Employer to completely bypass progressive discipline and dismiss Grievant.

The maximum penalty short of dismissal permitted by the Contract is a 30-day suspension. A suspension of half this amount is an adequate and effective alternative sanction. This should suffice to deter such conduct by Grievant in the future. It also should suffice to send the message to other employees that the misconduct displayed here was serious and will not be condoned.

ORDER

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

1. The Grievance of Dennis Jewett is sustained in part;
2. Grievant shall be reinstated to his position as a Correctional Officer II at the Chittenden Regional Correctional Facility;
3. Grievant shall be awarded back pay and benefits from the date commencing 15 working days from the effective date of his dismissal until his reinstatement, for all hours of his regularly assigned shift plus the amount of overtime Grievant would have worked, minus any income (including unemployment compensation received and not paid back) received by Grievant in the interim;
4. The interest due Grievant on back pay shall be computed on gross pay and shall be at the legal rate of 12 percent per annum and shall run from the date each paycheck was due during the period commencing 15 working days from Grievant's dismissal, and ending on the date of his reinstatement; such interest for each paycheck date shall be computed from the amount of each paycheck minus income (including unemployment compensation) received by Grievant during the payroll period;
5. The parties shall file with the Labor Relations Board by October 19, 2007, a proposed order indicating the specific amount of back pay and other

benefits due Grievant; and if they are unable to agree on such proposed order, shall notify the Board in writing that date of specific facts agreed to by the parties, specific areas of factual disagreement and a statement of issues which need to be decided by the Board. A hearing on disputed issues, if necessary, shall be held on November 1, 2007, at 9:00 a.m., in the Board hearing room; and

6. The Employer shall remove all references to Grievant's dismissal from his personnel file and other official records and replace it with a reference to a 15 day suspension consistent with this decision.

Dated this ____ day of September, 2007, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Edward R. Zuccaro, Chairperson

John J. Zampieri

Leonard J. Berliner