

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 14-62
ADAM PATTERSON)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On September 30, 2014, the Vermont State Employees' Association ("VSEA") filed a grievance with the Vermont Labor Relations Board on behalf of Adam Patterson ("Grievant"), contending that the State of Vermont Department of Corrections ("Employer") violated the collective bargaining agreement between the State and the VSEA for the Corrections Bargaining Unit effective July 1, 2012 to June 30, 2014 ("Contract") by suspending him for 30 days and demoting him from a Correctional Facility Shift Supervisor position. Specifically, Grievant alleged that the Employer violated Article 14 of the Contract because: 1) the suspension and demotion was not based in fact or supported by just cause, 2) the Employer improperly bypassed progressive discipline and progressive corrective action, 3) the Employer failed to apply discipline with a view toward uniformity and consistency, and 4) the Employer failed to impose discipline within a reasonable time of the alleged offense.

A hearing was held in the Labor Relations Board hearing room in Montpelier on May 14, 2015, before Board Members Gary Karnedy, Chairperson; James Kiehle and Robert Greemore. Assistant Attorney General James Shea represented the Employer. VSEA Staff Attorney Justin St. James represented Grievant. The Employer and Grievant filed post-hearing briefs on May 28, 2015.

FINDINGS OF FACT

1. The Contract provides in pertinent part:

...

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 or corrective action within a reasonable time of the offense;
 - b. apply discipline or corrective action with a view toward uniformity and consistency;
 - c. impose a procedure of progressive discipline or progressive corrective action;
 - 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 or progressive corrective action; . . .
 - g. . . . Nothing in this Agreement shall be construed to limit the State's authority or ability to demote an employee under Section 1(d) and/or 1(e) of this Article, for just cause resulting from misconduct or performance, but the State shall not be required to do so in any case. . .

...

 - 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. State Personnel Policy 5.6 provides in pertinent part:

...

REQUIRED CONDUCT

- (1) It shall be the duty of employees to fulfill to the best of their ability the duties and responsibilities of their position. Employees shall pursue the common good in their official activities, and shall uphold the public interest, as opposed to personal or group interests.

...

(3) Employees shall conduct themselves in a manner that will not bring discredit or embarrassment to the State of Vermont, whether on or off duty.

...

(Exhibit 12)

3. Grievant was hired by the Employer in July 2009 and was assigned to the Chittenden Regional Correctional Facility (“CRCF”) in South Burlington from then until 2014. Grievant started as a temporary correctional officer, and then ascended in rank to a permanent status Correctional Officer I, Correctional Officer II, and Correctional Facility Shift Supervisor (“CFSS”) within two years.

4. On March 24, 2011, Grievant received a written reprimand for violating unit post orders and facility rules when he documented security checks on an inmate who was not present. The letter of written reprimand stated in pertinent part:

...

Facility Procedure 403.00.01 “Scheduled Headcounts” states that officers will positively identify each inmate by matching each inmate’s face or inmate ID to the headcount sheet in order to count them. It also states that at no time will inmates be verified by number only. While you did identify the accurate number of inmates present in your unit, it was documented that an inmate (PD) was present who had been transferred to another unit.

The intent of this written reprimand is to document the misconduct. You will be subject to progressive discipline up to and including dismissal for future violations of DOC Work Rules, Directives, State Policies, or for other misconduct.

...

(Exhibit 2)

5. Grievant was assigned to work the third shift on June 25, 2013. Before he came to work, another supervisor, Ed Morley, placed female inmate JD into handcuffs. JD had an extensive history with the CRCF as both an inmate and as an incapacitated person. She remained in handcuffs for more than an hour before Grievant came to work. At 11:30 p.m., Grievant arrived at work. Morley informed him that JD was in handcuffs and under 15 minute observations. Grievant forgot about JD for a period of time until reminded by an officer around

2:30 p.m. Grievant immediately went to JD's cell and removed the handcuffs. Morley and Grievant both received supervisory feedback on September 25, 2013, for the June 25 incident because JD remained in restraints for more than two hours, and an unusual incident report was not filed, and the Superintendent was not notified, contrary to a directive (State Exhibit 24).

6. Grievant certified on August 6, 2009, that he read and fully understood the Department of Corrections Work Rules. The Work Rules provide in pertinent part:

1. No employee shall violate any provision of the collective bargaining agreement or a State or Department work rule, policy, procedure, directive, local work rule or post order.

...

3. 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.

...

6. No employee shall, while on duty or engaged in an activity associated with the Department of Corrections, engage in verbal or physical behavior towards members of the public, which is malicious, demeaning, harassing or insulting. Such behaviors include, but are not limited to: profane, indecent or vulgar language or gestures, or 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.

...

(Exhibits 12, 20)

7. Department of Corrections Policies and Directives provide in pertinent part:

...

Policy 405: Reporting Incidents

...

2.2 The purpose of this policy is to outline a process for the reporting of incidents which occur to inmates, clients, property, or staff that are within the control of the Department.

...

4.1.1. In order to carry out this policy, it shall be the responsibility of all staff to report the incident through the on-site chain of command.

...

4.2.3. The following incidents must be reported to the Superintendent or Site Manager within their next work day.

...

4.2.3.2 Use of force (to include all incidents where physical force is used which do not meet the standard for one hour notification).

...

Directive 405.02: Reporting Security Incidents

Purpose: The purpose of this directive is to establish and outline a process for the notification of managers and the reporting of incidents involving inmates, offenders, property, security breaches and staff. This directive will identify various categories of incidents and will outline the notification and reporting requirements for each.

...

I. DIRECTIVE

Incidents shall be categorized from the most serious (Category I) to the least serious (Category III) . . .

A. Incidents:

...

3. CATEGORY III INCIDENTS:

Institutions – Notification must be given to the Site Manager within 24 hours. Reporting, using the database must be done by the Shift Supervisor before going off shift. All staff and supervisory reports must be forwarded to the Director of Security and Supervision within 5 working days.

Use of Force Any occurrence not shown in Category 1 & 2 . . .

Use of Restraints Any occurrence not shown in Category 1 & 2 . . .

B. Reporting Incidents:

1. It is the responsibility of all Department staff to promptly and properly report all incidents through the work site chain of command.
2. Supervisors or those acting in a supervisory role will be responsible for both the notification of superiors, as outlined in the definitions of each category, as well as the initial and final reporting of all incidents.
3. All staff involved in or witnessing a reportable incident will submit a report to their respective supervisor that is thorough, complete, truthful and inclusive of everything that they witnessed or heard.

...

Directive 413.01: Use of Force – Facilities

Policy: The Vermont Department of Corrections believes in non-violent conflict resolution, although on occasion physical force may be the only alternative. The Department of Corrections authorizes staff to use force

only as a last alternative after all other reasonable efforts to resolve a situation have failed.

Definitions:

Emergent/Reactive Use of Force: The use of force in situations where time and circumstances do not permit approval by higher ranking employees or consultation or planning.

Excessive Force: A type or amount of force beyond that which is reasonably necessary to control the situation and achieve the correctional objective or the continued use of force after it is no longer reasonably necessary.

Reasonable Force: The use of physical force to achieve a legitimate correctional objective where the type and amount of force are consistent with the situation and objective to be achieved, where alternatives to physical force are unavailable or ineffective, and where the force used is the minimum necessary to control the situation.

Serious Physical Injury: Physical injury which creates a risk of death or which causes disfigurement, impairment of health or loss or impairment of the function of any bodily organ.

Use of Force: Any situation in which staff uses physical force against an inmate, except those situations in which security restraints are used in a standard manner for escort or transport.

Procedural Guidelines:

1. Conflict Resolution: Conflict shall be resolved at the lowest level of intervention compatible with the safety of staff, the public, inmates and the need to maintain order. Physical force shall only be used when alternatives to physical force have proven inadequate or the emergent situation does not provide the time or opportunity.

. . .

3. Prohibitions on the Use of Force: a. Staff shall not use force prior to employing non-physical alternatives, except in an emergent situation. b. Staff shall not use or permit the use of excessive force. c. Staff shall not use or permit the use of force as punishment or discipline . . .

4. Levels of Force: The level of force and type of force equipment that may be used is dictated by the assessed risk presented, the severity of the conditions of the situation confronted and the staff person's assessment of where the incident falls on the Use of Force Continuum (see section 11).

Levels of force are characterized as:

a. Less than lethal (non-deadly) force – This may be employed through the use of a device or the application of a staff member's hands, fists, elbows or feet against an inmate to gain control or defend against an assault.

Types of non-deadly force devices are:

i. Physical Restraint Devices

- handcuffs
- leg irons

- belly chains
 - flex cuffs
 - black locking box
 - chubb cuffs
 - restraint chair
 - soft restraints
- ii. Chemical Agents, also known as foreign agents, such as OC spray or tear gas designed to temporarily immobilize or incapacitate the inmate
 - iii. Plexiglas Shields
 - iv. Kinetic energy devices and devices designed to launch a “bean bag” or rubber bullet
 - v. Batons and other weapons designed to temporarily incapacitate an inmate by striking the inmate with the baton
 - vi. Munitions such as smoke grenades or “stun”

5. Use of Restraints

...

d. The use of restraints in any aspect of a use of force continuum shall be in compliance with administrative directive #413.08, *Use of Restraints and Roles of Security and Health Care Professionals in Facilities*.

...

11. “Use of Force Continuum”

The “Use of Force” Continuum” provides guidance in decision making when staff are confronted with an incident where the use of force may be necessary. There is no rigid hierarchy or specific initial sequence requiring one particular level of force or equipment to be used. The level of force and type of equipment used is dictated by the assessed risk presented and the severity of the conditions confronting staff.

Directive 413.03: Use of Foreign Agents

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2.1 A situation may arise where it becomes necessary to use oleoresin capsicum (OC), for protection of staff and others from imminent physical harm or loss of life, suppress riots or willful destruction of property. If order cannot be restored by application of less forceful methods, foreign agents may be deployed against either individual offenders or groups of offenders.

NOTE any use of foreign agents must be administered in accordance with the guidelines established for Conflict Resolution, Directive 413.01 (i.e. use of restraints, videotaping, incident reporting, etc.)

...

4.1 In facilities, it is required that Shift Supervisors and the First Responder Supervisor be issued OC spray as part of their equipment that they carry. Generally the Shift Supervisor or First Responder Supervisor will be present at the scene and make the determination to use Oleoresin

Capsicum. It is recommended that all First Responders carry OC. He/she will base his decision on all of these factors:

4.1.1 Use of ACT skills have not resolved the conflict

4.1.2 The use of Advanced Physical Control techniques will likely result in injury to staff or offender.

4.1.3 The offender is demonstrating any of the following behaviors:

- Overtly dangerous behavior, i.e., assaultive, striking, pushing, kicking, biting, or throwing spittle, blood, urine, of feces;
- Behavior that threatens the safe operation of the facility and is therefore dangerous;
- Behavior that requires staff to use physical handling to move the offender;
- Lethal threat - life threatening behavior, i.e., Holding knife, handmade weapon, shank, spear, etc., on self or others in a hostage situation;
- Disturbances.

Directive 413.08: Use of Restraints & Roles of Security and Health Care Professionals in Facilities

Policy: It is the policy of the Department of Corrections that procedures governing the use of restraints for inmates are standardized and consistently applied in all facilities. Mechanical restraints and devices may be used to prevent violence, self-harm, or property destruction by restraining inmates whose behavior has not been controlled by less intrusive measures. Mechanical restraints and devices are employed as a last, not as a first resort. Mechanical restraints and devices may not be used for purposes of punishment.

Definitions:

Restraints: Restraints include any mechanical device used to control the movement of an inmate's body and/or limbs . . .

PROCEDURAL GUIDELINES

1. Use of Emergency Restraints

Restraints may be used, but only as a last resort, by correctional staff or a physician.

- a. Restraint may be used by correctional staff as an emergency intervention when necessary for justifiable self-defense, protection of others, protection from self-harm, protection of property, to restore order, and to prevent escapes. A first attempt to achieve compliance from an inmate will be a verbal intervention . . .

...

2. Application of Emergency Restraints

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- f. Inmates will not be confined in an unnatural or unsafe position (hog-tied, face-down or spread-eagle)

...

7. Documentation

...

c. Correctional Staff Incident Reports and Video Recording of Incidents
Any incident involving the use of restraint devices, other than normal transport and escort, requires verbal notifications and written report as referenced in departmental policy and directives on *Reporting Incidents and Reporting Security Incidents (A)*. Where an emergent situation prohibits the planned use of a video recording device, one should be obtained as quickly as possible.

...

(Exhibit 12)

8. Edward Adams became CRCF Superintendent in early September 2013. He previously had 13 years of employment in the Department of Corrections working in correctional facilities, probation and parole offices and central office.

9. On September 11, 2013, Grievant and another correctional facility shift supervisor, Michael Wilson, were working on the same shift. When two shift supervisors are on the same shift, one is designated as S-1 and the other is designated S-2. The S-1 generally is in charge of the shift and is responsible for writing any unusual incident reports by the end of the shift. Wilson was serving as S-1, and Grievant was S-2, on September 11, 2013.

10. JD was lodged at CRCF for protective custody because she was incapacitated by alcohol and/or drugs. She had a cast on her right arm due to a self-inflicted injury. She was placed in a holding cell with another incapacitated person. At approximately 5:45 a.m., Correctional Officer Amber Bedard observed JD's cellmate throw a tray of food and entered the cell. Bedard saw JD grab a spork (i.e., combination spoon and fork) that fell from the tray and attempt to retrieve it. JD resisted and Bedard took control of her arm, grabbed her from behind in a manner similar to a bear hug, and took the spork from her. Grievant did not observe the incident. Subsequently, Bedard told Grievant and Wilson that she took a spork away from JD. It is unclear how detailed the explanation was that Bedard gave Grievant and Wilson concerning

the spork incident. She did not inform them that she had to use force to get the spork away from JD. Either Grievant or Wilson told Bedard that she did not have to file a use of force report concerning the incident (Exhibit 21).

11. Shortly after Bedard retrieved the spork from JD, Wilson and Bedard removed JD from the cell and prepared to move her to the “strip cell” for closer observation. While standing in the booking area where the strip cell was located, JD became resistive and Wilson called for other officers to come to the booking area to assist in the movement of JD. Grievant arrived in the booking area and began to put on gloves. Simultaneously, Bedard and Wilson each took an arm of JD and escorted her across the booking area into the strip cell. During the escort, JD appeared to slightly drag her feet. It is not established that Grievant observed dragging of the feet in the escort of JD into the strip cell and there is no evidence that this was reported to him (Exhibit 21).

12. After Wilson and Bedard placed JD in the strip cell and left the cell, JD was agitated and repeatedly struck her casted arm against the cell door. Approximately 9 minutes after JD had been placed in the cell, Wilson and Grievant entered the cell. Wilson quickly moved to place handcuffs on JD behind her back with assistance from Grievant. Bedard observed from the outside window of the strip cell door that handcuffs were placed on JD. Wilson and Grievant then exited the cell. JD kicked the cell door. Shortly thereafter, Wilson and Grievant returned to the cell. Grievant quickly moved to take JD down to the cell floor and was closely over her as she was on the floor. Grievant and Wilson then left the cell with JD lying on the cell floor in handcuffs. JD then quickly returned to her feet after Grievant and Wilson exited the cell (Exhibit 21).

13. Bedard, Wilson and Grievant did not file use of force reports concerning the September 11 interactions with JD. In the Shift Supervisor End of Shift Summary which Wilson filed for September 11, he did not mention the interactions with JD and left blank the section on the shift summary form to list “unusual incident reports” (Exhibit 7).

14. Neither Bedard nor Wilson were disciplined for failure to file a use of force report or for any other reasons for the September 11 interactions with JD.

15. Grievant received an overall rating of “excellent” on his annual performance evaluation covering the period August 28, 2012, to August 28, 2013. The evaluation was completed and signed by Security and Operations Supervisor Michael Miller, and signed by Superintendent Edward Adams on October 11, 2013. Among the comments made by Miller on the performance evaluation were:

- “CFSS Patterson is conscientious about keeping up with and following facility rules, regulations and procedures. CFSS Patterson can be counted on to correct staff that are less conscientious in this area.”
- “CFSS Patterson takes pride in his work and insures the accuracy of his reports and follows through with his task.”
- “CFSS Patterson is aware of events in the facility and is quick to address (a) situation that comes about. CFSS Patterson often reports unusual behaviors and prevents inmates from self-harming. CFSS Patterson is quick to identify safety and security concerns and communicates them well.”
- “CFSS Patterson has a good rapport with the inmate population. He is firm, but fair with his decision all while being alert to any behavior changes.”
- “CFSS Patterson does a great job of keeping his supervisors informed.
- “CFSS Patterson is flexible and responds well to emergent situations, it is clear that CFSS Patterson profits from the trainings he has received.”

Superintendent Adams made the following comments on the evaluation: “I have not been here long but I see a high quality product in the work you put out. I appreciate your professional attitude and the way you carry yourself. Looking forward to working with you this year.” (Exhibit 3).

16. Superintendent Adams was not aware of the September 11 interactions between Grievant and JD at the time he made these comments on Grievant's evaluation.

17. On October 13, 2013, at approximately 12:20 a.m., JD was brought to CRCF by the Burlington police for protective custody because she was incapacitated by alcohol and/or drugs. She had a cast on her right arm which was larger than the cast she had when she was at the correctional facility on September 11, 2013. JD refused orders from correctional officers during the booking process and did not consent to a search of her person. After continued resistance and verbal refusals, Grievant placed handcuffs on JD. Subsequent to the placement of handcuffs, JD indicated she would comply with the search of her person. Grievant then left the booking area. Shortly thereafter, Grievant returned to the booking area and helped control JD during the search process. When the search process was completed, JD and two other incapacitated females were placed together in a holding cell (Exhibits 9, 17).

18. At approximately 1 a.m. on October 13, Grievant was in the search room when a correctional officer stated that JD and one of the other incapacitated individuals were shouting at each other in the holding cell. Grievant along with three correctional officers entered the cell to intervene. Grievant instructed JD and the other incapacitated individual to sit on separate bunks. They initially complied, but JD suddenly got off the bunk screaming and charged the other individual. Grievant extended his arm and pushed JD in the chest to keep her away from the other individual. JD fell to the floor (Exhibit 22).

19. JD remained on the floor for 26 seconds. During this time, Grievant ordered JD to stay on the ground or he would spray her with "OC". He also was evaluating what options he had to control JD. There was not a separate cell to place her because of a large number of incapacitated individuals in the facility at the time. JD disobeyed Grievant's orders to stay on the

floor. She arose from the floor and began waving her arms in a threatening manner while shouting expletives. Grievant ordered JD to sit on the bunk. She disregarded this order. Grievant deployed a short spray of oleoresin capsicum ("OC Spray") towards JD. The spray landed on the left side of JD's face. The correctional officers then placed handcuffs on JD and escorted her to the shower area to be decontaminated (Exhibits 9, 22).

20. Grievant completed a use of force form on October 13, 2013, concerning the incident that day with JD. He described the use of force used as: "brought to a controlling surface, OC deployed, wrist compression used." In describing JD's behavior prior to using the use of force, he stated: "Incap JD was very vocal and expressed violent behaviors towards others. This was an emergent/reactive use of force" (Exhibit 18).

21. Grievant also completed an incident report on October 13, 2013, concerning the incident that day with JD. Grievant stated as follows concerning the interactions with JD:

. . . at approximately 0020 Burlington PD arrived with Incap JD for detox. Incap JD was very vocal while entering the facility calling staff various names. Incap JD was patted down and escorted into the search room. Once the cuffs were removed Incap JD was instructed to remove all her contraband clothing . . . Incap JD stated she was not taking anything off. This officer gave her the options of removing it herself or other female staff would remove her clothing. Incap JD still refused. At this time I instructed Incap JD to turn around, face the wall to be cuffed up. Incap JD verbally refused. At this time I unholstered my OC and gave her the choice to cuff up or be sprayed with OC. Incap JD complied. This officer placed cuffs on Incap JD . . . Incap JD removed her shoes . . . Incap JD stated she would comply with the rest of the clothing removal. At this time I removed the cuffs and exited the search room while COI Vaudrein and COI Crump continued with the property removal and the pat search. A minute later COI Vaudrein exited the search room and stated Incap JD was refusing to have a pet search completed. I again entered the search room and gave JD the same options. Incap JD turned around while COI Crump began the pat search. During the pat search Incap JD disobeyed instructions to keep her hands on the wall multiple times. This officer secured JD's left arm while the pat search was completed. After the pat search was completed Incap JD was escorted into HC3 without any further incident.

At approximately 0100 this officer was in the search room bringing in a male Incap. COI Lizotte stated that Incap JD and Incap MM were face to face shouting at each other. It appeared that both Incaps were getting ready to be involved in a physical altercation. This officer along with COI Lizotte, COI Crump, and COI Vaudrien entered the cell to intervene. Both Incaps were instructed to sit on the bunks. Both initially complied. Incap JD immediately sprung up and

charged in the direction of Incap MM screaming at her. This officer pushed Incap JD in the chest to create distance. Incap JD landed softly on the floor. This officer gave Incap JD orders to stay on the ground or she would be sprayed with OC. Incap JD disregarded these orders and stood up. This officer then deployed a half second burst of OC striking Incap JD in the left side of the face. Incap JD was then cuffed, checking for tightness and double lock. Incap JD was escorted into the shower area to be decontaminated.
(Exhibit 9)

22. Superintendent Adams placed Grievant on administrative leave with pay in late October, after he learned of the June 25, September 11 and October 13, 2013, incidents involving JD. The Vermont State Police conducted an investigation of Grievant's interactions with JD. This investigation concluded in a few months without the State Police taking further action. The State Department of Human Resources conducted an investigation of alleged misconduct by Grievant in his interactions with JD. Investigator Daniel Cavanaugh issued an Investigative Report on January 31, 2014, at the conclusion of the investigation (Exhibit 11).

23. Superintendent Adams sent a letter to Grievant dated April 24, 2014, which provided in pertinent part:

As a result of your behavior described below, the Department of Corrections ("DOC") is contemplating imposing serious disciplinary action up to and including dismissal from your position as Correctional Facility Shift Supervisor. You have the right to respond to the specific allegations listed below, either orally or in writing, before the final decision is made. . .

Disciplinary action is contemplated for the following reasons:

...

An employment investigation explored allegations that you improperly used force against JD when she was lodged at CRCF for protective custody as an incapacitated person on September 11, 2013 and failed to properly report your use of force. The investigation also explored allegations that you used excessive force against JD on October 13, 2013 when she was also lodged at CRCF for protective custody as an incapacitated person. . .

...

**Use of Excessive and Unnecessary Force and Failure to Report Use of Force
on September 11, 2013**

On September 11, 2013, JD was lodged at CRCF for protective custody because she was incapacitated by alcohol and/or drugs. She was placed in holding cell 3 with another incapacitated person.

At approximately 5:45 a.m., Correctional Officer Amber Bedard observed JD's cellmate throw a tray of food and entered the cell. Bedard saw JD grab a spork that fell from the tray and attempted to retrieve it. JD resisted and Bedard took control of her arm, grabbed her from behind in a manner similar to a bear hug, and took the spork from her. When Bedard informed you of the incident, you instructed her that it was not necessary for her to prepare a written report of the incident.

JD was escorted to the strip cell after Bedard retrieved the spork. According to Bedard, JD resisted being escorted to the strip cell by attempting to pull away from the officers escorting her. You were present for the escort, but did not write a report about it. During the investigation, you stated that the circumstances of the escort may have required you to write a report about it if "there wasn't a report already involved in the situation." You indicated you were not aware if a report of the incident had been prepared.

After JD was placed in the strip cell, you subsequently entered the cell with Correctional Officer Michael Wilson because she was kicking the door and you were concerned she might kick it open. JD reported that, once (in) the cell, you threw her to the floor and she was placed in handcuffs.

During the investigation, you indicated that you did not have an independent recollection of being in the cell. After reviewing video of the incident, you stated you assume you entered the cell to put JD in handcuffs, but do not recall if she resisted. You also acknowledged being on top of JD as she was on the floor and placing her in handcuffs. After Wilson exited the cell, you departed and left JD lying on the floor with her hands cuffed behind her back.

In your investigative interview, you agreed that the incident in the strip cell required you to write a report. You stated that you did not recall whether you wrote a report about the incident. In fact, you did not write a report about the incident.

Based upon a review of CRCF video, incident reports or lack thereof, witness statements, and your statements, it seems that you improperly instructed Bedard that she did not need to report the force she used to recover the spork taken by JD and failed to report the use of force yourself. You failed to comply with the requirement of Directive 405 to report JD's use of force within the next work day after she reported it to you. It also appears you failed to comply with Directive 405.02, which requires that when a Category III use of force occurs, supervisors are responsible for both the notification of superiors, as well as the initial and final reporting of all incidents.

It seems that you also similarly violated Policy 405 and Directive 405.02 when you did not report the force that was used against JD when she was being escorted to the strip cell. . .

Finally, it seems that you violated Directives 413.01 and 413.08 by using excessive force when you restrained JD with handcuffs in the strip cell and left her lying prone and cuffed on the floor. . . The video of that incident shows that JD was standing when you entered the cell and that you subsequently took her to the floor and asserted physical control over her. Applying handcuffs to JD after you had physically restrained her appears to have been excessive because it seems it was not reasonably necessary to control the situation. Moreover, handcuffs would not prevent her from kicking the door. Furthermore, Directive 413.08 provides that mechanical restraints may not be used to prevent property destruction when the behavior has been controlled by less intrusive measures. The position in which you left JD lying after you cuffed her also appears to have violated Directive 413.08's prohibition against restraining inmates in an unnatural or unsafe position.

. . . (Y)ou also violated DOC Work Rule 6 by treating JD in a demeaning manner which is physically abusive. Furthermore, you apparently violated DOC Work Rules 1, 3 and 9 and Vermont Personnel Policy 5.6 by engaging in activity that was malicious toward and endangered the safety of JD and conducted yourself in a manner that reflects discredit upon the Department.

Use of Excessive and Unnecessary Force on October 13, 2013

On October 13, 2013, JD was lodged at CRCF for protective custody because she was incapacitated by alcohol and/or drugs. She was placed in holding cell 3 with two other incapacitated persons. JD became frustrated with one of her cellmates because she was banging on the door and preventing JD from sleeping. JD began arguing with her cellmate and they appeared to be preparing to fight each other.

You entered holding cell 3 accompanied by Correctional Officers Ashley Lizotte, Rebecca Vaudrian, and Desiree Crump. Once in the cell, you positioned yourself between JD and attempted to determine the source of their conflict. JD advanced toward her cellmate and you pushed her to the floor.

You wrote in your incident report that "Incap JD landed softly on the floor." The video of the incident contradicts that description. In addition, JD stated during the investigation that she "hit the ground pretty hard", to the point where (she) didn't get up right away.

JD remained on the floor for approximately 26 seconds before she began to get up. You did not attempt to restrain her while she was on the floor, but

directed her to remain on the floor or you would deploy OC spray. During the investigation, you stated that you did not restrain her while she was on the ground because the cast on her right arm would have made the application of handcuffs difficult. However, you acknowledged that because JD has small arms you could have applied the handcuffs above her cast. Indeed, you previously applied handcuffs to JD in this manner when she was lodged at CRCF on September 11, 2013.

You stated that JD disobeyed your orders and rose to her feet. You also recalled ordering JD to return to her bunk. When she refused that order, you deployed OC spray to her face. The video of the incident (shows) JD turning toward her bunk before you deployed OC spray. JD was then placed in handcuffs and taken to the strip room.

. . . (I)t appears you utilized unreasonable and excessive force when you pushed JD to the floor. . . Given JD's size, it does not seem the force you used to push her was the minimum necessary to control the situation as required by Directive 413.01.

It's also apparent that you employed excessive force when you deployed OC spray at JD after she arose from the floor when you pushed her down. After you pushed her, she remained on the floor for approximately 26 seconds. During that time, you could have physically restrained her by employing advanced physical control techniques or by applying mechanical restraints, such as handcuffs. Both of these uses of force are lower on the use of force continuum than OC spray and could have been utilized to effectively control the situation as required by Directives 413.01 and 413.03.

. . . (I)t appears you violated Directives 413.01 and 413.03. That conduct also seems to have violated DOC Work Rules 1, 3, 6 and 9, as well as Vermont Personnel Policy 5.6, because it was malicious toward and endangered the safety of JD and reflected discredit upon the Department.

C. Conclusion

Your actions described above appear to constitute misconduct, gross neglect of duty and/or gross misconduct, and conduct which places in jeopardy the life and health of persons under your care. Your actions are extremely serious because it seems you used inappropriate and excessive force against an incapacitated person under your supervision in contravention of DOC's directives.

Although your duties as a Correctional Facility Shift Supervisor require strict compliance with the rules, it appears you blatantly disregarded DOC's clear directives on using force and reporting incidents. Your behavior was inappropriate, unacceptable, potentially dangerous, and potentially abusive. Consequently, as a result of your alleged

actions, you may have violated your duty to safeguard incapacitated persons, to act as a role model for offenders, and to protect facility security.

Overall, your alleged actions discredit and undermine the reputation of the DOC and the State of Vermont, and raise significant questions about your ability to satisfactorily – and credibly – carry out the responsibilities of your position. Accordingly, it appears your conduct provides just cause for disciplinary action up to and including dismissal from your position as a Correctional Facility Shift Supervisor.

Your disciplinary history as a State employee will also be considered in making a determination.

...

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

...

(Exhibit 12)

24. Superintendent Adams sent a letter to Grievant dated May 27, 2014, which provided in pertinent part:

This letter is to document a disciplinary demotion to Correctional Officer II and a thirty (30) day disciplinary suspension for violation of DOC Work Rules and State Personnel Policies. You are receiving this discipline because you used unnecessary and excessive force on an incapacitated offender under the Department of Corrections care and did not report all incidents according to directive. The DOC has lost confidence in your ability to perform duties as a leader, utilize sound judgment and act as a role model for employees and offenders.

As a DOC employee, you are expected to comply with State Personnel Policies and DOC rules, which require integrity in all professional representations. You will be subject to progressive discipline up to and including dismissal for future violations of DOC Work Rules, Directives, State Policies, or for other misconduct.

...

(Exhibit 14)

25. In deciding what disciplinary action to take against Grievant, Superintendent Adams engaged in an analysis of the twelve factors adopted by the Labor Relations Board for deciding the legitimacy of a particular disciplinary action. In analyzing Grievant's work record, Adams incorrectly determined that Grievant "placed JD into restraints for approximately 4.5 hours" during the June 25, 2013, event for which he received supervisory feedback. In fact, a

supervisor on a previous shift had placed JD in restraints and Grievant had allowed her to remain in restraints for three hours after the beginning of his shift. Adams concluded that the failure of Grievant to follow well-established procedures around incident reporting seriously impacted the Employer's confidence in Grievant's ability to perform the duties of a shift supervisor; that such behavior encouraged subordinates to conceal activities from facility management. Adams also determined that the use of excessive force on multiple occasions created a poor and unsafe environment for staff and inmates. Adams determined that Grievant's behavior brought discredit to the Department of Correction and the State. Adams concluded that Grievant was on fair notice of rules that were violated in committing his offenses because he had signed the Department of Corrections Work Rules, had received training in reporting incidents and use of force, and had filed numerous unusual incident reports. Adams reasoned that the penalty imposed on Grievant was consistent with those imposed on other employees on the grounds that the Employer had previously demoted or terminated staff for excessive use of force and failing to properly document and report serious incidents. He determined that an alternative sanction was not adequate because allowing Grievant to remain as shift supervisor would not send an appropriate message to staff regarding the importance of documenting and reporting incidents, and would place the life and safety of inmates in jeopardy (Exhibit 13).

OPINION

Grievant contends that the Employer violated Article 14 of the Contract because: 1) the suspension and demotion was not based in fact or supported by just cause, 2) the Employer improperly bypassed progressive discipline and progressive corrective action, 3) the Employer

failed to apply discipline with a view toward uniformity and consistency, and 4) the Employer failed to impose discipline within a reasonable time of the alleged offense.

Grievant contends that just cause does not exist for the demotion and thirty day suspension imposed on him. To establish just cause for discipline, it is necessary for the Employer to show that disciplining the employee for certain conduct is reasonable; and the employee had fair notice, express or implied, that such conduct would be grounds for discipline. In re Grievance of Brooks, 135 Vt. 563, 568 (1977). 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 made various charges against Grievant concerning the September 11, 2013, interactions with JD. The first charge is that Grievant improperly instructed Correctional Officer Bedard not to report the force she used against JD on September 11, 2013, to recover a spork taken by JD and violated a DOC directive when he did not report the force himself. The Employer has not established by a preponderance of the evidence that Bedard told Grievant that she had to use force to get the spork away from JD or that Grievant told Bedard not to file a use of force report concerning the incident. Thus, the Employer has not established that Grievant gave Bedard improper instructions or that he violated directives by not filing a use of force report on retrieving the spork from JD.

The Employer next charges Grievant with violating a policy and directive when he did not report the force that was used against JD when she was being escorted to the strip cell on September 11. The Employer has not established this charge because it is not established that

Grievant observed dragging of the feet in the escort of JD into the strip cell and there is no evidence that this was reported to him.

The Employer also charges Grievant with violating directives by using excessive force when he restrained JD with handcuffs in the strip cell and left her lying prone and cuffed on the floor. Excessive force under Directive 413.01 is defined as a “type or amount of force beyond that which is reasonably necessary to control the situation and achieve the correctional objective or the continued use of force after it is no longer reasonably necessary.”

The Employer has established that restraining JD with handcuffs and leaving her lying prone and cuffed on the floor constituted excessive use of force. Restraints such as handcuffs may be used under Directive 413.08 to prevent self-harm or property destruction by inmates “whose behavior has not been controlled by less intrusive measures”. Under Directive 413.08, such restraints “are employed as a last, not as a first resort”, and a “first attempt to achieve compliance . . . will be a verbal intervention”. JD had been striking her cuffed arm against the cell door before the handcuffs were applied. The evidence indicates that it was reasonable for the Employer to conclude that Grievant unreasonably failed to use less intrusive measures to control the situation before he and Wilson placed handcuffs on JD. They moved quickly to place handcuffs on JD upon entering the cell, indicating an insufficient use of verbal intervention before applying them.

Similarly, the Employer has established that leaving JD lying prone and cuffed on the floor was excessive force. This was done after JD kicked the cell door. The evidence indicates that it was reasonable for the Employer to conclude that Grievant unreasonably failed to use less intrusive measures to control the situation before leaving her lying prone and cuffed on the floor.

This action was taken quickly upon Grievant and Wilson entering the cell, indicating an insufficient use of verbal intervention before resorting to such a measure.

The Employer also charges Grievant with violating Directive 413.08's prohibition against restraining inmates in an unnatural or unsafe position by the position in which he left Grievant lying on the cell floor. Directive 413.08 defines "an unnatural or unsafe position" as "hog-tied, face-down or spread-eagle". Grievant did not leave JD in any of these positions. We thus conclude that the Employer did not establish this charge.

The Employer further charges Grievant with treating JD in a demeaning manner which is physically abusive with respect to the September 11 incident, engaging in activity that was malicious toward and endangered the safety of JD, and conducted himself in a manner that reflected discredit on the Department of Corrections. We conclude these charges are not established. Grievant's actions did not rise to the level of being demeaning, physically abusive or malicious. The Employer did not establish that Grievant endangered the safety of JD, or that his actions reflected discredit on the Department.

The Employer makes one other charge involving the September 11 interactions with JD: that he violated the requirement to file a report concerning placing JD in handcuffs and leaving her lying on the floor with her hands cuffed behind her back in the strip cell. Directive 413.08 requires the filing of a written report for "(a)ny incident involving the use of restraint devices, other than normal transport and escort". This directive required Grievant to file a report due to the placement of JD in handcuffs and leaving her with her hands cuffed behind her back in the strip cell. His failure to do so results in our conclusion that the Employer established this charge against Grievant.

The Employer made further charges against Grievant concerning October 13, 2013, interactions with JD. The Employer alleges that Grievant used unreasonable and excessive force when he pushed Grievant to the floor when she was in a holding cell. The facts do not support this charge. Grievant entered the holding cell because JD and another incapacitated individual in the cell were shouting at each other. Grievant instructed JD and the other incapacitated individual to sit on separate bunks. They initially complied, but JD suddenly got off the bunk screaming and charged the other individual. Grievant extended his arm and pushed JD in the chest to keep her away from the other individual. JD fell to the floor.

Directive 413.01 defines “reasonable force” as “(t)he use of physical force to achieve a legitimate correctional objective where the type and amount of force are consistent with the situation and objective to be achieved, where alternatives to physical force are unavailable or ineffective, and where the force used is the minimum necessary to control the situation.” This precisely describes the force Grievant used in this situation. Grievant attempted an alternative to physical force by instructing JD and the other incapacitated individual to sit on separate bunks. JD defied this instruction by charging at the other individual. Grievant used reasonable force consistent with achieving the legitimate objective of preventing JD from attacking the other individual and controlling the situation by extending his arm and pushing JD in the chest to keep her away from the other individual. The fact that JD fell to the floor does not demonstrate that the force he used was beyond that which was reasonably necessary given the quick, decisive action required to react to JD’s assaultive behavior and control the situation.

The Employer also charges Grievant with excessive force when he deployed OC spray at JD after she arose from the floor. The Employer asserts that Grievant could have effectively controlled the situation by physically restraining JD while she was on the floor by employing

advanced physical control techniques or by applying handcuffs to her. Once again, the facts do not support this charge. In the short period of time – i.e., 26 seconds - JD was on the floor, Grievant ordered her to stay on the ground or he would spray her with “OC”. He also was evaluating what options he had to control JD. There was not a separate cell to place her because of a large number of incapacitated individuals in the facility at the time. JD disobeyed Grievant’s orders to stay on the floor. She arose from the floor and began waving her arms in a threatening manner while shouting expletives. Grievant ordered JD to sit on the bunk. She disregarded this order, and. Grievant deployed a short spray of OC Spray towards JD which landed on the side of her face.

Grievant attempted an alternative to physical force by ordering her to stay on the ground or he would use the OC spray. It was reasonable for him to use this approach rather than placing handcuffs on her given that it was a chaotic, fast-moving situation with two other incapacitated individuals in a small holding cell. When JD disobeyed Grievant’s order to stay on the floor, disregarded his further order to sit on a bunk, and acted in a threatening manner while shouting expletives, Grievant acted reasonably by deploying OC spray. This achieved the legitimate correctional objective of controlling a situation which was threatening to him and the other individuals in the holding cell after alternatives to physical force which he attempted were ineffective. Under the circumstances, it was reasonable for Grievant to conclude deploying OC spray was the minimum force necessary to control the situation. In fact, it did control the situation without further incident as handcuffs were then placed on JD and she was escorted out of the holding cell.

The Employer further charges Grievant with engaging in activity that was malicious toward and endangered the safety of JD, and conducted himself in a manner that reflected

discredit on the Department of Corrections. We conclude these charges are not established since Grievant did not engage in unreasonable and excessive force on JD on October 13.

The fact that the majority of the charges made against Grievant have not been proven does not necessarily mean that the imposed disciplinary action lacks just cause. Failure of the employer to prove by a preponderance of the evidence all the particulars of a disciplinary letter does not necessarily require reversal of the imposed disciplinary action. Grievance of McCort, 16 VLRB 70, 121 (1993). Grievance of Colleran and Britt, 6 VLRB at 263 - 266, 272 – 277. In such cases, the Board must determine whether the remaining proven charges justify the penalty. Id.

We look to the factors articulated in Colleran and Britt, 6 VLRB at 268-269, to determine whether the proven charges justifies a demotion and a thirty-day suspension. The pertinent factors here are: 1) the nature and seriousness of the offenses and their relation to Grievant's duties, 2) Grievant's job level and type of employment, including supervisory and fiduciary role, 3) the clarity with which Grievant was on notice of the prohibited conduct, 4) the effect of the offenses upon supervisors' confidence in Grievant performing assigned duties, 5) Grievant's past disciplinary record, 6) Grievant's past work record, 7) the consistency of the penalty with those imposed on other employees for the same or similar offenses, and 8) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

The nature and seriousness of the offense is always significant in discipline cases. In deciding whether just cause exists for discipline, it is important to determinate the substantiality of the detriment to the employer's interests due to the proven misconduct of the employee. Grievance of Merrill, 151 Vt. 270, 273-274 (1989). The proven charges against Grievant are: 1) he violated the requirement to file a report concerning placing JD in handcuffs and leaving her lying on the floor with her hands cuffed behind her back in the strip cell on September 11, 2013;

and 2) violating directives by using excessive force when he restrained JD with handcuffs in the strip cell and left her lying prone and cuffed on the floor.

The seriousness of Grievant's misconduct is substantially diminished given that these are the only charges proven of the many charges made against him by the Employer to support imposition of the severe disciplinary action of a demotion and thirty day suspension. The substantiality of the detriment to the Employer's interests of the proven offenses is further decreased by the fact that the other shift supervisor on duty with Grievant on September 11 and the person generally in charge of the shift, Michael Wilson, also participated in, and did not file a report concerning, the placement of JD in handcuffs and leaving her handcuffed and lying on the floor, and he received no discipline. Nonetheless, Grievant's violation of directives concerning filing use of force reports and excessive use of force constituted a significant detriment to the Employer's interests in protecting persons in the Employer's custody.

Grievant was on fair notice based on Department of Corrections directives that he was required to file the use of force report which he neglected to do in this matter, and that he was not to engage in excessive use of force on persons in the Department's custody. The effect of Grievant's offenses would have some adverse impact on supervisors' confidence in Grievant performing assigned duties, but the detrimental effect is diminished given that the other shift supervisor participating in, and neglecting to file a report on, the same incident received no discipline.

Grievant's past disciplinary record is entitled to some weight in determining whether just cause existed for his demotion and 30 day suspension. It consists of a single written reprimand three years earlier for an unrelated offense. Grievant's work record works in his favor. He received an overall evaluation of "excellent" on his annual performance evaluation covering the

period immediately preceding his one proven offense. No evidence was presented on any problems with his job performance during his four plus years of employment except for receiving supervisory feedback, along with another supervisor, for leaving handcuffs on an inmate for more than two hours and not properly reporting it in June 2013.

The consistency of the penalty of demotion and 30 days suspension imposed on Grievant with those imposed on other employees for the same or similar offenses is an important factor in this case. Shift Supervisor Michael Wilson and Correctional Officer Amber Bedard, like Grievant, improperly failed to file a use of force report concerning the September 11 interactions with JD. Yet they received no discipline. Also, Wilson participated in the excessive force used on JD on September 11 for which Grievant was faulted, but Wilson received no discipline. Such disparate treatment is contrary to the requirement of Article 14 of the Contract to “apply discipline . . . with a view toward uniformity and consistency”.

Under the circumstances, we conclude that the Employer acted unreasonably in demoting Grievant and suspending him for 30 days. This discipline is unwarranted when Grievant’s proven offenses are substantially less serious than the charges made against him and when other employees engaged in comparable conduct received no discipline. A three day suspension under the circumstances constitutes an adequate and effective alternative sanction to impose on Grievant to deter such conduct by him or others in the future.

There is one remaining issue to discuss before we conclude. Grievant contends that the Employer failed to impose discipline within a reasonable time of the alleged offense in violation of Article 14, Section 1(a), of the Contract. The Board has indicated in several cases that, absent demonstrated prejudice by the disciplined employee, it was not prepared to conclude that the time it took the employer to impose disciplinary action on the employee affected the validity of

the disciplinary action. In these cases, employees were on temporary relief from duty with pay status during the investigation and did not demonstrate that they were prejudiced by the timing of the disciplinary action. Grievance of Richardson, 31 VLRB 359, 383 (2011). Grievance of Abel, 31 VLRB 256, 274 (2011). Grievance of Sileski, 28 VLRB 165, 191 (2006). Grievance of Scott, 22 VLRB 286, 301-02 (1999). Here, Grievant was on temporary relief from duty with pay status during the investigation, and he did not present evidence during the hearing in this matter that he was prejudiced by the timing of the disciplinary action. We question why Grievant was not disciplined until nearly four months after the investigation report was issued, but absent demonstrated prejudice to Grievant for this delay we will not invalidate the disciplinary action based on the timeliness of it being imposed.

ORDER

1. The Grievance of Adam Patterson (“Grievant”) is granted to the extent that the demotion and thirty day suspension imposed on him is rescinded, and is replaced with a three day suspension;
2. The State of Vermont Department of Corrections (“Employer”) shall restore Grievant to the position of Correctional Facility Shift Supervisor;
3. The Employer shall remove all references to Grievant’s demotion and thirty day suspension from his personnel file and other official records and replace it with reference to a three day suspension consistent with this decision;
4. The State of Vermont Department of Corrections shall provide Grievant with back pay and benefits for twenty-seven days plus interest for all hours of his regularly assigned shift plus the amount of overtime Grievant would have worked, minus any

income (included unemployment compensation received and not paid back) received by Grievant in the interim;

5. 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 dates he would have received his paychecks for the period of his suspension, to the date he receives the back pay award; 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; and
6. The parties shall file with the Labor Relations Board by July 31, 2015, 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 August 27, 2015, at 9:00 a.m., in the Labor Relations Board hearing room.

Dated this 30th day of June, 2015, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Gary F. Karnedy

Gary F. Karnedy, Chairperson

/s/ James C. Kiehle

James C. Kiehle

/s/ Robert Greemore

Robert Greemore