

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 81-5
ROYAL BUSHEY	)	

FINDINGS OF FACT, OPINION, AND ORDER

On February 6, 1981, the Vermont State Employees' Association, Inc. (hereinafter "VSEA") filed a grievance on behalf of Royal Bushey (hereinafter "Grievant") with the Vermont Labor Relations Board, alleging Grievant's resignation was not voluntarily given; that he was, in fact, dismissed and no just cause existed for such dismissal. The State contends this matter is not a grievance and, thus, the Board lacks jurisdiction.

Hearings were held at the Board hearing room in Montpelier on May 21, 1981, and June 18, 1981. On May 21, Kimberly B. Cheney, Chairman, and James S. Gilson were present for the Board. Cheney, Gilson, and William G. Kemsley, Sr. were present on June 18. Assistant Attorney General Bennett E. Greene represented the State; Michael R. Zimmerman, counsel for VSEA, represented Grievant. Requests for Findings of Fact and Memoranda of Law were filed by VSEA and the State on July 14, 1981, and July 16, 1981, respectively.

During deliberations on this matter, Mr. Cheney and Mr. Gilson were unable to agree on the disposition of the case. Pursuant to stipulation of the parties, Mr. Kemsley reviewed the entire record and participated in the decision.

1. Grievant was a permanent-status classified employee of the State and, as such, entitled to all rights afforded such employees by the Agreement between the State and VSEA for the Non-Management Unit, which was in effect from July 1, 1979, to June 30, 1981 (Joint Exhibit #1, hereinafter "Agreement").

2. In June, 1975, Grievant became an employee of the Vermont Department of Corrections and remained so, in various positions, until January 22, 1981. From about June, 1975, to August of 1975, Grievant's position was temporary Correctional Officer. From August of 1975 to December of 1975, Grievant held the position of full-time Correctional Officer. From December of 1975 to January of 1978, Grievant held the position of Correctional Counselor. From January, 1978, to November 1, 1978, Grievant's position was Probation and Parole Officer. From November 1, 1978, to August 20, 1979 (Grievant's Exhibit #4, Pages 1-2), Grievant's position title was Community and Residential Program Coordinator A (Pay Scale 15), and his workplace was the Woodstock Community Correctional Center. From August 20, 1979, to January 22, 1981, Grievant's position title was Assistant Superintendent A (Pay Scale 15), and his workplace was the Woodstock Community Correctional Center (Grievant's Exhibit #4, Page 2; Grievant's Exhibit #14).

3. During his entire period of employment by the Department of Corrections, Grievant received numerous letters of praise and commendation (Grievant's Exhibit #2). In addition, during the period beginning October 27, 1978, and ending January 23, 1980, Grievant's Performance Evaluations were all overall 4's ("frequently exceeds job requirements/standards")(Grievant's Exhibit #3, Pages 1, 2, 6, and 7). During that same period, Grievant received an official letter of reprimand from Richard L. Bashaw, Director, Adult Correctional Facilities. That reprimand

dated August 11, 1980, criticizes Grievant for not cleaning "red substance" from the ceiling of the maximum security area of the Woodstock Facility (Grievant's Exhibit #5).

4. During most of the period Grievant served as the Assistant Superintendent at the Woodstock Facility, the Superintendent of the Facility was Winston E. Riley.

5. During Grievant's tenure as Assistant Superintendent, the Woodstock Facility operated with three shifts - the first shift from 7:30 a.m. to 3:30 p.m., the second shift from 3:30 p.m. to 11:30 p.m., and the third shift from 11:30 p.m. to 7:30 a.m. Each shift was headed by a Shift Supervisor (Pay Scale 10 position).

6. As Assistant Superintendent, Grievant was second in command at the Woodstock Facility (Grievant's Exhibit #1), and was often required to serve as the Acting Superintendent in the absence of Superintendent Riley (Grievant's Exhibit #6).

7. Grievant's duties as Assistant Superintendent included contact with various public and private agencies (eg., the courts, sheriff's departments, probation and parole officers, vocational rehabilitation officials, CETA officials) in connection with rehabilitation programs for inmates (Grievant's Exhibit #1). In order to facilitate Grievant's performance of those and other duties, Grievant worked the first shift (7:30 a.m. to 3:30 p.m.), Mondays through Fridays.

8. On October 14, 1980, 24 employees of the Woodstock Facility (not including Grievant) filed a purported grievance with Superintendent Riley (Grievant's Exhibit #16), wherein they complained of a number of problems concerning working conditions at the Facility. The grievance complained of the high rate of turnover at the Facility (1979 - 122%,

1980 - 96%) which was much higher than existed at any other correctional facility, the low salaries for correctional officers, the understaffing of the Facility, the placement of employees in lower pay grades than their duties entitled them to, the lack of training provided employees, and the failure of the Department to correct these problems.

We take judicial notice of the following cases which have been filed with this Board relative to the events occurring at Woodstock: #80-81 - VSEA v. Department of Corrections, Unfair Labor Practice Charge; #80-91 - Grievance of John O'Hara; #80-91 - Grievance of Mark Richmond. Some of the Woodstock employees subsequently met with William Ciuros, Commissioner of the Department of Corrections, in his office in Montpelier. After this meeting, Ciuros scheduled a meeting with all the employees who signed the grievance. The VSEA Executive Director, Judy Rosenstreich, requested permission to attend, but this was denied. The Commissioner apparently did not want the VSEA involved. The VSEA filed an unfair labor practice, later withdrawn, over this issue. The employees were dissatisfied with the results of that meeting, and subsequently, some of the employees decided to stage a "sickout". On November 11 and 12, approximately eight or nine employees staged a "sickout", staying away from work.

9. We infer that these preceding events caused significant disruptions in normal management-staff relationships. One result of the "sickout" was that two of the employees participating in the "sickout" were fired on November 24, 1980 (Relevant's Exhibit #10,

Pages 1-2; Grievant's Exhibit #11, Pages 1-2). The other result was an ever greater involvement of the "central office" in the day-to-day operations of the Woodstock Facility. On November 11, 1980, (the first day of the "sickout"), Richard Bashaw, Director of Adult Facilities; Barbara Morrissey and William Anderson, Personnel Administrators, arrived at Woodstock and remained for most of that week. Shortly after this week, the Department of Corrections ran a two-week training program for the staff of Woodstock.

10. Richard Bashaw, as Director of Adult Facilities, occupied the third position from the top of the chain of command within the Department of Corrections. He was answerable to Deputy Commissioner Anthony Schembri, who, in turn, was answerable to Commissioner William Ciuros, Jr. As Director of Adult Facilities, Bashaw was responsible for security and operations of all six community correctional centers in Vermont.

11. On December 3, 1980, Bashaw instructed Superintendent Riley to write a new work schedule for the Woodstock Facility, which schedule would, among other things, place Grievant on the second shift at the Facility. Bashaw informed Riley his purpose in placing Grievant on second shift was to have an experienced member of the Facility staff on second shift. Superintendent Riley, however, protested on the grounds that such a schedule change would, in essence, make Grievant a Shift Supervisor (Pay Scale 10), and that such use of someone in Grievant's pay scale (Pay Scale 15) would not be "cost effective". In addition, Superintendent Riley protested because the nature of Grievant's job demanded that he work the first shift, and that if he was taken off that shift, the treatment program at the Facility would suffer severely.

12. As a result of the December 3, 1980, meeting between Riley and Bashaw, Riley did not draw up a new work schedule for Grievant, but Bashaw did. The new schedule, which was to be effective from December 8, 1980, to January 8, 1981, was as follows:

- A. On Mondays and Tuesday, Grievant was to work from 3:30 p.m. to 11:30 p.m. as second shift supervisor;
- B. On Wednesdays, Thursdays, and Fridays, he was to work from 12:00 p.m. to 8:00 p.m. as Assistant Superintendent.

(Grievant's Exhibit #7). This shift did not fit any of the existing shifts at the Woodstock Facility.

13. On December 4, 1980, Bill Finnigan, who had been temporarily assigned from the St. Albans Facility to replace one of the Woodstock employees fired for participating in the "sickout", personally delivered to Grievant a copy of his new shift schedule. That was the first knowledge Grievant had of the change. When he saw the new schedule, Grievant was concerned, since on Mondays and Tuesdays he would not be able to function at all as Assistant Superintendent (especially since he would be cut off from courts, sheriff's departments, and other agencies with whom he normally dealt in connection with the treatment program at the facility), and that on Wednesdays through Fridays, he would only be able to function as Assistant Superintendent for half the day. He told Superintendent Riley of his concerns. Superintendent Riley apologized to Grievant and explained that the schedule change was beyond his control.

14. Grievant complied with the schedule change drawn up by Bashaw. On those days when Grievant was performing the duties of a Shift Supervisor, his Assistant Superintendent duties were performed by a variety of people. Bashaw, Finnigan, and Paul Silva, who was normally assigned as a Correctional Counselor B (Pay Scale 13) at the St. Albans Facility, and who was temporarily assigned to the Woodstock Facility, all performed Grievant's Assistant Superintendent duties on various days.

15. On Friday, December 12, 1980, Commissioner Ciuros appointed the members of an "assessment team" which was dispatched to the Woodstock Facility to investigate the alleged improprieties there. The team was to be headed by Bashaw, and other members were Carl Roof (whose position was Adult Field Services Manager, Pay Scale 18), Finnigan, Silva, and Fred Jacobs (Correctional Officer, Pay Scale 8). One of the mandates of the assessment team was to assume control of the operation of the Facility. Bashaw was placed in charge of the Facility per order of Commissioner Ciuros (State's Exhibits #1, 2).

16. On Sunday, December 14, 1980, between 3:00 p.m. and 4:00 p.m., Riley, who was at his home, received a telephone call from Bashaw, who instructed Riley to meet him immediately at the Holiday Inn in White River Junction, Vermont. At the meeting, Bashaw showed Riley the two memoranda from Ciuros placing Bashaw in control of the Woodstock Facility (State's Exhibits #1, 2). Bashaw also told Riley, "Bad news, Geno, the boss wants you out, and Bushey, too." Bashaw informed Riley he had until 8:30 a.m. the following day to either resign or be fired.

17. Riley never told Grievant what Bashaw had told him, that the "boss" wanted Grievant "out, too."

18. Also, on December 14, 1980, the entire assessment team arrived at Woodstock, and Bashaw assumed the duties of Superintendent of the Woodstock Facility.

19. On Monday, December 15, 1980, Superintendent Riley submitted a letter of resignation, dated December 15, 1980, to Bashaw at the Woodstock Facility (Grievant's Exhibit #8). On that date, Riley ceased functioning as Superintendent of the Woodstock Facility. Grievant did not, at any time from then until his resignation on January 8, 1981, serve as Superintendent or Acting Superintendent. Between then and January 7, 1981, Bashaw, Silva, and Roof so served.

20. On Monday, December 15, 1980, after he had submitted his resignation, Riley went to Grievant's home to tell him about the resignation. Riley told Grievant he had resigned because there was no choice; that it was either resign, or face the stigma of dismissal.

21. On Monday, December 15, 1980, after Grievant had reported for duty at the Facility, he discussed his schedule change with Bashaw. Grievant explained to Bashaw that the schedule change not only impaired his ability to perform the duties of Assistant Superintendent, but that it was in violation of the Agreement because his shifts did not match any existing shifts at the Facility.

22. Article XVII of the Agreement, provides:

New Shifts - In any...institution, prior to establishment of a new shift (a shift with starting and quitting times different from any existing shift) or a new workweek (a combination of workdays constituting 40 hours which is different from any existing combination of workdays, or which includes evenings or half-days), the appointing authority shall notify the Association and shall negotiate the impact of that decision to the extent required by law..."



23. When Grievant protested the shift change because it was a violation of the Agreement, Bashaw responded that it was not a normal situation at the Woodstock Facility, and the restraints of the Agreement did not apply.

24. There is no evidence before the Board the Governor declared an emergency pursuant to Article V of the Agreement, due to a problem with inmate control, which would have permitted the employer to take whatever actions may have been necessary to carry out the mission of the Agency. In the absence of this, the Agreement is controlling. Thus, Bashaw's action in changing Grievant's schedule was in violation of the Agreement.

25. Also, during their conversation on December 15, 1980, Bashaw told Grievant to vacate his office, which was adjacent to the Superintendent's office, and move to the office then used by the secretary. The secretary's office was on the opposite side of the Facility in the Operations Office. The reason for the move was Bashaw wanted the secretary closer to his office because of the arrival of the assessment team at the Facility. Grievant protested on grounds the Operations Office was too noisy, that he needed a private office, and there were other closer, more private spaces to which he could move his office. The conversation ended in apparent misunderstanding. Grievant thought the matter would be further discussed the following day; Bashaw understood Grievant would be out of his office by the end of the day.

26. Also on December 15, 1980, Raymond J. Pilette, Superintendent of the St. Albans Correctional Facility, summoned Richard Friel to his office. Friel was, at that time, the Coordinator of Treatment Services at the St. Albans Facility, but was considering whether or not to accept a transfer to the Woodstock Facility. Pilette led Friel to believe both Riley and Grievant had been removed at Woodstock. Later that day, Friel

telephoned Grievant. Friel told Grievant what Pilette had said. Grievant confirmed Riley had been forced to resign, but assured Friel he was still working at Woodstock.

27. On Tuesday, December 16, 1980, prior to Grievant's arrival at work, Bashaw ordered Finnegan to clean out Grievant's desk and office, and put his belongings in boxes. Finnegan did so, and was observed doing so by co-workers of Grievant. Later that day, when Grievant arrived for work, he discovered his belongings in boxes in the middle of the busy Operations Office. Other staff members with whom he spoke expressed surprise at Bashaw's actions, and even Finnegan was apologetic.

28. Also on December 16, 1980, at the St. Albans Facility, Friel told Pilette he had spoken to Grievant the day before, and that Grievant was still working at the Woodstock Facility. Pilette replied, "Dick (Bashaw) wants them both out of there. He'll resign, too." Later that day, Friel telephoned Grievant and told him about Pilette's comment. Grievant responded he was optimistic working with Roof and hoped to make a go of it.

29. Normally, as Assistant Superintendent, Grievant played a part in the selection of employees to fill vacancies in positions at the Woodstock Facility. After Bashaw assumed command, however, Grievant was not allowed to participate in the selection of employees to fill vacancies.

30. On December 30, 1980, Grievant had a conversation with Bashaw. Bashaw told Grievant the assessment team might "possibly" recommend that Grievant be removed from his position as Assistant Superintendent. Bashaw informed Grievant he himself would recommend he be removed. Bashaw said that (1) it appeared that Mark Richmond (the third in command at the Facility until he was dismissed on November 24, 1980) had actually

run the Facility rather than Superintendent Riley or Grievant, and (2) Grievant had not dealt adequately with personnel matters. Grievant became upset at Bashaw's comments, and said he felt the assessment team's observations were erroneous, especially since his new schedule did not allow him to devote all of his time to his duties as Assistant Superintendent. He also told Bashaw he would fight any effort to remove him as Assistant Superintendent.

31. Later that day, Grievant, in an effort to corroborate what Bashaw had told him about the assessment team's tentative recommendation, spoke to Roof and Silva, both of whom were surprised to hear what Grievant reported. Neither was aware of such a tentative recommendation. As a result of those conversations, Grievant concluded Bashaw had lied to him about the assessment team's "possible" recommendation for his removal as Assistant Superintendent. Grievant believed Bashaw was the only member of the assessment team who felt he should be dismissed.

32. On January 4 or 5, 1980, Grievant learned Roof had been appointed as the new Superintendent of the Woodstock Facility. Grievant was pleased at the news of Roof's appointment, since Grievant had faith in Roof's integrity, and felt confident he and Roof could work together successfully. At the time he was appointed, Roof told Grievant Bashaw would be the one making decisions at the Woodstock Facility.

33. On Tuesday, January 8, 1981, before he was scheduled to begin work, Grievant went to Riley's home. Grievant was very upset and told Riley he was seriously considering resigning because of what was occurring at the Facility. Riley told Grievant, "you're next on the list" to be gotten rid of. At some point, either at this meeting or previously, Riley reminded Grievant he belonged to VSEA and had certain rights to pursue there.

34. Shortly after Grievant reported for work that day, he went to Roof's office where he overheard Roof talking on the telephone. From the nature of the conversation, Grievant assumed Roof was speaking to Bashaw and that the conversation involved how to break the news to Grievant that he was being dismissed. Grievant immediately requested that an assistant, who was also present, type a letter of resignation which Grievant dictated. The letter, which was addressed to Bashaw and dated January 8, 1981, read as follows:

I am hereby resigning my position as Assistant Superintendent of Woodstock Community Correctional Center effective January 22, 1981.

Over the past six weeks the working conditions at this facility have become intolerable and an affront (sic) to basic human dignity. (Grievant's Exhibit #14)

35. As the letter was being typed, Roof finished his telephone conversation, came out of his office, instructed the assistant to hold all his calls, and asked Grievant to come into his office. Grievant requested that he be given five minutes, and Roof agreed. When the letter was typed, Grievant signed it, and went into Roof's office. Grievant handed the letter to Roof, saying, "Here, I beat you to the punch." Roof replied, "That makes things easier." Grievant then left the Facility and did not return.

36. Roof had, in fact, been talking to Bashaw on the phone about Grievant, but the discussion was not on how to tell Grievant he was being dismissed. Roof had decided to put Grievant on a "special probationary period" because of his deficiencies, and was discussing this with Bashaw.

37. During the two or three weeks prior to his resignation, Grievant was in emotional turmoil. He had made corrections his life's work, and, from what had occurred at the Facility, especially after the assumption of

control by Bashaw, Grievant could see his career coming to an end. As a result, he was angry, nervous, confused, depressed, and weepy. He was aware of dismissals of the two employees as a result of the "sickout" and, having seen the evidence against them, felt those dismissals were groundless. He was aware that a Correctional Officer at the St. Albans Facility had been dismissed as a result of being "set up" (Grievant's Exhibit #12, Page 1). He distrusted Bashaw in particular, and felt that the administration of which Bashaw was a part would manufacture evidence against him in order to dismiss him. The triggering incidents leading to his resignation were the schedule change and his discussion with Riley the morning he resigned. In the face of what he viewed as a corrupt, unprincipled administration which had decided to dismiss him, he decided to resign, rather than face the stigma of dismissal. He had never before seriously considered resignation, and would not have resigned had he concluded his job was safe. The anticipation he was going to be fired caused him to resign. He chose resignation over dismissal because his reputation was at stake and a resignation caused no adverse impact on his record.

38. Rules and Regulations for Personnel Administration provide, in pertinent part, as follows:

2.038 SEPARATION is the termination of an employee from employment by the State through resignation, removal, dismissal, retirement, or layoff.

2.0384 RESIGNATION is a separation of an employee from State service by his own voluntary act.

12.02 A resignation once submitted shall not be withdrawn by the employee without the consent of the appointing authority.

### OPINION

The issue before us is whether Grievant's resignation was voluntary or involuntary. If it is deemed involuntary, Grievant asks us to rescind the resignation and consider it tantamount to an unjust dismissal.

In cases where there is a question whether an employee has resigned involuntarily or voluntarily, we will adopt the standard for constructive discharge applied by the courts, labor boards and arbitrators. In Young v. Southwestern Savings and Loan Association, 509 F2d 140 (2 Cir 1975), a Title VII case involving religious discrimination, they stated:

The general rule is that if the employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation, then the employer has encompassed a constructive discharge and is as liable for any illegal conduct involved therein as if it had formally discharged the aggrieved employee.

Federal courts have applied this standard in Title VII employment discrimination cases. Young, supra. Muller v. United States Steel Corp., 509 F2d 923 (10th Cir), Cert. Denied (1975). Calcote v. Texas Educational Foundation, 578 F2d 95, 5th Circuit (1978). The National Labor Relations Board has applied the standard where it is alleged an employer has forced an employee to quit his job because of union activities or union membership. J.P. Stevens and Co. v. NLRB U.S. Ct. of Appeals, 5th Circuit, 80 LRRM 2609 (1972). Arbitrators, in cases alleging constructive discharge, have, while not specifically applying the above-stated standard, made determinations based on like standards. Illinois Bell Telephone Co., 48 LA 273 (1967). Memphis Publishing Co., 51 LA 465 (1968). Georgia-Pacific Corp., 56 LA 474 (1971).

The key question in such cases is whether the employer has deliberately made an employee's working conditions so intolerable that the employee is forced into an involuntary resignation. There exists disagreement in case law as to what employer intention is required in order to find constructive discharge. As Schlei and Grossman observe:

"Young indicates that the only employer intention which is required to find constructive discharge is that an employee find a policy intolerable and that the policy be an intentional policy of the employer. Muller seems to require a specific company intent to get rid of the employee, which is analogous to the rule laid down by the National Labor Relations Board...where such intent has long been required."

Employment Discrimination Law, Schlei and Grossman, BNA, 1976 (Pages 536-37).

We believe the proper standard is that enunciated in Muller.

Thus, two tests have to be met here: 1) working conditions have to be intolerable; and 2) the establishment of such conditions must be intended by the employer to get the employee to resign.

Such deliberate action by the employer can be done through establishing wages, hours or working conditions of an employee in a discriminatory manner and/or in violation of the collective bargaining agreement, and harassing or humiliating an employee [See Stevens, supra; Georgia Pacific Corp., supra; Young, supra; Calcotte, supra; Robert Fredericks v. Georgia-Pacific Corporation, U.S. District Court, Penn, 331 F. Supp. 422 (1971)].

There was action taken by the State in the person of Richard Bashaw which seriously undermined Grievant's working conditions. Bashaw personally drew up a work schedule for Grievant which was in violation of the Agreement and made it impossible for Grievant to perform all the duties he normally did as Assistant Superintendent.

Article XVII of the Agreement provides:

Prior to establishment of a new shift (a shift with starting and quitting times different from any existing shift) or a new workweek (a combination of workdays constituting 40 hours which is different from any existing combination of workdays, or which includes evenings or half days), the appointing authority shall notify the Association and shall negotiate the impact of that decision to the extent required by law...

The schedule Grievant was assigned to work constituted such a new shift and new workweek, it was established without notifying VSEA and negotiating with it, and without a gubernatorial declaration of an emergency. The schedule change had a great impact on Grievant's ability to perform as Assistant Superintendent. He now had only one and a half days per week to deal with the agencies he normally dealt with in the course of his work, whereas previously he had five days. On two days he was unable to perform as an Assistant Superintendent at all as he was assigned to be a Shift Supervisor.

When working as Shift Supervisor, Grievant realized an effective demotion. This loss of status was accompanied by the incident where Bashaw ordered Grievant's desk and office to be cleared out; all his belongings to be put in boxes in the middle of the office to which he was being moved. This was done, and was observed by co-workers of Grievant. Grievant felt embarrassed at such action which was viewed by subordinates who accorded him respect as second-in-command at the Facility.

Other actions of Bashaw deprived Grievant of his normal responsibilities as Assistant Superintendent. Grievant, without any explanation, was deprived of his normal responsibility of taking part in the selecting of employees to fill vacancies at the Woodstock Facility. Also, when Riley



was Superintendent, Grievant often served as Acting Superintendent in the absence of Riley. However, when Bashaw became Acting Superintendent upon Riley's resignation, Grievant was not allowed to serve as Acting Superintendent in Bashaw's absence; Paul Silva and Carl Roof so served.

These actions by Bashaw seriously worsened Grievant's working conditions as they effectively made it impossible for Grievant to perform his Assistant Superintendent duties. Further, Grievant was well aware Bashaw felt he should be removed as Assistant Superintendent for on December 30th Bashaw informed Grievant he would recommend such action. Moreover, Bashaw represented to Grievant that the assessment team was unanimous in this recommendation; a representation we find from the creditable evidence before us to be contrary to fact. Bashaw's intentions, his apparent control over the assessment team, his personal affronts and perceived mendacity towards Grievant, led Grievant to conclude he was going to be dismissed.

However, the key element here is not Grievant's perception of his job security but whether management, in fact, deliberately made his working conditions so intolerable he would resign. The question before this Board is whether Bashaw's actions were designed to circumvent the just cause requirement for dismissal and force Grievant to resign or were necessitated by management reasons.

We have examined each of the actions taken by Bashaw, and, taken together, the actions appear designed to force Grievant to resign. The first action taken by Bashaw which adversely impacted on Grievant was the schedule change. Bashaw claims it was necessary to place Grievant on the second shift in order to have an experienced member of the Facility

staff on that shift. He was aware the change violated the Agreement, but felt the restraints of the Agreement did not apply because it was not a normal situation at the Woodstock Facility.

The evidence does not support Bashaw's claims. There is no evidence before the Board indicating an emergency situation existed at the Facility regarding inmate control which permitted management action contravening the provisions of the Agreement. Grievant's schedule change was effective December 8, 1980. This was almost four weeks after the November 11 and 12 "sickout" had left the Facility shorthanded. If there was any emergency situation, it existed on November 11 and 12, not four weeks later when there is no evidence there was a problem with inmate control.

Further, if Bashaw actually needed an experienced person to handle the second shift, he should not have selected Grievant, who had no previous experience in that position. Perhaps Bashaw could have located an experienced supervisor at another facility to handle the shift. Be that as it may, his reasons for giving the assignment to Grievant are suspect; he placed Grievant there, a person lacking experience as a shift supervisor, in violation of the Agreement. An additional factor of importance is that the schedule change impaired Grievant's effectiveness as Assistant Superintendent, further calling into question the necessity of the change for management reasons.

Bashaw's next action was having Grievant's office moved. Bashaw contends this was done to have the secretary closer to him. However, events occurring with the move cannot be defended on grounds of increasing efficiency. First, Grievant was moved to an office on the opposite side of the Facility in spite of the existence of closer and more convenient office space which would have allowed him close contact with the Superintendent.

Further, the way this move was carried out humiliated Grievant in front of his co-workers. Grievant, as Assistant Superintendent and second in command at the Facility, was accorded respect from his subordinates. The action of taking Grievant's belongings out of his office without his supervision and knowledge, and placing them in boxes, cannot be supported on grounds it was done for "efficiency" purposes. Instead, it indicates an obvious demonstration to Grievant and other employees that Grievant was "out of favor" with the management of the Facility - namely Bashaw.

That these actions were designed to force Grievant to resign is strengthened by the undisputed evidence Bashaw wanted Grievant removed from his position. Bashaw further told Grievant it was the "possible" recommendation of the assessment team that Grievant be removed as Assistant Superintendent. Two members of the assessment team, however, told Grievant they were unaware of such a tentative recommendation by the assessment team. It is clear Bashaw wanted to give Grievant the impression that the "cards were stacked against him" continuing as Assistant Superintendent. Implicit in this is pressure on Grievant to force him to resign.

We conclude Grievant was involuntarily forced to resign and thus constructively discharged. The effect of Bashaw's actions was to make Grievant's working conditions intolerable and such actions were deliberately intended to circumvent the contractual just cause requirement for dismissal and force Grievant to resign.

The remaining question before us is the determination of the proper remedy. Grievant was effectively discharged from a position unjustly, and he is entitled to continue in his chosen career with the Department of Corrections. We, thus, believe Grievant is entitled to be reinstated.

to a Pay Scale 15 position with the Department of Corrections. However, we are reluctant to order a more specific remedy at this time. We are aware another person is in the job he held, and we realize the potential disruptive effects of displacement on the individual involved and the operation of the Facility. Also, we are aware the parties may have additional information on the appropriate remedy that will aid us in our final determination. Thus, we withhold issuing a final order pending the admission of additional evidence by the parties as to the appropriate remedy.

#### ORDER

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

1. the grievance of Royal Bushey is allowed; and
2. Grievant be reinstated to a Pay Scale 15 position with the Department of Corrections; and
3. Grievant shall be awarded back-pay from January 8, 1981, until the time of his reinstatement for all hours of his regularly-assigned shift at the pay rate he was at on January 8, 1981, plus any negotiated pay increases, minus any income received by Grievant during the period January 8, 1981, until reinstatement; and
4. a hearing be held in the hearing room of the Labor Relations Board, 13 Baldwin Street, Montpelier, Vermont on October 15, 1981, at 9:30 a.m. for the purpose of allowing the parties to submit further evidence on the appropriate remedy for Grievant and the dollar amount of back-pay. Subsequent to the hearing, the Board will issue a final order

which includes a specific remedy for Grievant.

Dated this 2<sup>nd</sup> day of September, 1981, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney  
Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.  
William G. Kemsley, Sr.

James S. Gilson  
James S. Gilson

Reversed  
by Sup. Ct.  
12/1/82

VSEA Moved for  
reargument - 12/14/82

## VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:

ROYAL BUSHEY

DOCKET NO. 81-5

## ORDER

It is hereby ORDERED:

- 1) the Grievance of Royal Bushey is allowed; and
- 2) Grievant is reinstated to his position as Assistant Superintendent, Stock Community Correctional Center; and
- 3) Grievant shall be awarded \$7,761.25 in back-pay for the period July 8, 1981, to October 15, 1981, this amount representing the gross Grievant would have received had he worked as Assistant Superintendent Stock during the period (\$11,868.30) minus the gross pay Grievant actually received during the period (\$4,107.05). Grievant shall not be reimbursed for the money he spent for uniforms and equipment required for employment at the Windsor County Sheriff's Department, and
- 4) For the period October 16, 1981, until his reinstatement, or the end of employment, Grievant shall receive the difference between the amount he would have received during that period had he been employed as Assistant Superintendent and the amount he actually earned (including employment compensation received and not paid back) during that period.

Dated this 22 day of October, 1981, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William C. Kemsley, Sr.

James S. Gilson