

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)
) DOCKET NO. 80-85
EDWARD LYNN GODDARD)

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On August 14, 1980, the Vermont State Employees' Association, Inc. (hereinafter "VSEA") filed this grievance with the Vermont Labor Relations Board on behalf of Edward Lynn Goddard, Correctional Shift Supervisor at the Chittenden Community Correctional Center and member of the Non-Management Unit (hereinafter "Grievant").

Grievant alleges that his dismissal for using force on an inmate (hereinafter "resident") violates Article XV of the collective bargaining agreement negotiated by the VSEA and the State (hereinafter "Agreement") in the following respects:

- 1) No just cause existed for his dismissal;
- 2) The progressive discipline requirements of Agreement were not followed; and
- 3) The alleged basis for the dismissal does not constitute gross neglect of duty.

A hearing was held in the Board hearing room in Montpelier on January 8, 1981. Board members Kimberly B. Cheney and William G. Kinsley, Sr. were present. Michael R. Zimmerman represented Grievant. Bennett E. Greene represented the State. Requested findings of fact and memoranda were filed by VSEA and the State on January 22 and 23, respectively.

FINDINGS OF FACT

1. From March 1, 1976, to July 16, 1980, Grievant was continuously employed by the State of Vermont, Department of Corrections. From March 1, 1976, to January 22, 1979, Grievant was a Correctional Officer, a pay scale 8 position. On January 22, 1979, Grievant was promoted to the position of Correctional Foreman A, pay scale 10 position (Grievant's Exhibit #2, page 2; Grievant's Exhibit #2, page 4; Grievant's Exhibit #1, pages 3 and 4). Grievant occupied the position of Correctional Foreman A from January 22, 1979, until August 3, 1979, at which time Grievant's position title became Correctional Shift Supervisor, also a pay scale 10 position (Grievant's Exhibit #2, pages 4 and 5; Grievant's Exhibit #1, pages 1 and 2). Grievant occupied the position of Correctional Shift Supervisor until his dismissal on July 16, 1980 (Grievant's Exhibit #9).

2. Grievant's workplaces during his time of employment were the Correctional and Diagnostic Treatment Facility at St. Albans, Vermont (from March 1, 1976 to April 16, 1978) and the Chittenden Community Correctional Center in South Burlington, Vermont (from April 16, 1978 to July 16, 1980).

3. During his employment, Grievant received no suspensions from duty, no letters of reprimand, and no demotions. He received one oral reprimand, in January 1976, for tardiness.

4. Grievant, during the course of his employment, received seven letters of praise or commendation. Three of the letters praised his performance as a line officer in improving the appearance and performance of a wing, responding to incidents promptly, and following all orders of his supervisors. A further letter commended his conduct at a courtroom appearance. Another remarked on the "great benefit" of his insights and comments at a training session. In another letter, he was formally

commended, along with another correctional officer, for rescuing two prior residents from hanging themselves. Finally, Grievant was thanked for his assistance in implementing a new schedule for supervisors (Grievant's Exhibit #4).

5. Grievant received four annual evaluations of his performance. On one of the evaluations, Grievant received an overall rating of 4 ("frequently exceeds job requirements/standards"). On the other three annual evaluations, he received an overall rating of 3 ("consistently meets job requirements/standards"). On two occasions, the rating official noted that Grievant did not let his moods interfere with the performance of his duties.

6. Grievant, like any other correctional officer, was exposed to an element of danger. Residents frequently assault their custodians and, not infrequently, convey threats of physical harm.

7. Grievant was personally subject to abuse and violence by residents. On December 11, 1976, Grievant was involved in an incident during which he was spit at and scratched by a resident. As a result of that incident, Grievant was injured (Grievant's Exhibit #5, pages 1-4). In addition, on January 4, 1978, Grievant was attacked by a resident. As a result of that attack, Grievant was injured and unable to work for seven days. Grievant received a Workman's Compensation award for temporary total disability for those seven days as a result of that incident (Grievant's Exhibit #5, pages 5 and 6).

8. On June 6, 1980, Grievant was a Correctional Shift Supervisor. His duties were to supervise the nightshift at Chittenden Community Correctional Center "and ensure that all security and custodial functions are enforced."

He was required to "report any unusual incidents to the proper authority and complete a written report following his tour of duty".

9. While he was a student, Grievant participated in amateur boxing. In addition, shortly after he was hired as a Correctional Officer, Grievant underwent an 80-hour training course required by the Department of Corrections, part of which dealt with the use of force by correctional officers.

10. At some point before August 29, 1978, the administration at the Chittenden Community Correctional Center promulgated the "Burlington Facility's Personnel Rules and Regulations". In general, those rules set forth standards of conduct for staff members of the facility.

Section 17 of those rules provided as follows:

"No employee or volunteer shall 'use force' against a resident except within the guidelines of the Burlington Facility and Department of Corrections policy bulletin #1041. Policy will be taught in training, but it is the responsibility of each employee to know."

The last page of those rules provided, in pertinent part, as follows:

"There are five categories of discipline in order of severity:

1. Oral reprimand
2. Written reprimand
3. Suspension without pay
4. Demotion
5. Dismissal

This facility subscribes to a policy of progressive discipline. Repeated offenses warrant increased discipline, and serious offenses draw higher penalties than lesser offenses. *indicates suspension or dismissal and may occur at first offense."

(State's Exhibit #8, pages 3 and 4)

Item 17 of the rules is preceded by an asterisk.

11. On August 29, 1978, Grievant signed a memorandum, which provided as follows:

"I have read the Personnel Rules and Regulations. I have had the opportunity to review this information in its entirety, and have also had an opportunity to have my questions answered by my Supervisors. I completely understand my responsibility in these areas and understand I will be accountable for following these Rules and Regulations."

(State's Exhibit #10)

12. Policy Bulletin 1041, referred to in the above rules and regulations, provides, in pertinent part, as follows:

"Sound correctional practices minimize the necessity for using force." (Page 1)

"At all times, correctional employees must be conscious of their obligation to use only as much force as is needed to accomplish their objectives."
(Page 1)

"Force may only be applied where there is direct and imminent threat of escape, or when the resident presents an imminent threat of bodily harm to himself, an employee, another resident, or any other person, or when all other available alternatives to effect legal order have been tried and failed."
(Page 2)

"Employees are permitted to use the degree of force or restraint necessary to carry out a legal order, such as an order to move a resident from one place or another. They may also use the degree of force or restraint necessary to maintain order within the facility...
(Page 3)

"In no case is it justifiable for an employee to retaliate in kind against an inmate because that employee has been abused by an inmate. An employee's use of any punitive reaction on his own is clearly forbidden."
(Page 3)

(State's Exhibit #11)

13. When he went to work on June 6, 1980, Grievant was not in a good mood, and was not looking forward to going to work. A number of things had contributed to his attitude, and were on his mind as he went

to work:

(A) Recently he had had trouble with his third shift staff calling in sick at the last minute. This had made it difficult for Grievant, the person in charge on that shift, to find replacements in order to have full staffing on the third shift;

(B) Because of a burglary at his home in February of 1980, Grievant's wife was frightened of being alone at night, and Grievant was concerned about his wife's well-being;

(C) Grievant was in arrears in child support payments to his former wife.

14. Grievant arrived at the facility at approximately 11:10 P.M. on June 6, 1980. His shift was to start at 11:30 P.M. Almost immediately after his arrival at the facility, Grievant was advised that there had been "trouble". Grievant proceeded to the booking room where Mr. Dineen, second shift supervisor, could be found, in order to ascertain the nature of the "trouble".

15. When he arrived at the booking room, the first sight that greeted Grievant was that of resident Burke, who, sitting in a chair, had been crying, and was bleeding from the nose and ear. Burke's face was puffy. Dineen was with Burke and told Grievant that Burke had told him that he had been beaten by resident Jeff Robarge. Burke had also, as a result of the beating, requested that he (Burke) be placed in protective custody.

16. On June 6, 1980, Burke was between 28-30 years old, weighed between 135 and 140 pounds, was of slight build, and was about 5'9" tall. Grievant knew him as an "informant" and a "mouthy" prisoner, but not an assaultive one.

17. On June 6, 1980, Robarge was about 18 years old, weighed about 180 pounds, powerfully built (like a weightlifter), and about 5'8" tall. Grievant had known Robarge since about March of 1980, and knew him to be a troublemaker and violent (i.e., attacking guards and other residents).

18. On June 6, 1980, Grievant weighed about 250 pounds and stood about 6'3" tall.

19. When Grievant saw Burke's condition and learned that Robarge had assaulted him, Grievant felt angry at Robarge. He felt angry because of the long history of assaults on residents by Robarge. Grievant "felt he (Robarge) had done enough." Grievant determined to move him from the medium security area (or "MA", as it was called) to the maximum security area (or "Special Adjustment", more commonly known as "SA"). It was standard procedure at the facility to move residents to the maximum security area from other, less secure, areas when a resident became a danger to the safety of other residents.

20. Grievant knew on June 6, 1980, that the proper method for moving a resident was to (a) make a "show of force" by using several officers for the move, and (b) carrying and, if necessary, using "restraints" (such as handcuffs, leg irons and the like). The purpose of this method was to avoid trouble.

21. Grievant was offered assistance in the "move" of Robarge; however, even though he knew he should use other officers, he was feeling angry and declined assistance. He said he would go to Robarge's room alone. Even though he knew he should carry "restraints" and that they were readily available to him, he declined to obtain them.

22. Grievant left the booking room and proceeded toward 1A where Robarge's quarters were located. Although he was angry, Grievant did not walk toward Robarge's quarters with the intention of assaulting Robarge and "paying him back" for his assault on Burke. When Grievant arrived at the MA Unit, he asked Correctional Officer Harmon, who was on duty in the MA Unit, which room was Robarge's. Harmon told Grievant that Robarge's room was Number 2, and Grievant, followed by Harmon, proceeded to that room.

23. Robarge's room measured approximately 8' x 12'. It had a toilet, a sink, and a bunkbed. Across the entire length of the back wall of the room was a shelf which could be used as a desk. When Grievant entered the room, Robarge was sitting on the shelf, his back against the side wall, and his feet and legs stretched out upon the shelf.

24. Grievant entered Robarge's room alone, Correctional Officer Harmon remaining in the hallway just outside of the room. When he entered the room, Grievant said to Robarge, "Come on, Robarge, you're going to SA." Robarge said, "For what?" Grievant replied, "For assault." Robarge said, "I didn't assault Burke." Grievant hadn't mentioned Burke's name to Robarge, and the fact that Robarge mentioned Burke's name confirmed to Grievant that Robarge had perpetrated the assault on Burke.

25. Grievant and Robarge briefly discussed the move to SA, Grievant telling Robarge that he (Robarge) was going to SA, Robarge refusing to go. Finally, Grievant approached Robarge, who was still sitting on the shelf, pushed Robarge's legs off the shelf, grabbed Robarge by the back of his neck, and gave him a shove through the door of the room.

26. Board's Exhibit #1 is a schematic drawing of the pertinent parts of the floor plan at the Chittenden Community Correctional Center in South Burlington, Vermont. The letters A, B, C, and D were marked on it by Grievant. References made to A, B, C, or D respectively are intended to refer to the areas marked as such on Board's Exhibit #1.

27. As Robarge passed through the door of his room, he suddenly spun around, so that he was facing Grievant, and quickly raised his fists to about chest level. At that time, Robarge's position did not appear to be assaultive. Grievant then pushed Robarge against the hallway wall (Board Exhibit #1, Area A), and Robarge raised his arms to cover his face, his hands resting on the top of his head. Grievant then struck Robarge with 6 to 8 quick blows to his arms and shoulders. The blows were delivered with half-closed fists, the heels of Grievant's hands (rather than his knuckles) making contact with Robarge's arms and shoulders. The blows were wide and from the side, rather than straight in. There were no blows to Robarge's torso, face, or head. The blows were delivered with a force somewhat greater than a slap.

28. Immediately following, Harmon held on to Robarge to restrain him because Harmon expected that Robarge might retaliate.

29. From the creditable evidence before us we find that at no time did Robarge retaliate, attempt to retaliate, punch, punch at, strike, or swing at Grievant or anyone else, and neither did he attempt to do so.

30. Grievant, leaving Harmon behind in the medium security area, continued shoving or pushing Robarge toward a corridor labelled B on Board's Exhibit #1, having his hand on the back of Robarge's neck.

31. Immediately upon entering the corridor, Grievant and Robarge were no longer in the presence of Harmon, but were in the presence of Correctional Officer Stanton and other Correctional Officers.

32. At or near the point marked B on Board's Exhibit #1, after Robarge had stiffened his legs and was not walking forward voluntarily, he used abusive language. Grievant pushed him up against the wall and again struck him, rapidly and in the same manner as previously. Again, Robarge "covered up" in self defense, and did not attempt to retaliate.

33. After the incident at the point marked B, Grievant continued pushing Robarge down the corridor in the direction toward the point marked C, all the while accompanied by Stanton.

34. Grievant, Robarge, and Stanton passed through the electrically controlled doorway separating the corridor from the area near the control room; and they proceeded in much the same halting fashion as previously to the point marked C. At that point, Robarge was still balking and using abusive language and Grievant was still pushing him from behind unassisted by any other officer. At no point did Grievant request assistance or call for the application of restraints.

35. At Area C, Grievant again struck Robarge in the same manner, and under the same conditions as previously.

36. Grievant, Robarge, and Stanton passed through the electrically controlled door separating the area marked C from the corridor marked D, proceeding toward the point marked D in the same manner as previously. Again, at the point marked D, Grievant struck Robarge in the same manner and under the same conditions as previously.

37. All during the passage of Robarge and Grievant from the point marked A to the point marked D, Stanton did not interfere with or attempt to assist Grievant. He had been on the job only for a few days, and he did not feel he should interfere.

38. Finally, after Grievant had struck Robarge during the fourth incident (at that point marked D), Stanton did take hold of Robarge; and then Grievant and Stanton together, with Robarge between them, walked Robarge backward (a not uncommon technique) without further event, finally locking him in the booking area.

39. In total, Grievant struck Robarge at four different areas along the route from Robarge's room to the booking area. Along the entire route, Robarge was loudly abusive (using "jailhouse profanity"), and uncooperative. Robarge, refusing to walk, would stiffen his arms and legs so as to make more difficult Grievant's attempt to "move" him. On each occasion Grievant delivered quick side blows (not straight in) with half-closed fists, the heels of his hands making contact with Robarge's arms and shoulders. On each occasion, Robarge covered his head and face with his arms, hands resting on the top of his head. On none of these occasions did Grievant direct (or land) any blows to Robarge's head, face, or torso. On each of these occasions, the force of the blows was slightly greater than a slap. At no time did Grievant attempt to use other (i.e., non-striking) available alternatives in order to move Robarge from his room to the SA unit or seek assistance from other officers.

40. On each of these occasions, Grievant struck Robarge in order to encourage him to be more cooperative in the move from MA to SA (or, in other words, to "smarten him up"). Grievant testified he hit Robarge because he was angry and felt Robarge deserved it.

41. Grievant admits he did not follow established policy concerning the use of force in moving Robarge.

42. Correctional Officer Stanton had worked at the Correctional Center for three days at the time of this incident. Immediately preceding the first time he saw Grievant striking Robarge (at the point marked A), Stanton was in a training session regarding the use of force. Stanton testified that the force used by Grievant was unnecessary and not consistent with the use of force training he (Stanton) had received. In a report on the incident, Stanton wrote that Grievant was "pumeling" Robarge (State's Exhibit #7). He testified that he used the term "pumeling" because of the repetition of blows Grievant landed on Robarge.

43. After Grievant and Stanton managed to get Robarge to the booking room, Grievant decided to leave Robarge in the booking cell for the rest of the night, rather than in SA, as he had originally planned. The reason Grievant made that decision was that he did not want to risk further trouble from Robarge in SA (i.e., yelling, flooding area). Grievant, having made that decision, left the booking room and went about his other duties.

44. Correctional Officer Stanton remained in the booking room after Grievant left. Robarge was not wearing a shirt (as was his wont), and Stanton was able to see that Robarge had no black and blue marks or bruises on his arms or shoulders, and that Robarge was not otherwise injured. Stanton also observed that, after Grievant left the booking room, Robarge was laughing and wearing his usual "wiseguy" grin.

45. Robarge never received medical attention for having been struck by Grievant and never complained about the incident.

46. Bulletin #1041 (State's Exhibit #9) reads;

"When force must be used on a resident, the employee(s) involved will notify his immediate supervisor as soon as the incident requiring the use of force is ended. In addition, a written report will be submitted to the Superintendent within 24 hours stating the names of those involved, time, place, and circumstances of the incident, and a description of the force used."

(Page 4)

47. Grievant admitted that on June 6, 1980, he was aware that he was required to write a so-called "use of force" report for his superiors within 24 hours after striking Robarge.

48. Grievant made a decision, within 24 hours after striking Robarge, not to write a "use of force" report of the incident in which he struck Robarge. Grievant offered no reason in testimony why he did not file a report. We find that he did not file a report because he attempted to conceal the fact from his supervisors that the incident with Robarge had happened.

49. Philip A. Scripture, Jr. was the superintendent of the facility at the time of the incident. The first knowledge Superintendent Scripture had of the June 6, 1980, incident between Grievant and Robarge came indirectly when, in early July, during the course of speaking to Correctional Officer Polaria about allegations that he had used excessive force on an inmate, Polaria told the superintendent that a supervisor (meaning Grievant) had used force on an inmate. Superintendent Scripture ordered an investigation, which was conducted on July 7, 1980.

50. On July 7, 1980, as part of the investigation, Grievant was ordered, by Corrections Counselor Supervisor B, Richard Wright, to write a "use of force" report regarding Grievant's use of force on Robarge on June 6, 1980.

51. Grievant submitted the requested report on June 8, 1980. In the report, Grievant wrote, "At no time was undo (sic) force used during this move." (State's Exhibit #1). Officers Stanton and Harmon also submitted reports on the incident (State's Exhibits #4, #7).

52. Superintendent Scripture reviewed the evidence gathered as a result of the investigation (State's Exhibits #1, #4, #7), and, in addition, Grievant's personnel file. In addition to the letters of commendation (Grievant's Exhibit #4) and performance evaluations (Grievant's Exhibit #3) found in Grievant's official personnel file, Superintendent Scripture took into account an incident which had occurred on, or shortly before, May 29, 1978, at the St. Albans facility (Grievant's Exhibit #11). At the time of that incident, Mr. Scripture was the Assistant Superintendent at the St. Albans facility, and Grievant had recently transferred from the St. Albans facility to the Burlington facility. The incident occurred when Grievant visited the St. Albans facility, during off duty hours, in order to pick up some fence posts he had ordered. Grievant was chatting with Mark Richmond, an on-duty supervisor, when a resident, without authorization, walked off with a roll of tape. Mr. Richmond asked Grievant to get the tape away from the resident, and Grievant, even though off-duty and not subject to the orders of Mr. Richmond, complied with the request. In the course of retrieving the tape from the resident, Grievant had to use a slight amount of force to take the tape away from the uncooperative inmate. The result of the incident was a memorandum, which was placed in Grievant's official personnel file (Grievant's Exhibit #11), from the superintendent of the facility, wherein Grievant was required to obtain advance approval for further visits to the St. Albans facility. The memorandum, however,

does not criticize Grievant for the use of force on the resident, although Superintendent Scripture did cite the use of force during that incident as one of the factors in his decision in this case.

53. On July 14, 1980, following the investigation of the incident in question, Grievant was asked by Superintendent Scripture to explain his conduct in moving Robarge from his room to the SA Unit on June 6, 1980.

54. At that time, Grievant declined to discuss the matter, but expressed his intention to neither change nor add to his "use of force" report.

55. On July 16, 1980, Superintendent Scripture dismissed Grievant immediately and personally served a dismissal letter (dated July 16, 1980) on Grievant. The letter, signed by Superintendent Scripture, provides, in pertinent part, as follows:

"This letter is to advise you that you are hereby being dismissed from the position of Night Shift Supervisor at the Chittenden Correctional Center...effective immediately on July 16, 1980, for the following reasons:

- 1) On or about June 6, 1980, at the Chittenden Center, you did unnecessarily beat and strike resident (inmate) Jeff Robarge. This action is contrary to rule #17 of the Chittenden work rules; (sic) 'No employee...shall use force against a resident except within the guidelines of the Burlington facility and Department of Correctional (sic) policy bulletin #1041.
- 2) Unnecessarily beating and striking a resident (inmate) constitutes gross neglect of duty as well as conduct which places in jeopardy the life and health of a person under the employee's care; conduct for which one maybe (sic) dismissed without prior notice or pay, in accordance with Article XV, Sections (3a) and (3d) of the State Employee's Bargaining Agreement.

On August 29, 1978, you were informed and you so indicated in writing that you were aware that you would be held accountable for violations of the rules of the facility. Rule #17 is designated as a rule for which one could be suspended or dismissed upon first offense."

(Grievant's Exhibit #9)

56. As superintendent, Scripture was concerned about employee and resident unrest at Chittenden Community Correctional Center. When told about the incident in question, Scripture became concerned about the force used. His assessment was that the striking was intolerable and that Grievant had to be dismissed. He testified that any striking of a resident against policy, regardless of the force used, is subject to automatic dismissal. Scripture believes that correctional officers serve as "role models" for inmates, and that supervisors serve as examples for their subordinates. Given these beliefs, Scripture felt he had no choice but to dismiss Grievant; notwithstanding Grievant's good record of service.

57. At all times relevant, the contract provided, in pertinent part, as follows:

"Article XII

Employee Personnel Records

6. Letters of reprimand or warning, supervisors' notes or written records of relief from duty with pay (including investigation notes) which are more than two years old and have not resulted in official action or further discipline against the employee will be removed from the employee's official personnel file and destroyed."

"Article XV

Disciplinary Action

1. The parties jointly recognize the deterrent value of disciplinary action. Accordingly, the State will:
 - a) act promptly to impose discipline within a reasonable time of the offense;
 - b) apply discipline with a view toward uniformity and consistency; and
 - c) impose a procedure of progressive discipline, in increasing order of severity;

1. Oral reprimand;
2. written reprimand;
3. suspension without pay;
4. demotion;
5. dismissal.

The parties agree that there are appropriate cases that may warrant the State bypassing progressive discipline or applying discipline in differing degrees so long as it is imposing discipline for just cause.

2. The appointing authority...may dismiss an employee for just cause with two weeks' notice or two weeks' pay in lieu of notice...
3. Notwithstanding the provisions of Paragraph 2 above, an employee may be dismissed immediately without prior notice or pay in lieu of notice for any of the following reasons:
 - a) gross neglect of duty;
 - b) refusal to obey lawful and reasonable orders given by supervisors;
 - c) conviction of a felony;
 - d) conduct which places in jeopardy the life or health of a co-worker or of a person under the employee's care."

OPINION

There are two issues before us in this case.

- 1) Was Grievant dismissed for just cause for striking resident Jeff Robarge on June 6, 1980?
- 2) If so, did Grievant's actions constitute gross neglect of duty and/or conduct which placed in jeopardy the life or health of a co-worker or of a person under the employee's care, and thus permit management to dismiss Grievant immediately without prior notice or pay in lieu of notice? (Article XV, Section 3, Agreement)

The case before us is difficult because it involves a clash between two important considerations: protection of the rights of prison inmates and justice for correctional employees.

Prison inmates certainly have not only a right to be free from physical assaults of correctional officials, but the State also has a correlative duty to ensure that brutality does not become a commonplace event in prison administration.

The Vermont Department of Corrections has acted with commendable determination to protect inmates in its promulgation of rules relating to use of force (see Finding #10). We likewise commend Superintendent Scripture for his decisiveness in protecting residents from attack by correctional employees. This case demonstrates his, and his superiors, determination to uproot any tendency to permit a degrading or sadistic policy to exist in Vermont prisons and demonstrates that management within the department is determined to establish that unlawful force against residents by employees is reprehensible and a basis for severe discipline.

Considerations of appropriate correctional policy do not, however, abrogate the existence of Grievant's right to be dismissed only for "just cause" (Article XV, Agreement). We are statutorily required to be neutral evaluators of conduct after the emotions of the event are spent, and the facts giving rise to them can be sifted. We now undertake that difficult duty.

Did "just cause" exist for the dismissal of Grievant? In In re Grievance of Albert Brooks, 135 Vt. 563, 382 A2d 204, the Supreme Court defined "just cause":

"Just cause means some substantial shortcoming detrimental to the employer's interests...which the law and a sound public opinion recognize as a good cause for his dismissal..."
(135 Vt. 568)

The Court further held that a discharge may be upheld for just cause only if it meets two criteria of reasonableness:

"One that it is reasonable to discharge employees because of certain conduct, and the other, that the employee has fair notice, express or fairly implied, that such conduct would be grounds for discharge." (135 Vt. 568)

One of the criteria of reasonableness that has to be met for a discharge to be upheld is that Grievant had fair notice that such conduct would be grounds for discharge.

Paragraph 17 of the Chittenden Community Correctional Center Personnel Rules and Regulations prohibits use of force against residents except within the guidelines of Department of Corrections Policy Bulletin #1041 (see Finding #10). Bulletin # 1041 provides that:

"Force may only be applied where there is direct and imminent threat of escape, or when the resident presents an imminent threat of bodily harm to himself, an employee, another resident, or any other person, or when all other available alternatives to effect legal order have been tried and failed."

The Personnel Rules and Regulations state that prohibited use of force against residents may result in suspension or dismissal upon first offense.

Grievant signed a memorandum stating that he read the Personnel Rules and Regulations and further stated:

"I completely understand my responsibility in these areas and understand I will be accountable for following these Rules and Regulations." (see Finding #11)

Furthermore, Grievant testified that he knew he didn't use proper technique in moving Robarge. He admitted he knew, at the time of the incident in question (June 6, 1980), that the proper method for moving a resident was to make a "show of force" by using several officers for the move, and carrying and, if necessary, using "restraints" (such as handcuffs, leg irons, and the like). He knew the purpose of this method was to avoid trouble (see Findings #20, #41).

Thus, Grievant knew that force may be applied only if there is a threat of escape, bodily harm to someone, and if all other available alternatives to effect legal order have been tried and failed. At the time Grievant moved Robarge from his cell there was no threat of escape or bodily harm, and Grievant made no attempt to use other available alternatives in the move. He elected to move Robarge by himself and carry no restraints with him. When he resorted to force on Robarge, he knew he was not using proper technique. He had been warned that such conduct might lead to suspension or dismissal upon first offense. We conclude that Grievant had fair notice that such conduct may be grounds for dismissal.

It is left for us to decide, then, whether it was reasonable to discharge Grievant because of his unwarranted use of force against Robarge. We must find some "substantial shortcoming detrimental to the employer's interests."

It is unquestionable that Grievant used unnecessary force in moving resident Robarge, and that use of such force subjected him to possible suspension or dismissal. The Personnel Rules and Regulations of the correctional center, discussed above, provide that the striking of a resident against policy results in suspension or dismissal, and may occur at first offense (emphasis added). Thus, implicit in the regulations, is the consideration of progressive discipline. More importantly, the parties have negotiated a procedure of progressive discipline (Article XV, Section 1). c.f. In re Brooks, supra.

In the case before us, we must look to the nature of the act and the circumstances in determining whether dismissal was the proper penalty.

We have looked to private arbitration cases involving similar situations to see what patterns emerge in rendering decisions on such issues. We do so, not because these decisions are binding on us, but to look to the evolving "common law" of the workplace to formulate standards for industrial, and for that matter, governmental justice. The US Supreme Court has approved the arbitration process as the most desirable forum for resolving grievances because it molds a "system of private law" which meets the "needs and desires of the parties." United Steelworkers of America v. Warrior and Gulf Navigation, 363 US 574 (1960). Three of the cases [Harshaw Chemical Co. and International Chemical Workers Union, Local No. 604, 46 LA 248 (pressman struck another employee,

10-day suspension); Canton City Lines, Inc. and International Brotherhood of Teamsters, Local 489, 48 LA 91 (bus driver using force against passenger, 2-week suspension); New Jersey Bell Telephone Company and Telephone Union of New Jersey, Local 827, 68 LA 931 (telephone company employee who pummeled two boys for throwing snowballs at him, 30-day suspension)] involved employees using unwarranted force against other employees or non-employees. Some common elements in the three cases are: 1) the use of unnecessary force was the first such offense by the employee; 2) the employees were, or felt they were, provoked, yet were clearly not acting in self-defense, and 3) no injury was sustained by the person or persons against whom force was used. The elements present in these cases exist in the case before us also. In those three cases, the arbitrators reduced the disciplinary action from dismissal to suspension. While these cases are similar to the one at hand in many respects, they can be distinguished because the employees involved were not in a quasi-fiduciary relationship to those assaulted, as Grievant was in this case. Those cases, accordingly, are relevant only to establish a minimum baseline for discipline arising out of assaultive behavior.

We turn then to two cases where the employees, dismissed by management for use of unnecessary force, were serving in custodial functions.

Under hospital regulations prohibiting improper behavior toward patients and defining "improper behavior" as an act of "intended maliciousness or cruelty," a hospital for mentally retarded patients discharged an employee who delivered a blow to the head of a patient who had allegedly stolen food and was stuffing it into his mouth (In re State of Minnesota, Fairbault State Hospital and Minnesota State Employees' Union, AFSCME Council, No. 6, 68 LA 713). The grievant

was aware of the prohibition against resident abuse. The grievant had received no prior suspensions, and had not been suspected of any prior resident abuse. The collective bargaining agreement in effect provided that employees could be dismissed for "just cause". Discharge was not mandated by the agreement nor any personnel rules for resident abuse. Given such circumstances, the arbitrator found that the penalty of dismissal was too severe, because it was not found that the grievant intentionally and maliciously abused the resident, nor was the resident injured. However, because of the improper behavior and use of unnecessary force by the grievant, a one-month suspension without pay was ordered.

In In re City of Boulder, Colorado and International Brotherhood of Police Officers, Local 576, 69 LA 1173, a patrol officer was discharged for striking cell screen mesh to which a detained intoxicated prisoner pressed his face and later kneeling that prisoner in the midriff while in the interview room. The prisoner was noisy and boisterous, but never exhibited a threat of violence toward the patrol officer. The arbitrator found that the patrol officer was guilty of resorting to the use of excessive and unwarranted force under the circumstances. He held that although the patrol officer was provoked to some extent, the situation could have been handled without resorting to force. However, under the circumstances of the patrol officer having a heretofore unblemished record with the police department and a performance rating of above standard performance, progressive discipline should have been applied. This was viewed as more equitable because it afforded the grievant a corrective and educational opportunity and recognized his past good performance. The patrol officer was reinstated without back pay (an effective 7-month suspension).

These cases, provide guidance on the evolving "common law" workplace elements to be considered in determining the appropriate penalty in a case such as the one before us. Relevant elements are:

- 1) contractual or regulatory language on appropriate penalty;
- 2) provocation leading to incident;
- 3) degree of force used and/or injury sustained by person attacked;
- 4) intent to do harm;
- 5) past incidents of use of unnecessary force by grievant; and
- 6) overall work record of the grievant.

Each of these elements, as they relate to the case before us, will be discussed in turn.

Contractual and Regulatory Language on Appropriate Penalty - The Agreement between the parties establishes "just cause" as the basis for dismissal, and provides a procedure of progressive discipline. Thus, progressive discipline must be considered in such cases.

Provocation leading to incident - Prior to striking resident Robarge Grievant had been angered by two things done by Robarge: 1) Robarge had assaulted another resident, and 2) Robarge was uncooperative in the move from his room to the booking cell. We do not find that the action by Robarge of assaulting another resident by itself provoked Grievant to strike him, but it did anger Grievant so that when Robarge was uncooperative in the move, the combination of the two incidents provoked Grievant to hit Robarge. This is in no way condoning Grievant's action of striking Robarge, but does establish that Grievant was justly provoked when part of his responsibility was to protect residents from harm at the hands of other residents.

Degree of Force Used and/or Injury Sustained - As we found (see Finding #39) earlier, on each occasion Grievant struck Robarge, he delivered quick blows from the side (not straight-in) with half-closed fists, the heels of his hands making contact with Robarge's arms and shoulders: the force of the blows was slightly greater than a slap. Robarge was not injured and showed no bodily evidence of trauma to his body.

Intent to do Harm - While the intent of Grievant at the time of the incident in question cannot be established with absolute certainty, we can look to objective standards to approximate such intent. We find it significant that resident Robarge suffered no reported injuries from this incident whatsoever. If a man of Grievant's size and prior boxing training intended to harm someone, he could certainly do it. We find that Grievant did not intend to inflict punishment on Robarge for Robarge's assaulting another resident. On each of the occasions Grievant struck Robarge, he did so in order to coerce him in the move from his room to the booking cell (see Finding #40). This is not a case of vigilante justice, but one of inappropriate force to accomplish a lawful objective.

Past Incidents of Use of Unnecessary Force by Grievant - Grievant was not disciplined for use of unnecessary force prior to the incident in question, and we do not find, based on the evidence before us, any use of unnecessary force by Grievant prior to the incident in question. This distinguishes this case from In re Brooks, supra, where the justification for dismissal pertained directly to the prior incidents of improper force used by the grievant. We distinguish the two cases on the grounds that there is no past evidence of misconduct in the case at hand from which we can infer more serious misconduct in the future.

Overall Work Record of Grievant - Prior to the incident in question, Grievant received no suspensions from duty, no letters of reprimand, and no demotions. He did receive seven letters of praise or commendation. In the four annual evaluations of his performance, he received three overall ratings of "consistently meets job requirements/standards", and one overall rating of "frequently exceeds job requirements/standards."

Our consideration and weighing of these factors lead us to conclude that the penalty of dismissal is not warranted. We do not find "just cause" existing for dismissal. We do find, nonetheless, that management's justifiable concern to protect the rights of prisoners and to establish a humane prison system is worthy of the utmost respect and our vigorous support. However, upon consideration of all the evidence, we feel a lesser measurement of punishment will not undermine those values, and will carry out the contractual rights of the parties.

Parenthetically we reject management's claim that the unnecessary force used constitutes gross neglect of duty as well as conduct which places in jeopardy the life and health of a person under the employee's care. We interpret gross neglect of duty to mean either aggregate refusals to perform one's duty (Grievance of Robert DeForge, 3 VLRB 204) or one incident in which a flagrant neglect of duty occurs. We find neither exists here. We also find that the conduct of Grievant did not place in jeopardy the life and health of resident Robarge. Grievant did not intend to harm Robarge and did not, in fact, physically harm him.

With these principles in mind, we proceed to determine the appropriate penalty for the offense committed. This is another in a series of cases where we have considered the appropriate disciplinary penalty in misconduct

cases. [Grievance of Jo Ann Kinuestin, 3 VLRB 288, (police dispatcher asleep, 30-day suspension); Grievance of Paul Cook, 3 VLRB 105, (park ranger's cumulative relatively minor derelictions, 60-day suspension); Grievance of Peter Carlson, 3 VLRB 303, (middle manager's failure to prevent misuse of State property, demotion and 30-day suspension); Grievance of Robert DeForge, 3 VLRB 204, (supervisor's active participation in theft of State property, dismissal)].

The offense committed by Grievant was indeed serious, he struck a resident against established and known policy. An additional factor in this case is that Grievant was in a supervisory position. In DeForge, supra (at 217), we held that an act of misuse of State property by one in authority may be taken as condonation of similar acts by subordinates. As supervisor, Grievant is obligated to provide an example to those under him. This is a substantial distinguishing factor from Fairbault State Hosp. Unit, and City of Boulder, supra. Improper conduct, when engaged in by a supervisor, may encourage like conduct by subordinates, and, additionally compromise the supervisor's ability to discipline similar transgressions by subordinates (see Michael J. Cafferele vs. United States Civil Service Commission, Secretary of the Navy, 625 F2d 285). Also, we take into our consideration the fact that Grievant did not file a use of force report following the incident in question even though he was aware that he was required to file such a report.

The contract requires progressive discipline. After dismissal, disciplinary action next in severity is demotion, and next after that, suspension. We think a combination of both disciplines appropriate here. We are confident that the discipline we impose is a sufficient

deterrent to reinforce the salutary policies of the Corrections Department but also recognizes the fact that human beings must carry it out, and that the best of them are frail.

ORDER

Now, therefore, for all the foregoing reasons and based on the foregoing findings of fact, it is hereby ORDERED that the grievance of Edward Lynn Goddard is sustained and that 1) he be reinstated to a position within the Vermont Department of Corrections, which position represents a demotion to the next lower grade from Correctional Shift Supervisor in accordance with the rules contained in the Personnel Rules and Regulations; 2) his reinstatement shall include back pay at that rate commencing 10 days from the date of discharge; and 3) the parties shall submit to the Board within 10 days a proposed order indicating Grievant's present rate of pay and his effective rate of pay upon ordered demotion per Personnel Rules and Regulations for incorporation into a final order by the Board.

Dated this 6th day of March, 1981, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney
Kimberly B. Cheney, Chairman

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

*Reversed by
Supreme Court
Docket # 426-88
Nov, 1982
(Reil Feb 1983)*