VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF: HAROLD COLLERAN	)	DOCKET NO. 82-40
GRIEVANCE OF: CONNIE BRITT	)	DOCKET NO. 82-41

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On July 23, 1982, the Vermont State Employees' Association ("VSEA") filed grievances on behalf of Harold Colleran (#82-40) and Connie Britt (#82-41). The grievances alleged the suspensions and demotions of Colleran and Britt violated Article 15 of the Agreement between the State of Vermont and the VSEA, effective for the period July 1, 1981 to June 30, 1982 ("Contract"), and that the State violated Article 16 of the Contract at Step II of the grievance procedure in that the Step II hearing officer was not impartial and therefore was not capable of a genuine attempt to resolve the grievance at the lowest possible level of the grievance procedure.

Hearings were held before Board Members James S. Gilson, Acting Chairman, and William G. Kemsley, Sr. on December 9, 1982, January 6, 1983, and January 20, 1983. Chairman Kimberly B. Cheney was not present at the hearings, but the parties stipulated there was no objection to him reviewing the record and participating in the decision in the event of disagreement between Members Gilson and Kemsley. He has done so.

Grievants were represented by VSEA staff Attorney Michael R. Zimmerman. Attorney Michael Seibert represented the State.

At the December 9, 1982, hearing, Grievants requested their grievances be amended to include the allegations that the Step III hearing officers, as well as the Step II hearing officers, were not impartial. The Board granted the amendment. Grievants also requested the amendment of the grievances to state Richard Bashaw lacked authority to impose discipline. The Board stated that if this issue was not implicit in just cause, it was not proper for Grievants to raise the issue since it was not raised at earlier steps of the grievance procedure. At the January 6, 1983, hearing, Grievant Colleran waived his allegations regarding the partiality of the Step II and III hearing officers.

FINDINGS OF FACT

1. Harold L. Colleran is a permanent classified employee of the Vermont Department of Corrections ("Department"). He began his employment with the Department on December 3, 1978, as a Correctional Counselor A (Pay Scale 10), and on August 19, 1979, was made a permanent employee. On October 11, 1981, as a result of a departmental reorganization, Colleran's position was reallocated to Correctional Officer C (Pay Scale 11), and, as a result, Colleran's pay was increased from $5.68 per hour to $6.13 per hour. Also as a result of that reallocation, Colleran was placed in a "promotional probationary" period. On December 6, 1981, Colleran's position was reallocated again, this time to Correctional Facility Shift Supervisor (Pay Scale 14), and even though still in a "promotional probationary" period, he received a pay increase (i.e.,

from $6.13 per hour to $6.55 per hour). On February 5, 1982, Colleran was demoted from Correctional Facility Shift Supervisor (Pay Scale 14) to Correctional Officer B (Pay Scale 9), and, as a result, suffered a 5 percent reduction in pay [Grievant's Exhibit 2 (#82-40), Grievant's Exhibit 3 (#82-40), Grievant's Exhibit 12 (#82-40)].

2. During his employment by the Department Colleran's workplace has continuously been the St. Johnsbury Correctional Center, St. Johnsbury, Vermont. During this same period, Colleran's performance evaluations have given him overall ratings of "consistently meets job requirements/ standards", and he has received various letters of praise and commendation. Except for the incident which gave rise to this grievance, Colleran has not been disciplined [Grievant's Exhibit 4 (#82-40), Grievant's Exhibit 5 (#82-40)].

3. Connie W. Britt is a permanent classified employee of the Department. He began his employment with the Department in December of 1978 as a temporary Correctional Officer (Pay Scale 8), and, on February 3, 1979, was made a permanent employee. On October 11, 1981, as a result of a departmental reorganization, Britt's position was reallocated to Correctional Officer C (Pay Scale 11), and, as a result, Britt's pay was increased from $5.20 per hour to $5.62 per hour. Also as a result of that reallocation, Britt was placed in a "promotional probationary" period. On December 6, 1981, Britt's position was reallocated again, this time to Correctional Facility Shift Supervisor (Pay Scale 14), and even though still in a "promotional probationary" period, he received a pay increase (i.e., from $5.62 per hour to $6.50 per hour). On February

5, 1982, Britt was demoted from Correctional Shift Supervisor (Pay Scale 14) to Correctional Officer B (Pay Scale 9), and, as a result, suffered a 5 percent reduction in pay [Grievant's Exhibit 2 (#82-41), Grievant's Exhibit 3 (#82-41)].

4. During his employment by the Department, Britt's workplace has continuously been the St. Johnsbury Correctional Center, St. Johnsbury, Vermont. During this same period, Britt's performance evaluations have given him an overall rating of "consistently meets job requirements/standards, and he received one such evaluation (i.e., covering the period 8/4/80 to 8/4/81) wherein he was rated an overall "4" (i.e., "frequently exceeds job requirements/standards"). During this same period, Britt received various letters of praise and commendation [Grievant's Exhibit 4 (#82-41), Grievant's Exhibit 5 (#82-41).

5. At all times relevant herein, there was a written policy, issued by the Department, governing the use of force by Department employees (referred to as "Policy 1041"). That policy was not elaborated upon by local written policy at the St. Johnsbury facility. It provided in pertinent part, as follows:

> INTRODUCTION
>
> ... At all times, correctional employees must be conscious of their obligation to use only as much force as is needed to accomplish their objectives.
>
> POLICY DESCRIPTION
>
> Force may only be applied when there is a 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.

Situations Where Force May Be Used

... Effecting Legal Order: 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 to another. They may also use the degree of force or restraint necessary to maintain order within the facility.

... Restraints or Restraint Agents: When necessary, restraints or restraint agents such as handcuffs or leg irons or mace may be used to accomplish some necessary objective such as transporting an inmate or controlling destructive behavior. The ...extended use of restraints to control destructive behavior may be employed only with the approval of the Superintendent. Each facility should develop detailed procedures, including documentation and monitoring requirements for the use of restraints and restraint agents.

Reporting: 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. Each employee involved in the incident will file a written report. Such documentation is essential if employees are later called upon to defend their decisions and actions.

... It is the responsibility of the Superintendent to insure compliance with this policy.

[State's Exhibit G (#82-40 and #82-41)]

6. St. Johnsbury Community Correctional Center Personnel Rules and Regulations, Rule 17, provides:

> No employee or volunteer shall "use force" against a resident except within the guidelines of St. Johnsbury CCC local written policies and Department of Corrections Policy Bulletin #1041. Policy will be taught in training but it is the responsibility of each employee to know.
>
> (State's Exhibit E, Page 2)

7. Rule 5 of the facility's Personnel Rules and Regulations provides:

> No employee or volunteer shall maliciously use profane or abusive language toward others or about any resident or staff member.
>
> (State's Exhibit E, Page 1)

8. The facility's Personnel Rules and Regulations provide that the violation of Rule 17, but not Rule 5, may result in suspension or dismissal at first offense (State's Exhibit E).

9. Colleran signed an acknowledgement that he had read and understood the facility's Personnel Rules and Regulations on July 24, 1979 [Grievant's Exhibit 7 (#82-40)].

10. Britt signed an acknowledgement that he had read and understood the facility's Personnel Rules and Regulations on July 24, 1979 [Grievant's Exhibit 8 (#82-41)].

11. Both Colleran and Britt read Policy 1041 prior to December 31, 1981, and understand they were obligated to use only as much force as was needed to accomplish their objectives. They also realized, prior to December 31, 1981, a use of force report was required to be filed if force was used on an inmate or detainee.

12. The St. Johnsbury facility violated the requirement of Policy 1041 that each facility should develop detailed procedures, including documentation and monitoring requirements, for the use of restraints and restraint agents. No such detailed procedures were developed by the St. Johnsbury facility.

13. Different individuals had the following different understandings on December 31, 1981, whether use of force reports had to be filed if restraints were used:

a) Richard L. Bashaw was, at all times relevant herein, the Department Director of Security and Operations, with responsibility for all security aspects of the six State-run correctional facilities. With respect to those matters, each of the six facilities' superintendents reported directly to him, and he, in turn, reported directly to the Commissioner of Corrections, James Walton. It was his understanding that any time restraints were applied, it was necessary to file a use of force report, and that under normal conditions, two or more employees would apply restraints.

b) Richard Smith, the St. Johnsbury facility Assistant Superintendent, understood that a use of force report had to be filed if restraints were applied to stop or curtail someone's present behavior but not if employees were attempting to prevent behavior from occurring (i.e., escape). Smith was unaware whether his understanding was different from other employees at the facility.

c) Correctional Officers Britt, Larry Marcotte and Linda Engleman understood that a person had to be restrained for over two hours before a use of force report was required to be filed.

d) Colleran understood use of restraints did not constitute use of force; that the only time a use of force report was required to be filed in applying handcuffs or other restraints was if force was used to get the handcuffs on. In such situations, Colleran understood force was used if the person applying restraints was met with intentional resistance by the person being restrained.

14. In addition to Policy 1041, which was promulgated in 1976, the Department, in the Spring of 1981, issued another policy governing the reporting of "unusual incidents" to a central department location (i.e., Waterbury during normal working hours, or the St. Albans Correctional Facility during "off" hours). That policy provided, in pertinent part, as follows:

> The following UNUSUAL INCIDENTS must be reported to the Communication Control Center as soon as possible, but WITHIN FIFTEEN MINUTES of the occurrence, or from time of discovery.
>
> ... 8. Use of restraints for more than a two hour period.
>
> The following UNUSUAL INCIDENTS must be reported to the Communication Control Center as soon as possible, but WITHIN ONE (1) HOUR of the occurrence.
>
> 10. Use of force (to include all incidents where physical force is used).
>
> ... The UNUSUAL INCIDENT REPORT is not a substitute for other reports ordinarily used to relate less serious incidents within the facilities. These other reports shall continue to be submitted even when an incident requires the preparation of an UNUSUAL INCIDENT REPORT.
>
> [State's Exhibit H (#82-40)(#82-41)]

15. At all times relevant herein, the front section of the St. Johnsbury facility was divided into three sections: 1) receiving and sallyport, 2) admissions and processing office ("booking room"), and 3) visiting ("peep") room. Receiving and sallyport is the middle portion, a hallway leading from the front entrance. The backdoor of this area leads to the cell blocks, and the left door leads to the booking room. A desk, chairs, file cabinets, and radio communication equipment are located in the booking room. The left doorway of the booking room leads

to the kitchen. The peep room is to the right of receiving and sallyport, and can be entered through the right doorway of that area. The door through which entrance is gained to the peep room has metal bars on it. On the right side of the peep room is a door which leads to a trailer which contains the nurse's office (State's Exhibit A).*

16. The St. Johnsbury Facility was not equipped to handle the long-term lodging of female inmates. The only location within the facility to house female inmates (for short periods only) was the "peep room". Female inmates who were to be housed for other than short periods were transferred from the St. Johnsbury facility to the Chittenden Community Correctional Center.

17. On December 31, 1981, New Year's Eve, Britt and Colleran worked the second shift (i.e., from 3:00 p.m. to 11:00 p.m.), with Britt assigned as primary shift supervisor, and Colleran assigned as alternate shift supervisor [Grievant's Exhibit 9 (#82-41), Grievant's Exhibit 8 (82-40)]. In addition to Britt and Colleran, three other correctional officers worked the second shift on December 31, 1981: Mike Temple, an experienced officer, and Roger Heywood and Ed White, who were both inexperienced.

18. On December 31, 1981, there were 55-60 inmates housed at the St. Johnsbury facility.

19. At 12:56 p.m. on December 31, 1981, the St. Johnsbury Police brought Mary M. to the facility. Mary M. was in her 60's, 5'7" or 5'8" tall, and weighed between 165-170 lbs. She was wearing slacks and a blouse over which she wore a sweater and an insulated jacket,

*State's Exhibit A in reduced form is attached to this decision.

giving her a bulky appearance. The police had arrested her for creating a disturbance at a local doughnut shop. Mary M. was put into the peep room (State's Exhibit F).

20. Britt arrived at the facility about 1:00 p.m. to pick up his paycheck. At this time, Mary M. was being uncooperative and shouting "Let me go home" or words to that effect, and she asked Britt to take her home. Britt suggested to Larry Marcotte, first shift supervisor, that they not strip search Mary M., even though it was the required procedure at the facility to strip search all new prisoners, but just pat her down. He made that suggestion because Marcotte told him the only way to accomplish a strip search given Mary M.'s behavior would be to throw her on the ground and forceably remove her clothing. Marcotte decided not to strip search Mary M.

21. Between 1:00 - 3:00 p.m., Mary M. was in the peep room and there was an officer with her at all times. She was not restrained and was allowed to roam freely about the room. She was loud and boisterous during this period. At times, she stood at the peep room door, rattled its bars and yelled at Linda Englemann, desk officer in the booking room. As a result, Englemann and officers in the cell blocks had difficulty maintaining radio communication with each other.

22. Shortly after the change in shifts at 3:00 p.m., Mary M. became even more agitated and louder, since she saw the first shift employees leaving the facility. Shortly after 3:00 p.m., Englemann, whose shift ended at 4:00 p.m., spoke to Britt, and asked him if anything could be done about the noise Mary M. was making. As a result, Englemann

and Britt applied restraints to Mary M. in the peep room at 3:10 p.m. Englemann applied handcuffs to Mary M., while Britt chained her to a door on the other side of the room from the barred door which Mary M. had been rattling. Neither Englemann nor Britt wrote reports concerning the restraining (State's Exhibit F).

23. During the subsequent disciplinary investigation of Britt's and Colleran's actions that day, the investigative team was not told restraints had been applied to Mary M. at 3:10 p.m.

24. From 3:10 - 3:55 p.m., Mary M. was quieter although she was still mumbling. At 3:55 p.m., she left the facility in order to appear in court [Grievant's Exhibit 9, Page 4 (#82-40), Grievant's Exhibit 10, Page 4 (#82-41)].

25. At 5:02 p.m., Mary M. was returned to the facility following her court appearance [Grievant's Exhibit 10, Page 5 (#82-40), Grievant's Exhibit 11, Page 5 (#82-41)].

26. At the time Mary M. returned to the facility from court, the peep room was no longer available to her since there were two male prisoners, both of whom were considered suicide risks, housed there. As a result of the absence of a place to house Mary M., she was allowed to remain, unrestrained, in the booking office.

27. In the front office with Mary M. were Desk Officer Heywood, who was seated at the desk, Correctional Officer White, Colleran and Correctional Instructor Lucy Moulton.

28. During this time, Mary M. was generally "carrying on", shouting "take me home", and things of that nature. Whenever someone would come

into the room, she would ask that person if he would take her home. She was also very agitated. She would sit for a while, then bolt up from her chair when she thought she saw a car driving up outside. At one point, Correctional Office White told her to sit down. Inmates would come to the booking room door from the kitchen (dinner was being served at that time) in order to see what was "going on". She also wandered up to Heywood's desk twice, and once she walked behind the desk (i.e., between Heywood and the equipment behind the desk). At one point, Heywood told her to get away from the desk because a radio message had come in and he could not hear it.

29. While Mary M. was yelling, Colleran put his head next to her ear and shouted, "shut the fuck up", or words to that effect. He did so to get her attention, and because he was irritated with her. Because he was concerned lest Mary M. wander off into the kitchen or perhaps damage some of the equipment stored in the front office, Colleran then decided to restrain Mary M. by handcuffing her to the chair. Colleran obtained a pair of handcuffs and showed them to Mary M. Mary M. told Colleran not to put the handcuffs on her, and she was flailing her arms aimlessly while Colleran applied the handcuffs. The flailing by Mary M. was not a conscious and deliberate attempt to resist the placing on of handcuffs but a product of her general agitation at the time. Colleran stopped her arms from moving and handcuffed her left arm to the chair. The handcuff came undone, so he handcuffed her arms together in front of her. After the handcuffs were placed on her, Mary M. did not quiet down, but she no longer walked around the room.

30. Colleran did not write a use of force report concerning the application of handcuffs to Mary M. because he did not believe he was required to given his understanding of when such reports had to be filed.*

31. The placing of handcuffs on Mary M. by Colleran did not amount to use of force as understood by Colleran since Mary M. did not consciously and intentionally resist the placing on of handcuffs, and he did not roughly apply the handcuffs to her.*

32. Given the fact there are four possible interpretations of when it is necessary to file a use of force report if restraints are used, none of which were communicated clearly to correctional officers, we find the State has not proven by a preponderance of the evidence that Colleran knew, or should have known, he was required to file a use of force report concerning the application of handcuffs to Mary M.*

33. Following the handcuffing of Mary M., Colleran left the booking room and removed the two prisoners (i.e., the suicide risks) who had been occupying the peep room.

34. Shortly thereafter, Britt came into the booking room. Britt told Mary M., more than once, to go with him. Mary M. did not respond to Britt, but merely swayed from side to side in her chair. Britt then grabbed the chain between Mary M's handcuffs, and pulled her out of her seat. Mary M. did not struggle, but was not cooperative. Then Britt and Colleran escorted Mary M. into the peep room. Britt and Colleran then left the peep room.

35. After Britt left the peep room, Mary M. was standing at the

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*The findings of fact which are asterisked(*), Findings 30-32, are the findings of Chairman Cheney and Member Kemsley. Member Gilson does not agree with these findings (See Opinion of Member Gilson).

door (then closed and locked), hollering and rattling the metal bars on the door. After Britt had returned to the booking office, and had been there about five minutes, Correctional Officer Temple came out of the block into the booking office and told Britt that he could not communicate with the desk officer because of the noise created by Mary M. Britt, in order to take care of the problem being created by Mary M., decided he would restrain her (as he and Engleman had done earlier) away from the barred door of the peep room. Britt then obtained a chain which was used to restrain incapacitated people. The chain was about three feet long. Britt asked Moulton (the only female employee present at the facility) to go with him. Moulton seemed reluctant, and Britt ordered her to accompany him to the peep room. Britt and Moulton proceeded from the booking room to the peep room. Mary M. was standing at the peep room door when it was opened (it opened inward), and as the door swung open, Mary M. moved back with it. Britt entered the room first, then Moulton. Mary M. tried to get around them to reach the door, but Britt prevented her from doing so, and pushed her in the chest and front shoulder area to the corner of the room. Britt used some force in pushing Mary M. across the room but did not push her with all his force. Britt then moved Mary M., by himself, to the door against the back wall of the peep room which led to the trailer, where he intended to attach the chain (as he had done earlier in the day). Mary M. was not cooperating with Britt in the move, and Britt had to use some force to pull her to the door. When Britt and Mary M. reached the door, Britt was holding Mary M. around the waist with his right arm, and, with his left hand, trying to untie a knot in the chain.

Britt asked Moulton to give him a hand, but she did not assist him. Evenually, using his right arm to move Mary M. back toward the door, Britt succeeded in fastening the chain. Mary M. did not strike her head against the door at any time. After he had restrained Mary M., who was still dressed in her bulky clothes, Britt and Moulton left the room. Mary M. was left standing, tightly secured to the door which led to the trailer. She was not provided with a chair to sit on. She was restrained so tightly that she could not have sat on a chair if one had been provided for her.

36. Britt did not file a use of force report concerning this restraint of Mary M.

37. The atmosphere in the facility between 5:00 p.m. and 6:00 p.m. was hectic: evening meal was served at 5:00 p.m. and visiting hours started at 6:00 p.m. Five employees, three experienced and two inexperienced, were assigned custody of 55-60 inmates, including two suicide risks and the loud and boisterous Mary M.

38. At 5:58 p.m., Mary M. left the facility for transport to the Chittenden Community Correctional Center. During the drive to Chittenden, Mary M. did not complain of any injuries.

39. Monday, January 4, 1982, was Moulton's first day of work after December 31, 1981. That day, she verbally reported her view of Britt's and Colleran's actions of December 31, 1981, to Tom Hunter, her supervisor. Hunter, in turn, reported the incident to his supervisors. Later that day, Moulton was called to the facility front office to report the incident.

40. On Moulton's way to the front office, Britt, who Moulton had not told where she was going and who did not know where she was going,

asked her good naturedly, "are you going to rat me out, Lucy?"

41. Moulton then proceeded to the front office where she verbally reported the December 31, 1981, incident to Assistant Superintendent Richard Smith, facility security chief, Roger Brown, and Hunter. Moulton was not asked to file a written report on the incident and Brown told her if they wished one they would tell her.

42. Also, on January 4, 1982, the so-called "Hedding incident" occurred. Hedding was an inmate who complainted of brutality by an officer named Husband.

43. On January 5, 1982, between 3:30 p.m. and 4:00 p.m., Richard Bashaw, Department Director of Security and Operations, received a telephone call from Harry Goodsell, Superintendent of the St. Johnsbury facility. Goodsell told Bashaw the media had been contacted by the inmates, and had been advised that if the charges of brutality made by Hedding were not looked into, there was going to be a hunger strike by the inmates. Bashaw advised Goodsell to "monitor" the behavior of the inmates at supper. About one-half hour later, Bashaw telephoned the St. Johnsbury facility and learned that Goodsell had left the facility. Bashaw was angry that Goodsell had left the facility.

44. During the supper meal of January 5, 1982, the St. Johnsbury inmates did conduct a hunger strike. As a result of that event and the allegations of brutality, Commissioner Walton issued a written delegation of authority, dated January 6, 1982, to Bashaw; John Gorcyzk, Director of Program Services; Gail Pelletier, hearing officer; and William Anderson, Personnel Administrator; which delegation empowered them generally to "conduct an investigation of the administration of the Department", and

specifically to administer oaths, compel witnesses, and compel the production of documentary evidence (State's Exhibit C).

45. During the initial phases of the "team's" investigation, inmates relayed 60 problems to the team. The team met with Superintendent Goodsell and Assistant Superintendent Smith and gave them responsibility to resolve 26 of the problems.

46. During the initial phases of the team's investigation at the facility, the questions put to inmates and staff were phrased as, "have you ever seen excessive force used?" In due course, the "team" became aware of Moulton's comments about the Mary M. incident. Interviews were conducted of Moulton, Britt and Colleran. The team found Moulton's version of the events on December 31, 1981, more credible than Grievants' versions. As a result of those interviews, Superintendent Goodsell was ordered by Commissioner Walton to temporarily relieve from duty both Britt and Colleran pending investigation. On January 14, 1982, Britt and Colleran were temporarily relieved from duty with pay for 30 days by Goodsell [Grievant's Exhibit 11 (#82-40), Grievant's Exhibit 12 (#82- 41)].

47. As a result of the Team's investigation, Husband was exonerated of charges of excessive force in the "Hedding incident".

48. From February 2, 1982, to February 12, 1982, Superintendent Goodsell was on leave, and on February 22, 1982, Goodsell left the Superintendent's job to work in the Probation and Parole section of the Department of Corrections. Bashaw was orally given the authority by Commissioner Walton to assume command of the facility in Goodsell's absence. That authority was given Bashaw before February 5, 1982, and

was given him as a result of the investigation and the inability of Goodsell and Smith to adequately resolve the 26 problems assigned to them. Bashaw was in command of the facility on February 5, 1982.

49. By letter dated February 5, 1982, and signed by Bashaw as Director of Security and Operations, disciplinary action against Colleran was taken. That letter provided, in pertinent part, as follows:

> The investigation does not sustain the allegation of use of excessive force against you personally, but does raise serious questions regarding your suitability as a Correctional Facility Shift Supervisor.
>
> Your action toward the female detainee in question was inappropriate and unprofessional in that you shouted obscenities at her in response to her verbal protests and complaints.
>
> After restraints had been applied to the female detainee, you failed to report the incident in writing, which is a violation of Department of Corrections Policy 1041 pertaining to use of force.
>
> The above reasons collectively or any one of them taken separately are sufficient to justify disciplinary action. In view of the serious nature of these particular incidents, this is an appropriate case for bypassing the progressive discipline requirements of Article 15 of the contract.
>
> You will, therefore, be suspended immediately for five (5) days without pay and will be demoted to the position of Correctional Officer B, Pay Scale 9.
>
> [Grievant's Exhibit 12 (#82-40)]

50. Even though not cited in Colleran's disciplinary letter, one of the bases for discipline against him was Section 5 of the St. Johnsbury Personnel Rules and Regulations (See Finding #7).

51. By letter dated February 5, 1982, and signed by Bashaw as Director of Security and Operations, disciplinary action against Britt

was taken. That letter provided in pertinent part, as follows:

> ...(The) investigation does not conclusively prove that you used excessive force, but indicates that you used force inappropriately and raises serious questions regarding your conduct as the Facility Shift Supervisor.
>
> In accordance with Article 15 of the current collective bargaining agreement..., you are hereby demoted to the position of Correctional Officer B and suspended without pay for ten (10) days effective February 8, 1982... This action is being taken as a result of your conduct which placed in jeopardy the life or health of a person under your care and "gross neglect of duty".
>
> In addition to the inappropriate use of force, you failed to file a report of this incident and you did not request any employee on your shift to file a report, which constitutes a violation of Department of Corrections Policy 1041 pertaining to use of force.
>
> These reasons together or any one of them taken separately are sufficient cause to bypass the progressive discipline requirements of Article 15 of the contract and justify the discipline imposed...
>
> [Grievant's Exhibit 13 (#82-41)]

52. In Bashaw's mind, there is no distinction between excessive force and inappropriate use of force.

53. Commissioner Walton chose the discipline imposed on Britt and Colleran, after consulting with the investigation team, and ordered Bashaw to sign the disciplinary letters.

54. Britt and Colleran were the only employees disciplined for failing to file a use of force report concerning Mary M.

55. At some time subsequent to December 31, 1981, the facility changed its policy regarding filing use of force reports to conform to Department policy that any time restraints are applied, a use of force report has to be filed.

56. The position Colleran and Britt were demoted to, Correctional Officer B, was the highest non-supervisory position in the Department of Corrections.

57. At the Step II level of the grievance procedure, Hearing Officer John Peterson, Chief of Agency Personnel, made the following statements in his May 4, 1982, written decision on Britt's grievance:

> After reviewing testimony by witnesses and the statement of Mr. Britt, I did not find circumstances which would warrant restraint by using waist chains to secure the detainee to the trailer door in the peep room'.
>
> It is my conclusion that circumstances did not warrant the use of restraints and the force used in applying them was inappropriate and potentially dangerous...
>
> [Grievant's Exhibit 16 (#82-41)]

58 By letter dated June 23, 1982, the Step III hearing officer, Employee Relations Director Tom Ball, issued his decision on Britt's grievance. That letter provided, in pertinent part, as follows:

> The letter you received... cites two reasons for the discipline imposed: your inappropriate use of force in restraining an elderly female detainee on December 31, 1981, and; your failure to file a required report on the use of force in violation of the Corrections Department's Policy 1041 pertaining to the use of force... I have concluded that you did use an inappropriate amount of physical force and inappropriately restrained the female detainee... in violation of ... Policy 1041.
>
> Policy 1041 requires the submission of a report whenever physical force and/or restraints are used. Your failure to file such a report, or to order such a report to be made by others, violates that policy.
>
> [Grievant's Exhibit 18 (#82-41)]

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

DEFINITIONS

APPOINTING AUTHORITY - the person authorized by statute, or lawfully-delegated authority, to appoint and dismiss employees...

DEMOTION - the change of an employee from one pay scale to another pay scale for which a lower maximum rate of pay is provided.

PERMANENT STATUS - that condition which applies to an employee who has completed an original probationary period and is occupying a permanent classified position. Rights and privileges of permanent status include, but are not limited to, reduction in force, re-employment, appeal, and consideration for promotion, transfer, and restoration.

PROBATIONARY PERIOD - that working test period normally six months from effective date of appointment, plus any extension, during which the employee is expected to demonstrate satisfactory performance of job duties.

PROMOTIONAL PROBATIONARY PERIOD - that working test period which applies when an employee is promoted to a position assigned to a higher pay scale in certain upward reallocation situations.

ARTICLE 15

DISCIPLINARY ACTION

1. The parties jointly recognize the deterrent value of disciplinary action. Accordingly, the State will:

...

b. apply discipline with a view toward uniformity and consistency,...

c. impose a procedure of progressive discipline, in increasing order of severity:

i. oral reprimand;
ii. written reprimand;
iii. suspension without pay;
iv. demotion;
v. 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.

...

7. The appointing authority or his authorized representative may suspend an employee without pay for disciplinary reasons for a period not to exceed 10 workdays. Notice of suspension, with specific reasons for the action, shall be in writing...

ARTICLE 16

GRIEVANCE PROCEDURE

Section 1. Purpose

The intent of this Article is to provide for a mutually satisfactory method for settlement of... grievances... It is expected that employees and supervisors will make a sincere effort to reconcile their differences as quickly as possible at the lowest possible organizational level.

...

Section 7.

The parties agree, subject to applicable law, that every employee may freely institute... grievances without threats, reprisal, or harassment by the employer.

60. At all times relevant herein, the Rules and Regulations for Personnel Administration provide, in pertinent part, as follows:

6.072 Demotion: An employee who is rated as fully satisfactory and who is demoted to a position in a lower class shall be reduced in salary to the maximum of the lower class, or if his salary is within the range of the lower class, it may be reduced by an amount not to exceed 5 percent. An employee who is rated less than fully satisfactory and who is demoted... shall be reduced in salary by an amount not less than 5 percent.

6.072 An employee demoted to a position in a lower class during a promotional probationary period shall be paid the

salary received before promotion provided such rate does not exceed the maximum of the lower class, in which event salary shall be the maximum of the lower class.

...

10.02 Permanent Full-Time Appointment: Selection for permanent appointment shall be made for each position from the certificate submitted by the Director under the provisions of Section 9, Sub-section 9.01, except as otherwise provided. Persons so selected shall, after satisfactory completion of a probationary period, be given permanent status in the position occupied.

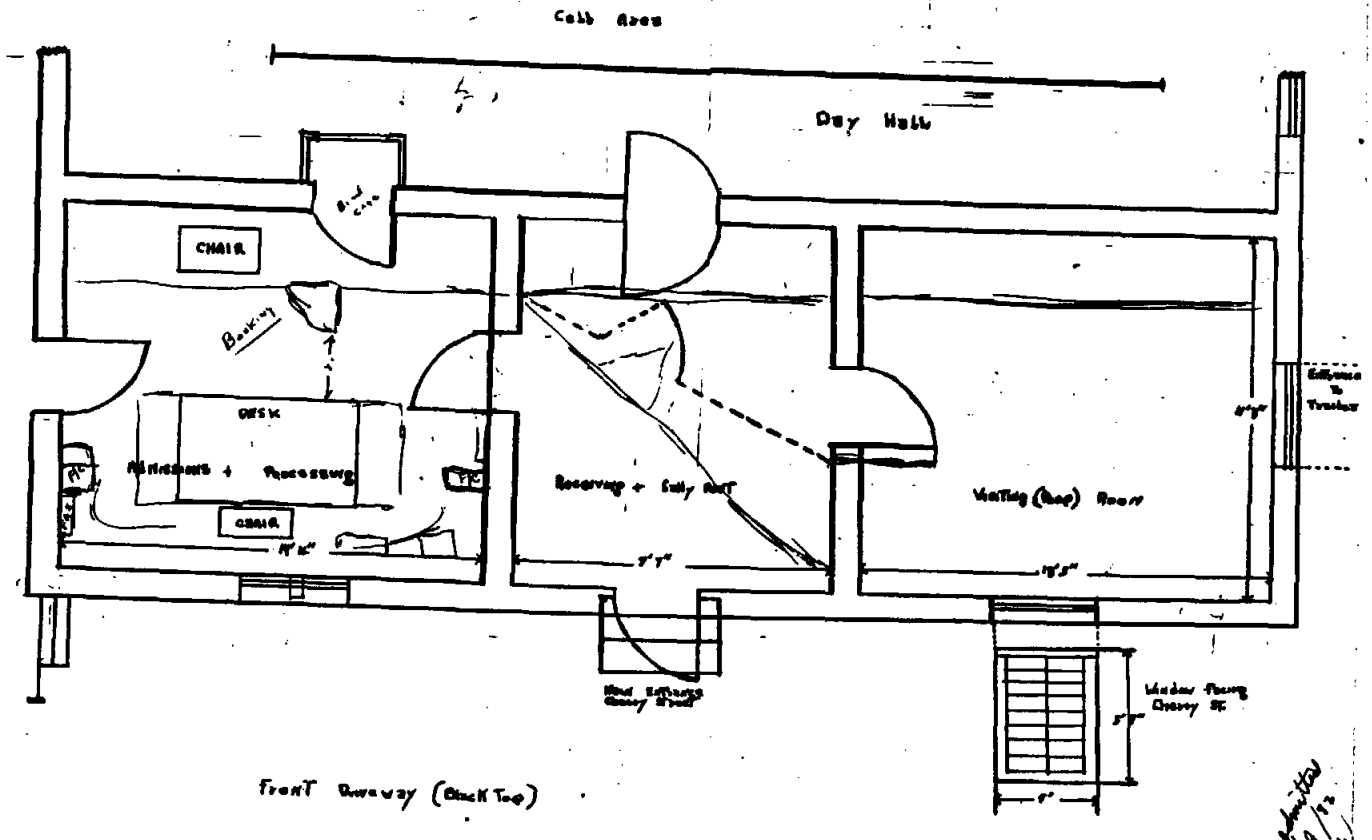
...

10.064 A performance evaluation of at least "Adequate" shall be required for completion of probation.

...

11.05 Demotion: An employee may be demoted at the discretion of the appointing authority for cause stated in writing to the employee...

ST Johnsbury Regional Correctional Center
St. Johnsbury, Vermont
Not To Scale



STATE'S EX. A.

Admitted 12/9/92

OPINION OF CHAIRMAN CHENEY

I. PRELIMINARY ISSUES

There are various preliminary issues that need to be addressed before the merits are discussed.

A. Authority of Richard Bashaw to Impose Discipline on Grievants

At the hearings, Grievants sought to amend their grievances to allege Richard Bashaw was without authority to impose disciplinary action on them. The Board stated that if the issue was not implicit in just cause for discipline, it was not proper to raise it at the Board level since it was not raised at earlier steps.

In my view, the failure to raise the issue at earlier steps of the grievance procedure is determinative here. Article 16 of the Contract, Grievance Procedure, states that a grievance shall contain "a statement of the facts concerning the grievance..." and "specific references to the pertinent section(s) of the Contract or of the rules and regulations alleged to have been violated". If a grievance is not raised in a timely manner at Steps II and III of the grievance procedure, "the matter shall be considered closed". Article 16, Section 3(B((a) and Section 3(C)(a), Contract. This language mandates specific raising of issues when the grievance is first submitted or the right to raise the issue is waived. A review of the grievances filed at the earlier steps indicates the issue of Bashaw's authority was not raised. Accordingly, the State was not on sufficient notice of the issue at the earlier steps, and therefore denied an "adequate opportunity to reconcile their differences as quickly as possible at the lowest possible organizational level".

Article 16, Section 1, Contract. Grievants failed to comply with the express terms of the Contract and are precluded from raising the issue now. Grievance of Cronin, 6 VLRB 37 (1983). Grievance of Faivre, 4 VLRB 60 (1981). cf. D'Aleo and the Vermont State Colleges Faculty Federation v. Vermont State Colleges, 141 Vt. 534 (1982). My belief is reinforced by the Supreme Court's view in Grievance of Bushey, 142 Vt. 290, 455 A2d 818 (1982), that "in-house resolution of problems should first be attempted" through the grievance procedure before raising the issue with the Board.

Even assuming arguendo the issue was timely raised, it is without merit since Bashaw was given authority by Commissioner Walton to assume command of the St. Johnsbury facility prior to the date disciplinary action was imposed on Grievants and, thus, clearly had authority to impose the discipline.

B. Action of Step II and Step III Hearing Officers

Grievant Britt alleges the Step II and Step III hearing officers violated various provisions of the Contract by changing the charges against him. Grievant Colleran raised the same contention in his grievance but withdrew the claim at the hearing as a result of the State's waiver of the claim that Colleran used excessive or inappropriate force.

In the disciplinary letter, Britt was alleged to have "used force inappropriately". The Step II hearing officer found "circumstances did not warrant the use of restraints and the force used in applying them was inappropriate". The Step III hearing officer concluded Britt "did use an inappropriate amount of physical force and inappropriately restrained the female detainee".

It is apparent the hearing officers violated the Contract by their decisions. In effect, they increased the charges against Grievant Britt by charging him with inappropriate restraint of detainee Mary M. in addition to inappropriate use of force. Article 15, Section 7, provides that notice of suspension must be accompanied by "specific reasons" for the action, and hearing officers cannot add to the reasons given in the letter. Such actions are contrary to the expressed intent of the grievance procedure that "employees and supervisors will make a sincere effort to reconcile their differences as quickly as possible at the lowest possible organizational level". Article 16, Section 1, Contract.

However, the actions of the hearing officers resulted in no demonstrated harm to Grievant Britt. He presented no evidence to show he was harmed by their actions and their actions have no effect on the disposition of Britt's case before the Board since we are not influenced by the conclusions of hearing officers. All Board hearings are de novo. Section 11.17, Board's Rules of Practice. Grievance of Patterson, 5 VLRB 376 (1976). Also, as we have consistently held in past cases, we will not look beyond the reasons given by the employer for the disciplinary action taken. Grievance of Earley and Ibey, 6 VLRB 72 (1983). Grievance of Erlanson, 5 VLRB 28 (1982). Grievance of Swainbank, 3 VLRB 34 (1980).

C. Effect of Promotional Probationary Status on Ability to Demote

At the hearing, the State took the position that since each Grievant was in a preliminary probationary period at the time of demotion, something less than "just cause" had to be established by the State to justify the demotions.

The State requests we look to the Contract, the Rules and Regulations for Personnel Administration, and our decision in Grievance of Byrne, 6 VLRB 1 (1983) to support its position.

I need look no further than the Contract to decide this matter. It is clear Grievants were demoted as a disciplinary measure. Article 15 of the Contract lists demotion as the fourth of five steps on the progressive discipline ladder, and provides discipline may be imposed for "just cause". The Contract makes no distinction between disciplinary demotions during promotional probationary periods and disciplinary demotions at any other time, and terms will not be read into a contract unless they arise by necessary implication. In re Stacy, 138 Vt. 68 (1980). Grievance of Allen, 5 VLRB 411 (1982).

The Supreme Court's decision in In re Grievance of Muzzy, 141 Vt. 463 (1982), precludes us from applying the Personnel Rules where a contract provision addresses the same issue that is covered by the Personnel Rules. Section 11.05 of the Rules provides "an employee may be demoted at the discretion of the appointing authority for cause". That is the only reference in the Rules to the necessary standard to meet to uphold a demotion and it has been superceded by the Contract since Article 15 of the Contract clearly states "just cause" as the standard needed to sustain a disciplinary demotion.

In Byrne, supra, we did find employees in promotional probationary periods "did not have permanent status in their job, or permanent entitlement to their pay rate, until completion of the promotionary period". However, it does not follow from that decision that the State has to establish

something less than "just cause" for disciplinary demotions of employees in promotional probationary periods. In Byrne, the issue was the rate of pay employees were entitled to when they were promoted or reallocated upward prior to the expiration of a promotional probationary period, and had nothing to do with disciplinary demotions.

Accordingly, I conclude the Contract requires the State to establish "just cause" for not only the suspensions of Grievants but also for their demotions.

II. ANALYSIS TO BE EMPLOYED BY THE BOARD IN STATE EMPLOYEE DISCIPLINARY GRIEVANCES

This is the first case since the Supreme Court's decision, In re Grievance of Goddard, ___ Vt. ___ (February 7, 1983), which requires the Board to analyze the legal principles applicable when reviewing cases of disciplinary action against State Employees.[1]

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[1]A brief summary of the historic background concerning standards governing dismissal of State employees would be useful here. Edward Goddard was dismissed. The 1979-81 contract between the State and VSEA was the first contract negotiated by the parties which contained a progressive discipline clause. The clause provided "the State will... 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." It further provided: "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.

In its Goddard decision, 4 VLRB 107 (1981), the Board determined that Goddard, a correctional officer, had used unnecessary force against an inmate, but in weighing the relevant elements, including the contractual language on appropriate penalty, the Board reduced the dismissal to a suspension and demotion. In an earlier decision under the 1979-81 contract, Grievance of Carlson, 3 VLRB 303 (1980), the Board had likewise reduced a dismissal to a suspension and demotion in recognizing the contract required progressive discipline.

The Court in Goddard stated:

> [The Board's] duty is to decide whether there was, in law, just cause for the action taken, not whether it agrees or disagrees with that action. It has power to police the exercise of discretion by the employer and to keep such actions within legal limits. But the Board is not given by statute or by the agreements, any authority to substitute its own judgment for that of the employer, exercised within the limits of the law or contract.

I see no reason why this scope of review is not applicable to disciplinary matters like the one before us, involving the imposition of penalties less than dismissal.

Vermont Supreme Court cases reviewing State employee discipline now give some clear guidelines to assist us in determining where there is just cause for the disciplinary action taken.

The Board's Carlson and Goddard opinions were issued prior to any Vermont Supreme Court dismissal decisions involving a contract requiring progressive discipline. The Court decisions up to that time were issued under the 1976-79 contract between the State and VSEA. That contract established "just cause" as the standard for dismissal but did not contain a progressive discipline clause. The Court's leading decisions under the 1976-79 Contract, In re Grievance of Brooks, 135 Vt. 563 (1977), and In re Grievance of Gage, 137 Vt. 16 (1979), held the Board erred in basing its orders reversing dismissals on the failure to follow progressive discipline since the contract did not require progressive discipline and progressive discipline was not inherent in the concept of just cause.

The Court's decisions In re Grievance of Carlson, 140 Vt. 555 (1982) and Goddard, supra, reversed the Board, holding the progressive discipline policy could be by-passed. These cases were the first the Court decided under the 1979-81 contract language establishing a progressive discipline policy. It is now apparent the change in the contract following Brooks did not change the law concerning the Board's function as we initially believed.

The Contract in effect in the case before us, the 1981-82 Contract, contains indentical language relative to dismissals as the 1979-81 Contract.

First, there are two requisite elements which establish just cause for discipline: 1) it is reasonable to discharge or otherwise discipline an employee because of certain conduct, In re Goddard, supra; In re Grievance of Brooks, 135 Vt. 563 (1977), and 2) the employee had fair notice, express or fairly implied, that such conduct would be ground for discharge or other discipline. In re Grievance of Yashko, 138 Vt. 364 (1980). The ultimate criterion of just cause is whether the employer acted reasonably in discharging or otherwise disciplining an employee for misconduct. Goddard, supra; Brooks, supra.

Second, it is the role of the Board to "hear and make final determination" on whether there is just cause for discipline. 3 VSA §926. Article 15 and 16, Contract. In such matters, the Board is designed to function as an independent administrative agency within the Executive Branch, not as part of the judicial branch. 3 VSA §921. Consequently, although we assume a quasi-judicial role, our determination of grievances is not comparable to that of a reviewing court. Rather, we are imposing the final administrative action in disciplinary matters, and it is our action which is an appealable action subject to judicial review. 3 VSA §1003. In re Grievance of Muzzy, supra.

In carrying out this function, our job is to determine de novo and finally the facts of a particular dispute, and whether the penalty imposed on the basis of those facts is within the law and the contract.

In large measure, this is an objective standard requiring review of the penalty imposed on the basis of the facts actually found by the Board. 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 . In re Muzzy, supra. cf. Earley and Ibey, supra. Once the

underlying facts have been so proved, the Board must determine whether the discipline imposed by the employer is within the range of its discretion given the proven misconduct.

The Board will not require that the employer prove by a preponderance of the evidence that its choice of discipline was proper. On this issue, the Board recognizes that a range of choices is available to the employer. If the State establishes management responsibly balanced the relevant factors in a particular case and struck a balance within tolerable limits of reasonableness, its penalty decision will be upheld. The Board will only alter the penalty selected by the employer if the employer imposes a penalty so severe, given the proven facts, that its choice amounts to an abuse of discretion. See Weiss v. United States Postal Service, 700 F2d 754 (1st Cir. 1983). (Agency need not prove it imposed the least severe discipline to achieve corrective action).

To be sure, we are not to substitute our judgment concerning the appropriateness of the penalty for that of the employer. I assume what the Court meant in Goddard, although not fully articulated, is that it is an inherent management function to control and direct the work force, and a necessary attribute of that function is to exercise discipline. Accordingly, as long as the exercise of that function is reasonable it will be sustained. Management is thus given broad discretion in disciplinary matters. It is the Board's function only to assure that this discretion has been properly exercised within tolerable limits of reasonableness, i.e. "within the limits of law or the contract".

That broad standard, however, needs clarification to provide guidance on what constitutes "legal" disciplinary action. I find useful the

analysis employed by the US Merit Systems Protection Board (MSPB) in such matters. I look to the MSPB because it is the only agency I know of which has analogous functions to ours; being authorized to "take final action" on disciplinary grievances of federal government employees, 5 USC 1205(a)(1), and also because it has articulated clearly in Douglas, et al., 5 MSPB 313 (1981) the relevant factors I believe ought to be considered in order to determine whether management has exercised its discretion within the "limits of law or contract".[2]

Douglas catalogues various formulations in determining whether a penalty is within the limits of law. I quote them here because the various statements add some contours to our task:

> ...whether the penalty was "too harsh and unreasonable under the circumstances", or was "unduly harsh, arbitrary, and unreasonable", or reflected disproportion between the offense and the personnel action, or disparity in treatment in violation of the "principle of like penalties for like offenses..."
>
> ...the Board must exercise a scope of review adequate to produce results which will not be found "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law..."
>
> ...The Board must...review the agency's penalty selection to be satisfied... 1) that on the charges sustained by the Board the agency's penalty is within the range allowed by law, regulation, and any applicable table of penalties, and 2) that the penalty "was based on consideration of the relevant factors and [that]... there [has] not been a (determination which is clearly erroneous)... a determination is "clearly erroneous" when although there is evidence to support it, the [Board] is left with the definite and firm conviction that a mistake has been committed... In addition, ...the Board...will consider whether a penalty is clearly excessive in proportion to the sustained charges, violates the principles of like penalties for like offenses, or is otherwise unreasonable under all the relevant circumstances.

[2]See Appendix for a survey of the appeal rights of state employees in other New England states and New Jersey.

All these formulations, however, add up to the principle that Agency discretion must be lawfully exercised.

The MSPB decision in Douglas, supra enumerates a number of factors that are relevant for consideration in determining the legitimacy of a particular disciplinary action:

> 1) The nature and seriousness of the offense, and its relation to the employee's duties, position and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated.
>
> 2) the employee's job level and type of employment including supervisory or fiduciary role, contacts with the public and prominence of the position;
>
> 3) the employee's past disciplinary record;
>
> 4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
>
> 5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
>
> 6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
>
> 7) consistency of the penalty with any applicable agency table of penalties;
>
> 8) the notoriety of the offense or its impact upon the reputation of the agency;
>
> 9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
>
> 10) potential for the employee's rehabilitation;
>
> 11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and

12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

We enunciated some of these factors in Grievance of Goddard, 4 VLRB 107(1981) as part of our review to determine whether the penalty there imposed was within established norms. We believe, however, these factors are also helpful as a framework within which to determine whether the disciplinary action is within legal standards of management discretion. However, I note that these factors do not purport to be exhaustive and not all these factors will be pertinent in every case. In many cases, the relevant factors will not be uniform in their weight or consistent in the direction they lead. Some will weigh in favor of harsher discipline, others towards more lenient. Management need not prove that each factor supports its decision as reasonable, only that on balance the relevant factors support management's judgment. Also, I do not use these factors to substitute our judgment for management's, but to ensure the employer considered the relevant factors in each particular case and took an action within legal limits.

III. BOARD AUTHORITY TO MITIGATE PENALTIES

The final issue in our analysis is to determine what action to take if the discipline exceeded the limits of reasonableness. This problem arises if we conclude either that the facts of the underlying incident are different than those relied on by management when it imposed the penalty and the proven facts do not justify the penalty, or we find the facts to be as relied on by management, but do not find the penalty meets the requisite standards of reasonableness.

There are two alternatives: 1) remand to management for determination of the appropriate disciplinary action; or 2) determine the appropriate disciplinary action ourselves.

I believe from a review of the statutes, practical considerations and prior Court cases that the Board has the authority to determine the appropriate disciplinary action where management has not done so within the limits of the law or the contract.

First, 3 VSA §926 states the Board is to make "final determination" on grievances. If we find the facts are different than those relied on by management, it could violate an employee's due process rights and those established by this statute, to remand to State officials who have previously imposed a penalty on the basis of a different set of facts than those found by the Board.

I also believe we have the authority to determine appropriate disciplinary actions because to do otherwise would create excessive delay in the final resolution of cases. I find persuasive the MSPB's position in this regard, as stated in Douglas, supra:

> If we were to conclude that the Board must remand cases involving excessive penalties to the employing agency for selection and imposition of a new penalty by that agency, then renewed appeal to the Board to review the new penalty must be allowed... Such successive appeals would prolong ultimate resolution of these cases, a result clearly contrary to Congress's desire for expedition in concluding adverse action appeals.

Similarly, I cannot believe the Vermont legislature intended such excessive delays in final resolution of grievances when they gave the Board authority to "make final determination" on the grievances of State

employees, 3 VSA §926, and stated it was the purpose and policy of the State Employees Labor Relations Act to "provide orderly and peaceful procedures" for protecting the rights of employees and the State. Prolonged litigation might promote "orderly" resolution of cases, but I question whether the legislature meant to impose such exhausting order on the system.

Were we to remand to management, we would be the only jurisdiction in the country of which I am aware where this happens.[3] I know of no other state where such a procedure is followed, and the federal government does not do so. Douglas, supra. If the legislature intended to remove Vermont from the mainstream of labor law in this regard, I believe it would have done so clearly. Finally, if we establish a penalty after concluding the facts are different than those relied upon by management, or conclude the penalty was illegal, we are not violating the Court's admonition not to substitute our judgment for management. In such a case management has not exercised its judgment within legal limits and has exceeded its inherent rights. In such cases, I believe we must make the final determination.

My belief is reinforced by the Supreme Court decision, In re Grievance of Swainbank, 140 Vt. 33 (1981), and Vermont State Colleges Faculty Federation and Peck, 139 Vt. 329 (1981). In Swainbank, a case involving a five-day suspension of a correctional guard, the Court overturned the Board's allowance of the grievance, but remanded "for the Board's determinatio on the "issue of severity of discipline". In Vermont State Colleges Faculty Federation and Peck, the Court recognized the Board had broad remedial

[3]See Appendix

powers in State employee grievances, citing 3 VSA §926 and 3 VSA §982(g), which states the "board is authorized to enforce compliance with all provisions of a collective bargaining agreement upon complaint of either party". These decisions recognize the Board's broad remedial powers, and while the Court has never specifically determined whether the Board may mitigate penalties imposed by management, I believe it follows that the Court would recognize our responsibility to finally determine the appropriate disciplinary actions.

Even though I believe the Board has the authority to impose a lesser discipline where the employer's discipline is outside of the law or contract, I do not believe it should exercise this authority fully in the Colleran case. The Douglas analysis has not been expressly relied upon by the Board in past cases and, therefore, the parties may not have presented all relevant evidence on the issue of alternative disciplinary measures. Accordingly, I believe the appropriate course in this case is to decide on a mitigated penalty, but to allow the parties an opportunity under Board Rule 11.20(b) to move to reopen the evidence on the issue of the appropriateness of alternative discipline if they feel further evidence would better illuminate the issue.

IV. APPLICATION OF THESE STANDARDS TO GRIEVANTS

I turn now to the application of these standards to the cases at hand.

Britt's Case

Britt was suspended for 10 days and demoted for his inappropriate use of force toward Mary M. and his failure to file a use of force report over the incident.

The first question is whether Britt used inappropriate force against Mary M. Neither my colleagues nor I believe the facts regarding this incident, as shown in our findings, indicate as severe use of force as relied upon by management (i.e. Lucy Moulton's version of events regarding Britt's action towards Mary M.) However, the facts as found indicate inappropriate use of force in three separate instances: 1) grabbing the chain between Mary M.'s handcuffs in the booking room and pulling her out of her seat; 2) pushing her across the peep room; and 3) restraining her to the door in the peep room which led to the trailer with a belly chain and so tightly that she could not sit down. While it may have been necessary to quiet Mary M. down because of the general disturbance she was causing, Britt used inappropriate force.

Britt was on fair notice he could be disciplined for his inappropriate use of force since he had read Department Policy 1041 regarding use of force, which provided "employees must be conscious of their obligations to use only as much force as is needed to accomplish their objectives".

The next question is whether Britt was on fair notice he could be disciplined for his failure to file a use of force report. In re Grievance of Yashko, supra. I conclude he was. He knew he had to file a use of force report if force was used against a detainee, he clearly used force against Mary M., and yet did not file a report.

It was not unreasonable for management to suspend and demote Britt given these two areas of misconduct. We need look no further than the first two factors listed on Page 268 of this opinion relevant for consideration in determining the appropriateness of disciplinary

actions.[4] Britt's actions indicate serious offenses, intentionally committed, and reflect adversely on his ability as a supervisor. As a supervisor, he was required to act as a role model to subordinates. Grievance of Patterson, supra. Grievance of Goddard, 4 VLRB 107 (1981). In failing to file a use of force report, he in effect "attempted to conceal the incident from his supervisors by not reporting it". In re Grievance of Goddard, Vt. (February 7, 1983). Such action encourages subordinates to demonstrate the same disdain for established procedures, and I think it is reasonable to demote an employee for such an action when it is designed to preclude supervisory review of use of force.

A 10-day suspension was a reasonable punishment for Britt's inappropriate use of physical force. I find the subsequent coverup equally reprehensible. Accordingly, the State was amply justified in bypassing the first two steps of the progressive discipline procedure and imposing the combination of suspension and demotion on Britt. Thus, even on the facts we find, I do not find the penalty excessive. I recognize the actions he was disciplined for occurred on a hectic New Year's Eve. However, his actions were inappropriate even under such circumstances, particularly considering his supervisory position.

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[4]The objections of Member Gilson to considering the 12 factors in this case are not well taken. First, the factors applied were impliedly used by management in assigning penalties. Second, as is discussed later, the majority of the Board came to the same result as management as to penalty imposed with regard to Britt. Third, with regard to Colleran, the principal issue is one of notice as to whether he had to file a use of force report, an issue fully litigated.

Colleran's Case

Colleran was suspended for five days and demoted for two reasons: 1) inappropriate action toward Mary M. in shouting obscenities at her; and 2) failure to file a use of force report in violation of department policy pertaining to use of force. (He was not punished on account of the actual use of force he did use in applying restraints.)

The principal issue is the discipline attributable to the failure to file a use of force report. Here there is a Yashko problem: whether Colleran was on fair notice he was required to file a use of force report. Unlike the case with Britt, that has not been established here. The State did not prove by a preponderence of the evidence that the mere placing on of handcuffs triggered the need to file a report. While management has ultimately established that Colleran had to stop Mary M.'s arms from flailing in applying handcuffs to her, they have not established he was on notice he had to file a use of force report in such an instance. There were various conflicting directions as to when a use of force report had to be filed in applying restraints. It was Colleran's understanding he did not have to file a report. Moreover, the facility had not adopted the detailed procedures required by Department policy on use of force, including documentation requirements for the use of restraints.

Colleran did not use force to overcome conscious resistance to the handcuffing; Mary M. was not resisting but only moving her arms aimlessly. It is not clear Colleran was on fair notice use of handcuffs, even if it

involved the action of stopping arms from flailing in order to apply the handcuffs, constituted an act requiring the filing of a use of force report. Accordingly, management has not sustained their burden of proving he was on fair notice he could be disciplined for such failure. In re Grievance of Yashko, supra. This is in contrast to Britt's failure and that of the correctional guard in Grievance of Goddard, supra, who knew they were required to file a use of force report given the force they used and did not do so to avoid detection.

Accordingly, the only charge proved against Colleran is his use of profanity in violation of Rule 5 of the facility's rules (State Exhibit E). The range of discipline to which he is subject for this conduct is limited by the State's own rules: only an oral or written reprimand may be imposed for a first offense under Rule 5. See State's Exhibit E, pp. 1 and 3.[5] Applying the Douglas standards, I believe a written reprimand is warranted.

The offense was deliberate. The language used was strong, offensive, and shouted in the detainee's ear. The employee was in a supervisory capacity and his conduct exhibited poor leadership qualities, though on a minor scale. The employee's past disciplinary and work record weigh in his favor. The offense should not significantly impair the employee's ability to perform or his superior's confidence in him. There is no evidence of what punishment others have received for similar offenses. The punishment suggested is consistent with the applicable agency table

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[5]Although the facility's rules do not explicitly state demotion cannot be imposed for a first offense under Rule 5, we conclude that is implied in the rules because if the imposition of suspension is prohibited, then certainly it can be assumed the greater penalty of demotion is likewise prohibited.

of penalties. The offense is not likely to produce notoriety or harm the agency's reputation. The employee had clear notice of the rule he violated. The employee has good potential for rehabilitation, to the extent this mild offense shows a need for it. There are mitigating circumstances in that the general atmosphere in the facility at the time of the incident was hectic and there was, accordingly, a great deal of pressure on Colleran. In human terms, the offense is an understandable reaction to circumstances. The sanctions available are so close together that the choice between them is unlikely to influence deterrence.

On balance, the offense is not very serious, but the sanction of a reprimand is correspondingly mild. I believe that the deliberate nature of the offense and the supervisory role of the employee tip the balance in favor of a written, rather than oral, sanction.

I reject Grievants' contention that the State violated Article 15, Section 1(c) of the Contract, which provides the State will "apply discipline with a view toward uniformity and consistency" because Grievants were the only employees disciplined for failure to file a use of force report. As between the two of them, there are clear differences in their actions as noted here. Lucy Moulton was the only other employee centrally involved in the use of force incidents and she reported the incidents verbally and was told by the facility security chief she would be told if management wanted her to file a report. Thus, she was diligent in reporting the incident and there was certainly no reason to discipline her.

Kimberly B. Cheney, Chairman

OPINION OF MEMBER KEMSLEY

I concur with the analysis to be employed by the Board in State employee disciplinary grievances as stated by the Chairman since I believe it is consistent with what the Vermont Supreme Court has told us we must do. However, it is not without reservation since a public employee has a right to an impartial decision maker to render a decision, Hostrop v. Board of Junior College District 575, 471 F2d 488 (7th Cir., 1972), United Farm Workers of America, AFL-CIO, et al. v. Arizona Agricultural Employment Relations Board, 696 F2d 1216 (9th Cir. 1983), and the Court ruling that we may not substitute our judgment for that of the employer raises a substantial question whether or not we are permitted to be impartial decision makers.

Further, I concur with the opinion of the Chairman in all other parts of his opinion except one. I believe the discipline imposed on Britt, like that imposed on Colleran, was unreasonable in view of the circumstances.

Britt was suspended and demoted for failure to file a use of force report and inappropriate use of force against Mary M.

Britt was clearly at fault in failing to file a use of force report, and, in my view, this was the greatest error he committed. He realized he had to file such a report if force was used on a detainee. Yet, despite his use of force on detainee Mary M., he did not file a report. His failure to do so demonstrates an apparent attempt to "conceal the incident(s) from (his) supervisors by not reporting it", and warrants some kind of disciplinary measure. In re Grievance of Goddard, supra.

With regard to inappropriate use of force, the evidence established Britt did use force in his handling of Mary M. However, taking into consideration all the circumstances existing the night of his action New Year's Eve, I do not believe the force he used was inappropriate.

Britt was working in the same hectic atmosphere in the facility at the time of the above incidents as was Colleran and the most pressure was on him since he had chief supervisory authority that New Year's Eve and had to deal with the security problem Mary M. was creating. By moving Mary M. to the peep room, he was hoping to quiet her down. When he told Mary M. to go into the peep room with him, she did not rise from her chair. He then pulled her out of the chair. I do not believe this is an indication of inappropriate use of force, but a reasonable action by Britt due to the pressure he was under at the time, resulting in a need to act in haste with an uncooperative detainee.

After bringing Mary M. to the peep room, he later was forced to take more severe action since Mary M. remained standing at the peep room door, shouting and rattling the barred door, and thereby still making radio communications impossible. He decided to restrain her to the door on the other side of the peep room with a belly chain. This was a reasonable decision: she would no longer be able to rattle the peep room door and it may have frustrated her to the extent she would quiet down. Belly chains are often used to quiet loud and hyperactive inmates and are always used in transporting inmates. When he went into the peep room with Lucy Moulton to accomplish this task, Mary M. attempted to

move around Britt and leave the peep room. He prevented her from doing so and pushed her across the room. Again, it is apparent this was a result of acting in haste with an uncooperative inmate on a particularly hectic night, rather than an attempt to "rough her up".

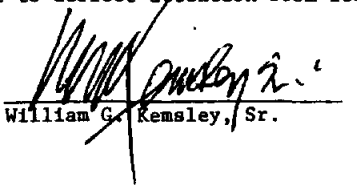
Finally, Britt had to use some force to move Mary M. to the door on the far side of the peep room to restrain her because she was not cooperating in the move. I fail to see how the force he used here was inappropriate. He merely pulled an uncooperative detainee to the door to accomplish a reasonable objective and was given no assistance by Moulton, even though he had requested her assistance.

Given Britt's actual actions and the circumstances surrounding those actions, management abused their discretion and acted "unreasonably" in both suspending and demoting Britt. Goddard, supra. This is particularly so since the set of "facts" management had in mind when it imposed discipline (i.e., Moulton's version of events) are more severe than what we believe happened. The severity of the discipline imposed is not supported by the new set of facts which indicate a lesser degree of force by Britt. The action was "disproportionate to the sustained charges". Douglas, supra (emphasis added).

The less serious nature of Britt's offenses than what he was charged with bring his level of conduct more into line with Colleran's offenses, although his proven misconduct was still more serious than Colleran's offenses. Accordingly, his penalty should be somewhat greater. Article 15, Section 1(b), Contract. Like Colleran, his derelictions of one

night, which under all the circumstances were not that severe, did not warrant demotion from his supervisory position. This is particularly so since, as is the case with Colleran, the evidence indicates no prior disciplinary or performance problems. Reducing his penalty to just a 10-day suspension would be reasonable.

I do not intend to condone use of force by anyone in my resolution of this case. I believe, however, that management has used force against the employees here which is every bit as reprehensible as that used by Grievants against Mary M. The facility was understaffed. New Year's Eve bedlam, with five people supervising 60 inmates, was bound to lead to an incident. Management, in my view, is making scapegoats out of Colleran and Britt and punishing them to cover up its own inadequacies in obtaining funds from the Legislature to staff correctional facilities. It is all very well to call for "law and order", but it is unfair to deprive corrections guards of money and status because management has been unable or unwilling to convince the Legislature to fund enough positions to prevent what occurred here. I think both men should be disciplined, but management has imposed penalties so severe that they can only be explained as an attempt to deflect attention from its own shortcomings.



William G. Kemsley, Sr.

OPINION OF MEMBER GILSON

I dissent from the views of the Chairman in three respects:

First, while the 12 factors listed by the Chairman in Part II of his opinion relevant for consideration in determining the legitimacy of a particular disciplinary action are valid and reasonable, I do not believe the penalties imposed here should be judged against these factors since there is no evidence management applied the penalties with those criteria in mind. Nothing on the record indicates any specific evidence on the 12 factors. While these factors could be considered by management in future cases, it is unfair to apply them in this case. Neither side was on notice these factors would be applied here and they have not bargained for the application of the factors in disciplinary cases. Accordingly, they should not be weighed by the Board here.

Even given my views, I concur with the Chairman's logic in concluding the penalty imposed by management with regard to Britt was reasonable and within the limits of law and contract. I would like to comment on the distinction between "excessive" force and "inappropriate" force. In the letter informing Britt of his discipline, the statement is made: "the investigation does not conclusively prove that you used excessive force, but indicates that you used force inappropriately..." However, in the mind of Richard Bashaw, who signed the disciplinary letter upon the order of Commissioner Walton, there is no distinction between excessive force and inappropriate use of force. In my mind, also, there is no distinction and there is no basis for such a distinction in either the Contract or Department rules.

Second, I believe the penalty imposed against Colleran, like that imposed against Britt, was reasonable and within the limits of law or contract. Colleran was suspended for five days and demoted for two reasons: 1) inappropriate action toward Mary M. in shouting obscenities at her; and 2) failure to file a use of force report in violation of Department policy pertaining to use of force.

The evidence supports both allegations against Colleran. In a state of irritation and to get her attention, he put his head next to Mary M's ear and shouted an obscenity. He also failed to file a use of force report after using some force to apply handcuffs to Mary M., even though he understood he was required to file a report if force was used to get handcuffs on.

It was reasonable for management to suspend and demote Colleran for these actions. As a supervisor, he was required to act as a role model to subordinates. Grievance of Patterson, supra. Grievance of Goddard, 4 VLRB 107 (1981). In failing to file a use of force report, he in effect "attempted to conceal the incident from his superiors by not reporting it". In re Grievance of Goddard, ___ Vt. ___ (February 7, 1983). I disagree with the Chairman and Member Kemsley that Colleran was not on notice he had to file a use of force report. Given his actions in applying handcuffs to Mary M., he knew he had to file a report if force was used, he used force in applying handcuffs to Mary M. by stopping her arms from flailing in order to apply the handcuffs and yet did not file a report. Accordingly, his failure to file a report was

intentional, bringing it into the category of a serious offense. Such action encourages subordinates to demonstrate the same disdain for established procedures. By swearing at Mary M., he demonstrated improper treatment of inmates and raised serious doubts of his suitability as an employee supervising other employees who would have custody of inmates. Colleran had fair notice his actions could result in disciplinary action against him since he knew he was required to file a use of force report if he used force in applying handcuffs and he was aware it was a facility rule not to "maliciously" use "profane or abusive language" towards others. Colleran's actions were serious enough to justify bypassing the oral and written reprimand steps of the Contract's progressive discipline policy, and management had "just cause" for the discipline imposed.

It is apparent that Grievants Colleran and Britt were caught somewhat in the transition from the "old regime" at the facility to the "new regime". Also, I recognize the actions they were disciplined for occurred on a hectic New Year's Eve. However, that does not justify their inappropriate actions against a confused woman in her 60's who was a threat to no one. The undeserved treatment she received should not be forgotten in our determinations. Grievants deserved the discipline they received.

Third, I disagree with Part III of the Chairman's opinion that the Board may mitigate penalties imposed by management. If the Board finds that the penalty imposed by management is unreasonable or otherwise outside legal limits, it may not then impose a lesser penalty of its own choosing. The Supreme Court has stated that we may not substitute our

judgment for that of the employer, In re Goddard, supra, and by assuming management's authority to impose discipline we would be doing just that. The Board must remand so management may determine the proper penalty. I recognize this means litigation may very well be protracted as the penalty imposed by management on remand may then be appealed. This may not be a desirable method of resolving disputes, but it is what I believe the Legislature and the Supreme Court have told us we must do.

The lesser penalty imposed by the Board on Colleran is not desirable for either party. The Board has determined there was no just cause for management's penalty, yet Colleran finds himself being punished by the Board. Management is prejudiced by the Board's opinion since the current state of the law provides the Board may not substitute its judgment for management but the Board has done just that in setting the penalty here. As a result, management will be confused in future cases since it is receiving conflicting signals from the Court and the Board. The majority should remand this case to management to determine the proper penalty, and not change the state of the law on its own initiative. If nothing else, this will provide the parties with uniform guidance.

Additionally, assuming the penalty imposed by management was too harsh, in this case it would be unreasonable for us to impose an appropriate penalty on either Colleran or Britt since there was no evidence presented of punishment imposed on other employees for similar offenses. Therefore, we are without the necessary knowledge to ensure discipline is applied "with a view toward uniformity and consistency", as required by Article 15, Section 1(b) of the Contract. Accordingly, we are unable to impose a penalty in conformity with the Contract, and would have to remand to management to do so.

James S. Gilson

James S. Gilson

ORDER [1]

Based on the foregoing Findings of Fact and for all the reasons stated above, it is hereby ORDERED:

1. The grievance of Connie Britt is DISMISSED:

2. The grievance of Harold Colleran is ALLOWED: and

a) The disciplinary letter to Colleran signed by Director of Security and Operations Bashaw dated February 5, 1982, shall be removed immediately from Grievant's personnel file and destroyed, and there shall be substituted in its place a written reprimand consistent with this decision, a copy of which shall be provided to Grievant and the Board within two weeks from the date of this ORDER.

b) The five-day suspension and demotion imposed upon Grievant is rescinded. Grievant shall be reinstated to his position of Correctional Facility Shift Supervisor retroactively to February 5, 1982, and back pay and benefits adjusted accordingly. The parties shall stipulate to the amount of back pay and benefits due Grievant within 10 days from the date of this ORDER, or failing in agreement, may request further hearings before the Board.

c) Within 10 days from the date of this ORDER, the parties may move to reopen hearings in the Colleran matter on the issue of the appropriateness of alternative disciplinary measures.

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[1] The Board issued its views in this matter initially as a Notice of Proposed Decision on June 9, 1983, and gave the parties the opportunity to submit any additional memoranda if they so desired. Grievants filed a Supplemental Memorandum on July 14, 1983. The State filed a Supplemental Memorandum on August 18, 1983. Grievants filed a Reply Memorandum to the State's Supplemental Memorandum on August 25, 1983.

Dated this 22nd day of September 1983, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.

James S. Gilson

APPENDIX

The purpose of this appendix is to examine the appeal rights of state employees in other states in situations where disciplinary action has been imposed. The appeal rights of employees in all the remaining New England states and New Jersey have been examined, through a review of applicable statutes and case law.

The appendix is divided into the following categories: a) reviewing body; b) standards for determining facts underlying disciplinary action; c) standards in reviewing disciplinary action; d) authority to modify employer penalties; and e) judicial review of reviewing body's decision. In each category, the applicable statutory language and case law for each state is provided.

A) Reviewing Body

Connecticut - Permanent state employees not included in bargaining units have the right to appeal to the Employees' Review Board, a state administrative body, if they are demoted, suspended or dismissed. CGSA §5-201. State employees included in bargaining units may use the services of the State Board of Mediation and Arbitration or other arbitration tribunals for the resolution of grievances over disciplinary action. CGSA §5-276.

Maine - The State Employees Appeal Board, an impartial board of arbitration, has the authority to decide disciplinary grievances of state employees, both classified and unclassified. 5 MSRA §751-752. The State Employees Labor Relations Act permits binding arbitration as the final step of the grievance procedure. If there is no such contractual provision, the parties shall submit disciplinary grievances for resolution by the State Employees Appeal Board. 5 MSRA §979-k.

Massachusetts - State employees may appeal disciplinary action either to the Civil Service Commission or final and binding arbitration. Where arbitration is elected by the employee, it shall be the exclusive procedure for resolving grievances: MGL c31 §41, c 150 e, §8.

New Hampshire - There is no provision for arbitration. Permanent state employees may appeal to the Personnel Commission for review if they are dismissed, demoted or suspended. The Personnel Commission is responsible for the executive direction of the Personnel Department, and appoints the Director of Personnel. NHRSA §98:3, §98:9, §98:15.

Rhode Island - The Personnel Appeal Board hears appeals by any employee who has been discharged, demoted or suspended. Employees have the right to negotiate contractual provisions providing for arbitration, and such provisions are valid, irrevocable and enforceable. RIGL 1956 §36-3-10, §28-9-1, §28-9-2.

New Jersey - State employees appeal disciplinary action to the Civil Service Commission. NJSA 11:15. The binding arbitration of disputes involving discipline of state employees is prohibited. Employer-Employee Relations Act, Section 34:13 A-5.3.

Thus, in three of the states examined (i.e., Maine, Massachusetts, Rhode Island), state employees have the choice of appealing disciplinary action to either arbitration or a state administrative agency. In two states (i.e., New Hampshire, New Jersey), employees' only right of appeal is through the state administrative agency, while in Connecticut, employees' right of appeal to either the administrative agency or arbitration depends on whether they are excluded from or included in bargaining units.

We assume arbitrators in these situations, absent restrictive legislation to the contrary, have the scope of review in reviewing disciplinary action and authority to modify penalties as is generally recognized for arbitrators. See Remedies in Arbitration, Hill and Sinicropi (BNA, 1981), pages 22, 30-31, 52-53, 97-105; How Arbitration Works. Elkouri and Elkouri (BNA, 2nd Ed., 1973), Chapter 15, "Discharge and Discipline", pages 610-666; The Arbitration Journal, September 1980, Vol. 5, No. 3, pages 22-29, "Grievance Adjudication for Public Employees: A Comparison of Rights Arbitration and Civil Service Appeals Procedure", Hayford and Pegnetter.

As a result, this appendix will not be concerned with the scope of arbitrators' review in the surveyed states, but will be restricted to the scope of review exercised by the state administrative agencies.

B) Standards for Determining Facts Underlying Disciplinary Action

In all states surveyed, the state administrative agency acts as an independent fact-finding tribunal, and its factual findings are treated with deference. In Connecticut, the Personnel Appeal Board's factual findings are affirmed if supported by substantial and reliable evidence, and in order to reverse the board based on an evidentiary ruling, it is necessary substantial prejudice be shown. Tomlin v. Personnel Appeal Board, 416 A2d 1205 (Ct.Supreme Ct.,1979). The Maine Supreme Court has held that the statute precluding Administrative Procedures Act review of State Employees Appeal Board decisions means that the Court cannot review Appeals Board factual decisions under a "substantial evidence" test. McElroy v. State Employees Appeal Board, 427 A2d 958 (1981). Facts found by the Massachusetts Civil Service Commission are final and conclusive, and cannot be set aside by the Court; the issue on review is simply whether the Commission's findings are supported by substantial evidence on the record as a whole. Cambridge Housing Authority v. Civil Service Commission, 389 NE2d 432 (Mass. Supreme Ct., 1979).

The findings of the New Hampshire Personnel Commission upon all questions of fact shall be deemed to be prima facie lawful and reasonable. NHRSA §541:13. The Commission's findings and conclusions are entitled to great weight and cannot be set aside lightly. As a fact-finding tribunal, the Commission is at liberty to resolve any conflict in the evidence and to accept or reject such portions of the testimony as it sees fit.

Peabody v. Personnel Commission, 245 A2d 77 (New Hampshire Supreme Ct., 1968). The Commission did not fail to follow state law in allocating the burden of proof so that the employer had the burden of establishing the factual allegations by a preponderance of the evidence, yet requiring the employee to bear the burden of persuasion. Desmaris v. State Personnel Commission, 378 A2d 1361 (New Hampshire Supreme Ct., 1977).

The findings of the Rhode Island Personnel Appeals Board will not be set aside if there is any legal evidence or reasonable inference therefrom to support the findings of the Board. Hamaker v. Gagnon, 297 A2d 351 (R.I. Supreme Ct., 1972). The New Jersey Civil Service Commission is empowered to redetermine guilt and can substitute its judgment as to guilt or innocence for that of the appointing authority. Henry v. Rahway State Prison, 410 A2d 686 (N.J. Supreme Court, 1980).

C) Standards in Reviewing Disciplinary Action

Connecticut - If a majority of the Employee's Review Board determines the action appealed from was arbitrary or taken without reasonable cause, the appeal shall be sustained. CGSA §5-201. The appointing authority may dismiss an employee when he considers the good of the service will be served thereby. The notice of dismissal shall set forth the reasons for dismissal in sufficient detail to indicate whether the employee was discharged for misconduct, incompetency or other reasons relating to the effective performance of his duties. CGSA §5-240.

The responsibility imposed on the Board to determine whether the disciplinary action is arbitrary or taken without reasonable cause requires an exercise of judgment and discretion. The Board will be upheld if it acts within the scope of delegated authority and honestly and fairly exercises its judgment in performing its function. Hannifan v. Sachs, 187 A2d 253 (Ct. Supreme Ct. of Errors, 1962).

Maine - An appointing authority may dismiss, suspend or otherwise discipline an employee for cause. 5 MRSA §678. The decision of the Personnel Board is final and binding, and shall supercede any prior action taken by the state agency with reference to the employment and working conditions of such employees. 5 MRSA §752.

The legislature endeavored to create a system under which grievances of state employees might be settled, expeditiously, inexpensively and finally. It saw fit to entrust the Appeals Board with the ultimate judgment on disputes and grievances. State Board of Education v. Coombs and State Employees Appeals Board, 308 A2d 582 (Me. Supreme Court, 1973).

Massachusetts - An employee shall not be discharged, removed or suspended except for just cause. MGL c31 §41. The Civil Service Commission shall affirm the action if if finds by a preponderance

of the evidence there was just cause for action taken; provided, however, if the employee, by a preponderance of the evidence, establishes said action was based on harmful error in application of appointing authority's procedure, an error of law, or upon any factor or conduct on part of employee not reasonably related to the fitness of employee to perform in his position, such action shall not be sustained. MGL c31 §43. The Commission's decision will be affirmed as long as its decision can be justified on the basis of the accepted findings. Commissioner of Revenue v. Lawrence, 396 NE2d 992 (Ma. Supreme Ct., 1979).

New Hampshire - The Personnel Commission may reinstate an employee or otherwise change or modify any order of the appointing authority, or make such other order as it may deem just. NHRSA §98:15. The determination of sanctions for employee misconduct must be tailored to the individual employee, and (the Supreme Court) is loath to substitute its judgment in this matter for the Commission's. Desmaris v. State Personnel Commission, 378 A2d 1361 (N.H. Supreme Ct., 1977).

Rhode Island - A classified employee with permanent status may be dismissed by an appointing authority whenever he considers the good of the service to be served thereby. RIGL 1956 §36-4-38. The language in the statute limiting dismissal of employees to situations where the appointing authority considers his action to be for the good of the service has the effect of limiting valid exercise of that power to dismiss for cause. The appointing authority must establish the dismissal is based on substantial grounds. Amiello v. Marcello, 162 A2d 270 (R.I. Supreme Ct., 1960). The Personnel Appeal Board substantially complied with the terms of the statute in a dismissal case where it found the challenged action was not arbitrary, discriminatory or unfair. Masyk v. Parshley, 180 A2d 314 (R.I. Supreme Ct., 1962).

New Jersey - The Commission may, when in its judgment the facts warrant it; modify, amend or substitute another penalty for the penalty imposed by the appointing authority. NJSA 11:15-6. The Commission may substitute its judgment as to the penalty imposed for that of the appointing authority. There is no support in the civil service law for a conclusion that the Commission should affirm the penalty imposed by an appointing authority absent an abuse of discretion. Henry v. Rahway State Prison, 410 A2d 686 (N.J. Supreme Ct., 1980), Town of West New York v. Bock, 186 A2d 97 (N.J. Supreme Ct., 1962).

D) Authority to Modify Penalties

Connecticut - The Employees' Review Board shall have the power to direct appropriate remedial action and shall do so after taking into consideration just and equitable relief to the employee and the best interests and effectiveness of state service. CGSA §5-202. The Board had the statutory authority to order an employee, who had suffered myocardial infarction prior to being terminated, reinstated subject to the condition

that the leave of absence without pay be continued until clearance was received from the state physician since CGSA §5-202 specifically authorized the board to direct appropriate remedial action. Johnson v. Personnel Appeal Board, 391 A2d 168 (Ct. Supreme Ct., 1978). Prior to the enactment of the above-cited §5-202, the Supreme Court of Errors held the Board could adjudge a removal invalid but that in the absence of specific authority, that was the limit of its power. It could not go further in modifying the action by directing a greater or less period of suspension. Turrill v. Erskine, 54 A2d 494 (1947).

Maine - The decision of the Employees Appeal Board is final and binding, and shall supercede any prior action taken by the state agency with reference to the employment and working conditions of such employees. 5 MRSA §752.

Massachusetts - If the Civil Service Commission does not find just cause for the action taken, it shall reverse such action and the employee shall be returned to his position without loss of compensation or other rights. The Commission may modify any penalty imposed by the appointing authority. MGL c31 §43.

In a case where the Commission reduced a dismissal to an 18-month suspension, the Appeals Court, Bristol County, recognized the Commission's power to modify penalties and the broad discretion granted to administrative agencies generally to impose and enforce penalties in matters within their delegated authority. However, while the Commission has considerable discretion in these matters, that discretion is not without bounds, and the case was remanded because the Commission did not specify particular facts on the record on which it based its decision to modify the penalty. Faria v. Third Bristol Division of the District Court Department of Trial Court, 439 NE2d 842 (1982).

New Hampshire - The Personnel Commission may reinstate an employee or otherwise change or modify any order of the appointing authority, or may make such other order as it may deem just. NHRSA §98:15. Determination of sanctions for employee misconduct must be tailored to the individual employee and (the Supreme Court) is loath to substitute its judgment in this matter for the Commission's. Kulas v. Personnel Commission, 387 A2d 639 (1978). The Personnel Commission's decision that employee's resignation was tantamount to a dismissal, and ordering the state to reinstate the employee and provide him with a rehabilitative program was not unlawful, unjust or unreasonable. Appeal of Department of Public Safety, Division of State Police, ___ A2d ___ (N.H. Supreme Court, May 6, 1983).

Rhode Island - Personnel Appeal Board decision may confirm or reduce demotion, suspension, layoff or dismissal of the employee or may reinstate the employee and the Board may order payment of part or all the salary of the employee for the period of time he or she was demoted, suspended, laid-off or dismissed. RIGL 1956 §36-4-42.

New Jersey - The Civil Service Commission may, when in its judgment the facts warrant it, modify or amend the penalty imposed by the appointing authority or substitute another penalty for that imposed, except that removal from the service shall not be substituted for a lesser penalty. NJSA 11:15-6. The Commission is empowered to redetermine the penalty and this is so even where the only issue may be the propriety of the penalty imposed below. The former rule of the overiding effect of punishment fixed by the appointing authority, absent a clear abuse of discretion, no longer exists. Henry v. Rahway State Prison, 410 A2d 686 (N.J. Supreme Court, 1980). Town of West New York v. Bock, 186 A2d 97 (N.J. Supreme Court, 1962).

[Prior to the enactment of the above-cited NJSA 11:15-6, where the statute was silent on the power of the Commission to modify the penalty, the New Jersey Supreme Court interpreted the statute to mean that when the appointing authority had committed an abuse of discretion, the Commission could modify the penalty although it upheld the finding of guilt. City of Newark v. Civil Service Commission, 177 A 868 (1935).]

The Commission, pursuant to NJSA 11:15-6, had the power to increase the penalty imposed against employees above that imposed by the appointing authority. Sabia v. City of Elizabeth, 331 A2d 620 (N.J. Supreme Ct., 1975).

E) Judicial Review

Connecticut - The statute does not permit appeal to the courts from a decision of the Employees' Review Board, and if the board acted fairly and honestly and in accordance with the power conferred on it by statute, its decision is final. Hannifan v. Sachs, 187 A2d 253 (Ct. Supreme Court of Errors, 1962).

Maine - The decision of the Employees Appeal Board is final and binding. 5 MRSA §752. The Maine Supreme Court construed the final and binding clause to mean if the board acts constitutionally and within its jurisdictional framework and if the grievance alleged falls within those grievances reviewable under the act, the decision reached by the appeals board is not subject to judicial review and is conclusive. State Board of Education v. Coombs and State Employees Appeals Board, 308 A2d 582 (1973). The final and binding clause of §752 satisfies the exception in the section of the Administrative Procedures Act (APA), which provides for review of agency action except where specifically precluded or limited by statute, and precludes APA review. McElroy v. State Employees Appeal Board, 427 A2d 958 (Me. Supreme Court, 1981).

Massachusetts - The Civil Service Commission decision may be appealed to the municipal court of the City of Boston or district court. The court may set aside and reverse the decision of the commission if it finds that such decision a) violates constitutional provisions; or b) exceeds

the statutory authority or jurisdiction of the commission; or c) is based upon an error of law; or d) was made pursuant to unlawful procedure; or e) is unsupported by substantial evidence; or f) is arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law. MGL c31 §44.

New Hampshire - The Personnel Commission's decision may be appealed to the Supreme Court. The burden of proof is on the party seeking to set aside the Commission's order to show it is clearly unreasonable or unlawful. The Commission's order shall not be set aside except for errors of law or the court is satisfied by a preponderance of the evidence the order is unjust or unreasonable. NHRSA §541:6, 541:13.

Rhode Island - The decision of the Personnel Appeal Board shall be final and binding on all parties concerned. RIGL 1956 §36-4-42. Any person aggrieved by a Board decision is entitled to judicial review by appealing to superior court. The court may affirm the Board decision or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are: 1) in violation of constitutional or statutory provisions; 2) in excess of the statutory authority of the agency; 3) made upon unlawful procedure; 4) affected by other error of law; 5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or 6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. RIGL §42-35-15. The "final and binding" mandate of §36-4-42 is just so much meaningless rhetoric and nothing more, since the Administrative Procedures Act provisions relating to judicial review apply to the Board. Rohrer v. Ford, 425 A2d 529 (R.I. Supreme Ct., 1981).

New Jersey - An appellate court will reverse the decision of an administrative agency only if it is arbitrary, capricious or unreasonable or is not supported by substantial credible evidence in the record as a whole. Henry v. Rahway State Prison, 410 A2d 686 (N.J. Supreme Court, 1980).

VERMONT LABOR RELATIONS BOARD

Grievance of:)
)
HAROLD COLLERAN)

Docket Number 82-40

ORDER FOR MONETARY AND OTHER RELIEF

This matter having come on for hearing on October 20, 1983, and the parties having presented evidence on the relief to which Grievant is entitled,

IT IS HEREBY ORDERED that:

1. The disciplinary letter to Grievant, signed by Director of Security and Operations BASHAW, and dated February 5, 1982, shall be forthwith removed from Grievant's personnel file and destroyed;

2. That in the place of the foregoing disciplinary letter, a written reprimand, consistent with the September 22, 1983 decision of the Board, shall be substituted;

3. That the five-day suspension and demotion imposed upon Grievant be rescinded, and that Grievant be reinstated to his Correctional Facility Shift Supervisor position, effective February 5, 1982;

4. That the State pay to Grievant the sum of $266.40, with interest at the rate of 12% per annum, which sum represents lost earnings during the said five-day suspension;

5. That the State pay to Grievant the sum of $2,232.05, with interest at the rate of 12% per annum, which sum represents the difference between what Grievant actually earned and what he would have earned as a Correctional Facility Shift Supervisor during the period from February 14, 1982 through September 10, 1983;

6. That the State pay to Grievant the sum of $166.32,with interest at the rate of 12% per annum, which sum represents the difference between what Grievant actually earned and what he would have earned as a Correctional Facility Shift Supervisor during the period from September 11, 1983 to October 22, 1983;

7. That Grievant's present hourly rate of pay be increased from $7.42 to $8.08, effective October 23, 1983;

8. That Grievant be forthwith credited with 6 personal leave days;

9. That 1 day of annual leave be forthwith credited to Grievant's bank of annual leave as and for restitution of 1 day of annual leave which Grievant used in order to attend a day of hearing in this matter.

Dated this 27th day of October, 1983, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney

KIMBERLY B. CHENEY, Chairman

James S. Gilson

JAMES S. GILSON, Member