VERMONT LABOR RELATIONS BOARD

Grievance of: Jay Earley	)	DOCKET NO. 82-50
Grievance of: David Ibey	)	DOCKET NO. 82-51

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On September 1, 1982, the Vermont State Employees' Association ("VSEA") filed grievances on behalf of Jay Earley (#82-50) and David Ibey (#82-51). The grievances alleged that the 10-day suspensions and demotions of Earley and Ibey violated Article 15 of the collective bargaining agreement between the State of Vermont and the Vermont State Employees' Association, effective for the period July 1, 1981 to June 30, 1982 ("Contract").

The grievances were consolidated for hearing, and a hearing was held before the full Board on February 3, 1983. Michael R. Zimmerman, VSEA Staff Attorney, represented Grievants. The State was represented by Attorney Michael Siebert. At the conclusion of the hearing, the State requested a continuance in order to present legal arguments and evidence on a polygraph examination give Gary DeMag. On February 17, 1983, the State withdrew its request to introduce evidence on the polygraph examination. By February 25, 1983, both parties had notified the Board the record was closed.

Requested Findings of Fact and Memoranda of Law were due March 24, 1983. VSEA submitted Requested Findings on March 15, 1983, and a Memorandum of Law on March 17, 1983. The State did not submit Requested Findings and a Memorandum of law until April 7, 1983, and it was not considered by the Board in its decision.

FINDINGS OF FACT

1. Grievant Earley, age 23, has been continuously employed by the State of Vermont, Department of Corrections, since August of 1979. Earley was hired as a Correctional Officer (Pay Scale 8), and completed his probationary period (thus becoming a permanent-status employee) on February 18, 1980. On October 11, 1981, as the result of a reorganization of the Department of Corrections, Earley's position (then Correctional Officer) was reallocated to Correctional Officer C (Pay Scale 11), and he received a pay increase of 42 cents per hour. Earley held the Correctional Officer C position until May 21, 1982, at which time he was demoted to a Correctional Officer B position (Pay Scale 9 [Grievant's Exhibit 1 (#82-50); Grievant's Exhibit 2 (#82-50), Grievant's Exhibit 5, pages 1 and 2 (#82-50), Grievant's Exhibit 7 (#82-50), Grievant's Exhibit 10 (#82-50)].

2. Grievant Ibey, age 24, has been continuously employed by the State of Vermont, Department of Corrections, since October of 1979. Ibey was hired as a Correctional Officer (Pay Scale 8), and completed his probationary period (thus becoming a permanent-status employee) on April 14, 1980. On October 11, 1981, as the result of a reorganization of the Department of Corrections, Ibey's position (then Correctional Officer) was reallocated to Correctional Officer C (Pay Scale 11), and he received a pay increase of 42 cents per hour. Ibey held the Correctional

Officer C position until May 21, 1982, at which time he was demoted to a Correctional Officer B position (Pay Scale 9)[Grievant's Exhibit 1 (#82-51), Grievant's Exhibit 2 (#82-51), Grievant's Exhibit 5, page 1 and 3 (#82-51), Grievant's Exhibit 9 (#82-51)].

3. During the entire periods of their respective employment, Grievants have worked at the St. Albans Correctional Facility, St. Albans, Vermont.

4. During the period of his employment, Earley has received three performance evaluations. In each, he has been given an overall rating of "consistently meets job requirements/standards" [Grievant's Exhibit 15 (#82-50)].

5. During the period of his employment, Ibey has received three performance evaluations. In two of them (i.e., one covering the period 10/9/79 to 4/9/80, and the other covering the period 10/11/81 to 4/11/82), he was given an overall rating of "consistently meets job requirements/ standards", and in the third (i.e., the one covering the period 4/9/80 to 4/9/81) he received an overall rating of "frequently exceeds job requirements/standards" [Grievant's Exhibit 15 (#82-51)].

6. The duties of Correctional Officer C involve, to some degree, the supervision of employees in subordinate positions (e.g., Correctional Officers A or B). During the period they were Correctional Officer C's (i.e., from October 1981 to May 1982), Grievants supervised other employees, some of them older than Grievants.

7. On April 20, 1982, Ibey and Earley were scheduled to work the 1st shift (7:00 a.m. to 3:00 p.m.). At about 6:30 a.m., Ibey's wife dropped him off in the facility parking lot near Post #3, a small shack outside the facility used by 3rd shift perimeter guards.

8. Gary Demag, age 34, was manning Post #3. DeMag was, at that time, a Correctional Officer A (Pay Scale 8). He had been previously employed for one year and four months at the facility in 1977-78, had left for other employment, and had returned to State employment at the facility in July 1981, first as a temporary employee, then, beginning on November 8, 1981, in a permanent position (but in a probationary status). After Grievants had been allocated to their Correctional Officer C positions, DeMag had been subject to their supervision on occasion.

9. Ibey walked to Post #3, and went into the shack where he and DeMag struck up a conversation. About seven to eight minutes later, Earley, who had just driven into the parking lot in his car, walked over to the Post #3 shack, and went inside.

10. Ibey then asked if anyone wanted to "smoke a joint". Earley responded, "yea, light it up". Ibey then took a marijuana cigarette out of his pocket, lit it, took a drag, and passed it to Earley. Earley took a drag, and offered it to DeMag. DeMag responded he was going home to bed and he could not sleep when "stoned", and refused the offer. Ibey and Earley continued to smoke the cigarette for five to eight minutes, and smoked about half the cigarette. Ibey then rolled up the rest of the cigarette in a dollar bill and placed it in his pocket. The only noticeable change in Ibey and Earley's behavior after smoking was that they became more talkative and "giggly". A few minutes later, at about 6:50 a.m., Ibey and Earley left the shack together and walked in the facility where they worked the 7:00 a.m. to 3:00 p.m. shift.

11. On April 22 or 23, 1982, DeMag told Keith Tallon, a shift supervisor, that Ibey and Earley smoked marijuana in front of him in

the Post #3 shack on April 20, 1982. The next day (i.e., either April 23 or 24, 1982), DeMag told Superintendent Richard Bashaw the same thing.

12. On April 26, 1982, both Grievants were "suspended with pay effective April 27, 1982...for a period of up to thirty (30) days" pending investigation of the charge they "were involved in smoking marijuana on Post #3 on Tuesday, April 20, 1982" [Grievant's Exhibit 8 (#82-50), Grievant's Exhibit 7 (#82-51)].

13. In May 1982, DeMag completed his six month probationary period, and was transferred from the St. Albans facility to the St. Johnsbury Correctional Center, and promoted from a Correctional Officer A (Pay Scale 8) to a Correctional Officer C (Pay Scale 11). There is no credible evidence that the transfer and promotion of DeMag constituted a "payoff" for his reporting Grievants smoked marijuana.

14. At all times they worked together, Grievants and DeMag had good working relationships. DeMag did not resent that Grievants supervised him even though they were younger.

15. On May 21, 1982, Grievants each received a letter, dated that day, from Superintendent Bashaw, imposing punishment. The letters informed Grievants they were suspended for two weeks without pay and were to be removed from Correctional Officer C positions and placed in Correctional Officer B positions. The letters gave the following bases for the actions:

> The reason for this action is that we believe, based on the information from Officer DeMag, that you were guilty of the very serious behavior of smoking marijuana on Post #3 on Tuesday, April 20, 1982. In addition, the violations of the St. Albans Personnel Rules and Regulations:

1. Violation of the St. Albans Personnel Rules and Regulations, Rule #6; to wit, 'No employee shall destroy, abuse, or misuse State property, nor shall he/she use State property for personal use unless he/she has written permission from the Superintendent or Assistant Superintendent.'

a. On Tuesday, April 20, 1982, you misused State property by smoking marijuana on State property.

2. Violation of the St. Albans Personnel Rules and Regulations, Rule #9; to wit, 'No employee shall report to work under the influence of alcohol or any unprescribed drug, to include the odor of alcohol on the breath'.

a. On Tuesday, April 20, 1982, you used marijuana on Post #3 and came into the facility for your scheduled shift, after your use of marijuana.

3. Violation of the St. Albans Personnel Rules and Regulations, Rule #23; to wit, 'No staff member shall engage in any employment, activity, or enterprise which has been or may be determined by the appointing authority to be inconsistent, incompatible, or in conflict with his duties, functions, or responsibilities to SACF.'

a. You engaged in an unacceptable activity in that you were smoking marijuana on Post #3.

...Due to the seriousness of the infractions, the normal utilization of progressive discipline was bypassed.

[Grievant's Exhibit 10 (#82-50); Grievant's Exhibit 9 (#82-51)]

16. At all times relevant herein, the St. Albans Correctional Facility Personnel Rules and Regulations contained Rules 6, 9 and 23, which were accurately quoted in the letters imposing punishment on Grievants (State's Exhibit 6).

17. Grievants received copies of the Facility Personnel Rules and Regulations soon after they began employment at the facility in 1979 and were aware they were responsible for complying with its provisions [State's Exhibit 5 (#82-50), State's Exhibit 5 (#82-51)]. Grievants were fully aware prior to April 20, 1982, they could be disciplined for smoking marijuana.

18. At all times relevant herein, the Contract provides, in pertinent part, as follows:

ARTICLE 15
DISCIPLINARY ACTION

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

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... Notice of suspension, with specific reasons for the action, shall be in writing...

OPINION

Burden of Proof

It is now established law in this State that the employer has the burden of proof in cases involving the dismissal of State employees. In re Grievance of Muzzy, 141 Vt. 463 (1982). Grievants assert this principle applies to all cases involving State employees who grieve disciplinary action of any kind. We agree.

In Muzzy, the Supreme Court stated that in grievance proceedings, the Board's rulings must comport with the essentials of due process, and one of the essentials of due process is "the right to have the burden of persuasion cast upon those who would terminate the right under consideratio Accord. Burroughs v. West Windsor Board of School Directors, 138 Vt. 575 (

Article 15 of the Contract provides the State may impose discipline "so long as it is imposing discipline for just cause". By this provision, employees are provided a right not to be disciplined unless it is for just cause; and, since punishment deprives employees of some right which is a normal incident of their employment, discipline is the termination or modification of rights held. Thus, the burden of proof in all disciplinary cases is on management, which must establish "just cause" for the discipline.

As a practical matter, it makes sense for the employer to bear the burden of proof, since it is the employer who is taking an affirmative act based on facts asserted to be true, namely that the employee did something prohibited. Sound policy requires the employer to prove an affirmative, rather than requiring the employee to prove a negative. Our position is buttressed by the universal accord among labor arbitrators that the burden of proof in all disciplinary cases is on the employer. Koppers Co., 73 LA 760 (Merle Hart, arb., 1979). Hawaiian Telephone Co., 59 LA 930 (Thomas Gilson, arb., 1972). Schlitz Brewing Co., 51 LA 731 (1968).

Just Cause for Suspensions and Demotions

We are mindful the Superintendent who imposed discipline (here Bashaw) has the burden of proving by a preponderance of the evidence that Grievants should be disciplined. He has done so. We have considered the credibility of witnesses, their demeanors, and the weight to be given their testimony, In re Grievance of Young, 134 Vt. 569 (1976), and find DeMag's testimony more credible. Apart from the judgments made as a result of personally observing and listening to the witnesses, we find no credible motive for DeMag to fabricate a story against Grievants.

There was no showing of animosity between DeMag and Grievants and no credible evidence to demonstrate he lied in order to further his chances of promotion.

Grievants contend that even if they did smoke marijuana as alleged, they did not violate the facility rules and regulations cited in the letters imposing discipline.

In reviewing the rules, we believe Grievants violated the cited Rule #9, which provides: "No employee shall report to work under the influence of...any unprescribed drug..." Grievants reported to work April 20, 1982, immediately after smoking marijuana and accordingly it is permissable inference that they were under the "influence" of it to some degree. This we think is sufficient to constitute a violation of the rule.

Grievants also are charged with violations of Rule #6, in misusing State property, and Rule #23, in engaging in unacceptable activity, through smoking marijuana. It is apparent these rules were not intended to apply to smoking marijuana, and we find no violations by Grievants.

That Grievants did not violate two of the facility's rules cited in the disciplinary letters does not, by itself, mean the discipline imposed is unsupportable.

In past cases, we have said we will not look beyond the reasons given by the employer for the disciplinary action taken, Grievance of Swainbank, 3 VLRB 34 (1980), but that we will not turn disciplinary letters into dialectic exercises, Grievance of Erlanson, 5 VLRB 28 (1982). A review of the disciplinary letters here indicates there were

two bases for the discipline: 1) the smoking of marijuana on Post #3 of the facility; and 2) reporting to work immediately afterwards under the influence of marijuana.

Both bases are supported by the evidence, and the citing of Rules #6 and #23 add nothing new to the charges against Grievants but were an unnecessary supplementary basis for the action. It is apparent Bashaw felt compelled to point to a specific facility rule that was violated in the smoking of marijuana on State property. No such rule existed, and Bashaw engaged in an overly broad construction of facility Rule #6 and #23 to support the disciplinary action. Possession and smoking of marijuana constitutes a criminal offense under Vermont Statutes, 18 VSA §4205, 4224(a), and we believe it makes little sense to require the State to torture contractual or regulatory language to penalize the commission of a crime.

Management has the inherent right to punish the commission of a criminal offense when there is a nexus between the activity and employment. In re Grievance of Carlson, 140 Vt. 555 (1982). Grievance of Barre, 5 VLRB 10 (1982). Douglas, et al., (US Merit Systems Protection Board), 5 MSPB 313 (1981). Doe v. Hampton, 566 F2d 265 (D.C. Cir., 1977). Young v. Hampton, 568 F2d 1253 (7th Cir., 1977). IRS and National Treasury Employees' Union, Chapter No. 27 (Government Employee Relations Report, Sept. 7, 1981, No. 928, p. 34). Here, there was a nexus because the offense took place on State property, Grievants were about to report to work, and Grievants influenced DeMag's relationship with his superiors by placing him in a compromising position where he had to either condone a criminal offense or report it.

In determining whether Grievants' actions constituted just cause for suspension and demotion, we recognize the misconduct required to be demonstrated in order for a suspension and demotion to be upheld is less serious than that required to uphold a dismissal. Grievance of Patterson, 5 VLRB 376 (1982). Grievance of Erlandson, 5 VLRB 28 (1982).

We believe the smoking of marijuana on facility property immediately prior to reporting for duty is a serious offense. No only is that conduct a criminal offense, but also, in a correctional facility, it could place in jeopardy the safety of co-workers who may require quick and alert assistance. Also, Grievants were on fair notice of the prohibition of smoking marijuana since they were fully aware prior to the incident in question they could be disciplined for smoking marijuana.

We conclude management operated well within its discretion in suspending and demoting Grievants, and reasonably employed the progressive discipline provisions of the Contract.

ORDER

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

The Grievances of Jay Earley in #82-50 and David Ibey in #82-51 are DISMISSED.

Dated this 20th day of April, 1983, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.

James S. Gilson