VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 82-69
GARY WARREN	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On November 24, 1982, the Vermont State Employees Association ("VSEA") filed a grievance on behalf of Gary Warren ("Grievant"). The grievance alleged the October 27, 1982, dismissal of Grievant, a correctional officer at the Woodstock Community Correctional Center ("WCCC"), constituted a violation of Article 15 of the collective bargaining agreement between VSEA and the State of Vermont ("State"), effective July 1, 1982 - June 30, 1984 ("Contract") in that there was no just cause for dismissal and/or progressive discipline requirements of the Contract were not followed.

On May 4, 1983, Grievant filed a motion requesting the Board issue an order prohibiting the State from introducing into evidence a November 9, 1982, letter from WCCC Superintendent Carl Roof to Grievant, and any testimony or documents concerning wrongdoing alleged in that letter which did not address the alleged wrongdoing cited in the dismissal letter of October 27, 1982. On May 19, 1983, the Board denied Grievant's motion because the November 9, 1982, letter did not raise any new charges against Grievant not contained in the October 27, 1982, letter of dismissal.

Hearings were held before the full Board on June 16 and 30, 1983. VSEA Staff Attorney Susan Dole represented Grievant. The State was represented by Special Assistant Attorney General Michael Seibert. Requested Findings of Fact and Memoranda of Law were filed by VSEA on July 14, 1983. The State filed Requested Findings of Fact and Conclusions of Law on July 14, 1983, and a Memorandum of Law on July 18, 1983.

FINDINGS OF FACT

1. Grievant, at all times relevant, was a permanent status employee of the State Department of Corrections. As such permanent status employee, Grievant was entitled to all rights afforded to such employees by statute, by regulation and by the Contract.

2. From December 23, 1980, to October 27, 1982, Grievant was continuously employed by the Department of Corrections at WCCC. From December 23, 1980, to January 5, 1981, Grievant was employed as a temporary employee in the position of Correctional Officer. On January 6, 1981, Grievant became a permanent employee in the position of Correctional Officer, Pay Scale 8. He completed probation in July 1981. In September, 1981, Grievant became a Correctional Officer B, Pay Scale 9, and held that position until his dismissal on October 27, 1982.

3. Grievant attended a training program in Waterbury while he was a temporary employee. The training included instructions in the Department's use of force policy. Grievant's only other training for his work as a correctional officer was observing other officers for his first two weeks of work.

4. On January 7, 1982, Grievant received a written reprimand from his supervisor, Scott Shafer, for thrice refusing Shafer's orders to work in the "upstairs block" on January 2, 1982, and only obeying Shafer's orders after Shafer told him he would be sent home if he refused to work in the "upstairs block". Shafer warned Grievant that if incidents of this nature continued, further disciplinary action up to and including dismissal would be taken (Joint Exhibit 1).

5. Grievant did not file a grievance over his January 7, 1982, letter of reprimand.

6. On July 20, 1982, Grievant received a written reprimand from Shift Supervisor Gary Osha for his July 19, 1982, actions of taking an inaccurate headcount of inmates and booking in an inmate while neglecting to insure that a mandatory intake form was signed by the arresting officer. Osha warned Grievant that if he had any more problems in these areas they would "have to be dealt with in a more severe manner". Osha informed Grievant he could appeal the reprimand "to Step 1 under VSEA guidelines" (Joint Exhibit 2).

7. Grievant did not grieve the July 20, 1982, letter of reprimand.

8. On September 9, 1982, Assistant Superintendent McLiverty suspended Grievant for five days. The letter informing Grievant of the suspension provided:

> The reason for this action is a result of your actions on September 1, in which you were insubordinate and argumentative to your supervisor, displayed total disrepect to one of your fellow officers, and acted in a totally unprofessional manner in dealing with a rather minor incident in the Block...

The first situation involved your interaction with (an inmate). You took property of his out of the Tier without notifying him; you claimed to not even have known whose property it was. You did not clearly explain to him why you were taking his property once he clearly established himself as the owner of said property. For some one of your rank, I am amazed at your disregard for what was a very common sense procedure for dealing with this type of thing...

The second situation you were involved with is clearly connected to the first. After you had managed to get (the inmate) wound up to the point of almost having to segregate him, by your mishandling of this situation, you called for your supervisor, Malcolm Jensen. Mr. Jensen agreed to talk to (the inmate) in C-Block to calm him down and you were to remain out of the Tier until he was done.

You violated this order after only five minutes by doing a cell-by-cell inspection of all of C Tier. I can only interpret this action as a clear attempt to further aggravate the situation, as well as a deliberate disobeying of Mr. Jensen's orders to you.

When Mr. Jensen did come out of C Tier, he told you that (the inmate) would be on Tier restriction for one hour and level restriction for the rest of the night. You did not think this was harsh enough and told Jensen to replace you as you were going home. You quickly amended this to demanding to talk to the Superintendent, myself, or the Chief of Security, which Mr. Jensen granted.

I feel that this was totally unnecessary on both Mr. Jensen's and your own parts. Wheb (sic) given an order you will follow it without question and when Mr. Jensen gives an order, he better realize that his is the final word.

The third situation arose when you finally returned upstairs to again deal with (the inmate). Officer Preston, the upstairs officer, fearing another blowout with (the inmate) requested that someone at the Front Desk get you out of C Tier. Mr. Niles (your supervisor as well) instructed Mr. Call to tell you to stay downstairs. You voiced some obscenities to Mr. Call, gave him the finger, and instructed him that he did not tell you what to do and that, if someone wanted to give you orders, they should do it themselves (Joint Exhibit 3).

9. In the same letter, McLiverty further informed Grievant:

When you return to work you will be on a 60-day probation period. If you fail to attain a satisfactory rating, your continued employment here will be reviewed, and termination a possibility (Joint Exhibit 3).

10. When McLiverty placed Grievant in a "probation" period, McLiverty did not recognize the distinction between a "probation" period and a "warning" period.

11. The Contract defines "probationary period" as:

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

The Rules and Regulations for Personnel Administration, Section 2.043, define "warning period" as:

> a specified period immediately following the receipt of a marginal or unsatisfactory performance rating by a non-probationary employee, during which he is expected to achieve an adequate level of performance.

12. McLiverty did not give Grievant a performance rating prior to placing him in the "probation" period.

13. Article 15, Section 6 of the Contract reads, in pertinent part, as follows:

> A VSEA representative, so requested by an employee, has the right to accompany the employee to any meeting between the employee and management where discipline is being imposed or to any such meeting the purpose of which is to determine whether discipline shall be imposed... Notices of suspension and temporary relief from duty with pay shall contain a reference to the right of the employee to request representation by VSEA or private counsel in any interrogation connected with the investigation or hearing resulting therefrom.

14. The September 7, 1982, suspension letter to Grievant did not contain reference to his right to request representation by VSEA or private counsel in any interrogation connected with the investigation or hearing resulting therefrom.

15. McLiverty held a meeting with Grievant on September 7, 1982, to present the September 7, 1982, letter of suspension and placement in a "probation" period. Two days prior to that meeting, McLiverty had telephoned Grievant that a meeting would be held and that Grievant should request David Lamb to attend. Lamb is a correctional officer who serves as a VSEA steward. Lamb was present at the September 7 meeting.

16. During the September 7, 1982, meeting with Grievant and Lamb, McLiverty explained that Grievant's performance would be closely monitored during the "probation" period, that his performance would have to improve significantly during that time, and that, at the end of 60 days, Grievant could be dismissed if he had not satisfactorily performed.

17. Neither Grievant nor Lamb raised any question during the meeting or indicated any confusion with respect to the use of "probation", as opposed to "warning", to describe the 60-day period during which Grievant was expected to improve his performance.

18. Grievant understood the "probation" period was equivalent to the probationary period he had served during the first six months of service in a permanent classified position. Grievant knew that McLiverty expected him to improve his performance and that he could be dismissed if his performance did not improve.

19. Grievant did not file a grievance over his September 7, 1982, suspension and placement in a "probation" period.

20. The 60-day probationary period cited in McLiverty's letter was to run from September 11, 1982, through November 9, 1982 (Grievant's Exhibit A).

21. In early October, 1982, McLiverty spoke with Michael Chater, a Personnel Administrator assigned to the Department, concerning Grievant's status to make sure he was adhering to proper procedures. Chater informed McLiverty it would have been more appropriate to conduct a performance evaluation of Grievant before placing him in a warning period.

22. On October 12, 1982, McLiverty met with Grievant, and told him he had made a mistake by placing Grievant in a "probation" period without first conducting a performance evaluation. McLiverty told Grievant he would do a performance evalution of him and would place him in a "new" warning period; that his 60-day probation period would start over and the 30 days that had already elapsed would be ignored.

23. From October 14, 1982, to October 17, 1982, Grievant was traveling on personal business outside the State of Vermont with William Whalen, a Woodstock police officer. He arrived in Woodstock between 5:00 - 6:00 p.m., the night of October 17, 1982.

24. In the early hours of October 18, 1982, Grievant had an argument with his wife. Grievant left the house that evening, going first to Whalen's home and then to the park where he intended to spend the night. At 3:00 a.m., he went to WCCC to get a blanket and some coffee because he was cold.

25. Grievant was admitted into the front entrance of WCCC by Shift Supervisor Thomas Crowley. Grievant told Crowley his wife had kicked him out of the house and that he wanted a cup of coffee and wished to borrow a blanket. Crowley approved Grievant's request.

26. When Grievant entered WCCC that morning, and for all the time he was inside the facility, he wore a bulky army fatigue jacket, with several pockets in it.

27. To the left of the front entrance of WCCC is a counter which is the duty station for the correctional officer operating the front entrance. On the right is a desk upon which there is a locked box into which any weapons are placed before anyone leaves the front desk area. Directly in front of the front door as one enters the WCCC is the "trap door". The "trap door" is an electronic steel security door which is opened by means of triggering an electronic device which is located behind the counter, and which leads into the medium security area of WCCC (Joint Exhibit 7).

28. As the intake officer, Crowley had the responsibility for security checks for persons coming into the facility (Joint Exhibit 11, p. 3). Crowley asked Grievant to hand over his keys. Crowley did not ask Grievant to hand over his weapons. Grievant gave his keys to Crowley at the counter. Crowley then opened the "trap door", and Grievant entered the medium security area of WCCC through the "trap door".

29. The "trap door" leads into a small hallway and to the left of the "trap door", only a short distance away, is the WCCC kitchen, which is also a medium security area. Immediately in front of the "trap door" across the hallway of approximately 10 feet, is a steel barred key-operated security door which leads to the sallyport (Joint Exhibit 7).

30. The sallyport at WCCC is an entranceway to the areas where the residents are housed. Directly in front of the sallyport gate, about five or six feet from that gate, is the "302 door", which is another steel barred security door, which leads into the medium security blocks which house residents in WCCC. At the entranceway to the medium security blocks is a "Day Room" (Joint Exhibit 7).

31. To the left of the sallyport door are several steps which lead upward to another steel barred security gate, which leads to the maximum security area at WCCC.

32. The sallyport area itself is quite small, and is roughly only five to six feet long and the same distance wide. It is quite easy to see through the sallyport into the medium security blocks while standing in the hallway just inside the "trap door".

33. After Grievant went through the "trap door", he saw Correctional Officer Thomas Adams on duty sitting at a table in the "Day Room" in the medium security block area. Grievant called to Adams from the hallway and began a conversation with him. During the conversation, Grievant was standing at the sallyport door in the hallway area, and Adams was standing in the "Day Room" at the "302" door.

34. At the time of the conversation between Grievant and Adams, there was a resident standing in the sallyport area.

35. While he was talking to Adams, Grievant put his hands in his jacket pockets and felt an object. He then pulled the object out of his pocket and pointed it in the direction of Adams. The object was a can of mace which Grievant had bought for his wife's protection from Norm's Gun Shop in White River Junction months before and had left in the jacket.

36. Mace is a chemical spray designed to temporarily disable persons.

37. Adams asked Grievant, "What's that?" Grievant said it was a can of mace. Adams then opened the "302" door and came into the sallyport area. Grievant did not discharge the mace nor threaten Adams or the

inmate with the mace. Shortly after removing the mace from his pocket, Grievant returned it to his pocket.

38. Grievant then went into the kitchen and got a cup of coffee. He then borrowed a blanket and left WCCC. He spoke to Crowley on the way out the door.

39. In total, Grievant was in WCCC five to 10 minutes.

40. Shortly after Grievant left WCCC, Adams reported the mace incident to Crowley.

41. Crowley spoke with Grievant concerning the mace incident the following day and told him not to let it happen again (State's Exhibit 7).

42. On October 19, 1982, McLiverty met with Grievant. At the time of the meeting, McLiverty was unaware of the mace incident. At the meeting, McLiverty gave Grievant the performance evaluation he had promised him at the October 12, 1982, meeting he had with Grievant and a letter dated October 12, 1982 (State's Exhibit 3, 4).

43. The performance evaluation was a "warning" rating dated October 18, 1982, signed by McLiverty and covered the period July 4, 1982 - October 16, 1982. Grievant was given "2" ratings ("inconsistently meets job requirements/standards") in eight of 10 individual factors, an overall "2" rating, and the following comments:

> Gary has a good eye for security. With a relatively inexperienced crew, Gary's almost two years experience is an asset...
>
> Gary has poor relations with residents, staff and supervisors. He argues when given orders and feels compelled to overuse his authority when dealing with residents. Lateness is a problem.

> As intake officer, Gary is not thorough when filling out forms for transfers. Needs to be constantly supervised. Does not produce his share of work. This, along with attitude, has created bad morale problems on his shift.

McLiverty recommended Grievant be placed in a 45-day warning period (State's Exhibit 4).

44. The October 12, 1982, letter, from McLiverty to Grievant pointed out dissatisfaction with the following actions of Grievant during the period October 6 - 8, 1982: failure to notice a security screen had been removed although he had performed security checks of the area, failure to respond immediately when he was informed the screen was missing, failure to follow proper transfer procedures which allowed an inmate to go without medication, and reporting one and one-half hours late for work and not notifying his supervisors he was going to be late until after the shift started. The letter informed Grievant he was being placed in a "special 60-day probation" (State's Exhibit 3).

45. McLiverty could not explain the discrepancy between the "special probationary" period of 60 days in the letter dated October 12, 1982, and the "warning period" of 45 days in the warning evaluation dated October 18, 1982.

46. On October 21, 1982, the supervisors at WCCC were holding their weekly supervisory meeting. Among those in attendance were Superintendent Carl Roof, McLiverty and Crowley. Crowley brought up the mace incident of October 18, 1982. Superintendent Roof told Crowley to prepare an incident report, and to have Adams prepare one.

47. At some time before October 27, 1982, Crowley and Adams wrote reports of the October 18, 1982, mace incident (State's Exhibit 6, 7). The reports were submitted to Superintendent Roof.

48. On October 27, 1982, Superintendent Roof dismissed Grievant. The letter of dismissal provided:

> This letter is to inform you that your employment at Woodstock CCC is terminated as of this date due to your act of carrying a can of mace past the front desk area and into the medium security area on October 17, 1982, during your off-duty hours.
>
> At approximately 0320 hours on October 17, 1982, you entered the medium area between the trap door and the sallyport and called officer Thomas L. Adams away from his duty station and into the sallyport. At this time you reached into your coat pocket and pulled out a can of mace which you aimed at Officer Adams. An inmate, also in the sallyport at the time, was aware of the mace also. This action constituted gross misconduct and conduct which placed in jeopardy the life or health of a coworker and an inmate (Joint Exhibit 5).

49. Before Roof dismissed Grievant, he reviewed the reports of the mace incident submitted by Crowley and Adams (State's Exhibit 6, 7).

50. The October 27, 1982, dismissal letter provides the wrong date for the mace incident. The incident occurred on October 18 at approximately 3:20 a.m., not "(a)t approximately 0320 hours on October 17, 1982" as stated in the dismissal letter. When Grievant received the dismissal letter, he knew the letter referred to the October 18 mace incident.

51. Although it was not mentioned in the dismissal letter, Roof was also aware of and relied upon Grievant's performance problems, past reprimands and suspension which, in Roof's opinion, when considered with the mace incident, provided just cause for Grievant's dismissal.

52. When Roof dismissed Grievant, he was aware Crowley had orally reprimanded Grievant for the mace incident.

53. On November 9, 1982, Roof issued an addendum to the dismissal letter, which provided:

> By this letter I wish to enumerate the various departmental and facility regulations which you violated...
>
> Your action of carrying an unauthorized can of mace into the facility violated the following departmental and facility rules:
>
> 1. Department Policy 328 (Tools and Equipment): "Control or access to such equipment (mace or chemical agents) will be delegated to the superintendent, and that staff authorized to deal with such equipment will be delegated by the superintendent".
>
> 2. Department Policy 1041 (Use of Force): "The use of mace... may be employed only with the approval of the superintendent."
>
> 3. Woodstock CCC work rule #18: "The use of mace can only be authorized by the supervisor on duty".
>
> 4. Woodstock CCC post orders for Intake which require the securing of all weapons in the box for that purpose in the control room.
>
> 5. Woodstock CCC work rule #10: "Officers shall behave in a professional manner towards other staff and residents".
>
> 6. Any dangerous weapon, such as mace, not authorized by the supervisor is contraband within the facility, and your action constituted carrying contraband into the facility.
>
> It should be noted here that this action is further demonstration of your continued poor judgment and failure to follow work rules as outlined in several letters of reprimand issued to you since January 7, 1982, including a six-day suspension from work beginning on September 6, 1982, for instigating a fight with other staff, and culminating recently with your placement in a probationary warning status on October 18, 1982 (Joint Exhibit 6).

54. Roof misquoted Department Policy 328 in his November 9, 1982, letter. The rule provides: Control <u>of</u> access to such equipment...", not "Control <u>or</u> access..." (emphasis added)(Joint Exhibit 10, page 3).

55. Department policy 1041 and WCCC Work Rule #18 are accurately quoted by Roof in his November 9, 1982, letter (Joint Exhibit 12, Pages 4, 5, Joint Exhibit 8, Page 3).

56. In his November 9, 1982, letter Roof cited WCCC Post Orders for Intake as Grievant's fourth alleged violation. These post orders address the intake officer's responsibilities (Joint Exhibit 11, Page 3).

57. Roof miquoted WCCC work rule #10 in his November 9, 1982, letter. The rule actually provides: "All employees will be expected to behave in a professional and courteous manner towards visitors, residents, fellow employees, and any other person/persons entering the grounds of this facility" (Joint Exhibit 8, Page 2).

58. Department Policy 328 was promulgated under the Administrative Procedure Act, and filed with the Secretary of State (Grievant's Exhibit D). WCCC Post Orders and Work Rules were neither filed with the Secretary of State nor promulgated under the Administrative Procedure Act (Grievant's Exhibit C).

59. Before October 18, 1982, Grievant read Department Policies #328 and #1041 and WCCC Work Rules and Post Orders (Joint Exhibits 8, 10, 11 and 12).

60. When police officers come into WCCC, they place their guns in the weapon box. They are also expected to turn in their keys, and if they carry mace, to turn that in also. While some officers, on occasion, have walked into the WCCC kitchen, which is a medium security area, with their keys or mace, that is not a practice supported by Superintendent Roof.

61. No correctional officer at WCCC has been dismissed or otherwise disciplined for carrying a can of mace other than Grievant. No evidence indicates other correctional officers have had mace in their possession on WCCC property without the authorization of their supervisors.

62. Grievant served as an intake officer at times and he was aware weapons and keys of persons entering WCCC had to be checked in at the front counter and that weapons were to be placed in the weapons box.

63. At all times relevant, Article 15 of the Contract provided, in pertinent part:

> 1. The parties jointly recognize the deterrent value of disciplinary action. Accordingly, the State will:
>
> a) act promptly to impose discipline within a reasonable time of the offense;
> b) apply discipline with a view toward uniformity and consistency; and
> c) impose a procedure of progressive discipline, in increasing order of severity:
> 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.
>
> 2. The appointing authority... may dismiss an employee for just cause with two weeks' notice or two weeks' pay in lieu of notice... In the dismissal notice, the appointing authority shall state the reason(s) for dismissal...
>
> 3. Notwithstanding the provisions of Paragraph 2 above, an employee may be dismissed immediately without prior notice or pay in lieu of notice for any of the following reasons:
> a. gross neglect of duty;
> b. gross misconduct;
> c. refusal to obey lawful and reasonable orders given by supervisors;
> d. conviction of a felony;
> e. conduct which places in jeopardy the life or health of a coworker or of a person under the employee's care.

OPINION

At issue is whether there was just cause for Grievant's dismissal.

Just cause means some substantial shortcoming detrimental to the employer's interests. The ultimate criterion of just cause is whether the employer acted reasonably in discharging the employee because of misconduct. A discharge may be upheld only if it meets two criteria of reasonableness: one, that it is reasonable to discharge employees because of certain conduct, and the other, that the employee had fair notice, express or fairly implied, that such conduct would be grounds for discharge. In re Grievance of Goddard, 142 Vt. 437 (February 7, 1983), In re Grievance of Brooks, 135 Vt. 563, 568 (1977).

Grievant makes a three-fold argument in claiming that just cause does not exist for his dismissal: 1) his conduct did not constitute a substantial shortcoming detrimental to the State's interests; 2) he was not put on notice that his conduct would be grounds for discharge, and 3) the progressive discipline requirements of the contract were not met.

Grievant maintains it was not reasonable to discharge him for inadvertently bringing a can of mace into WCCC in the early morning hours of October 18, 1982, while he was off-duty.

Superintendent Roof, in the letter dismissing Grievant, termed Grievant's actions concerning the mace incident "gross misconduct and conduct which placed in jeopardy the life or health of a coworker and an inmate".

In reviewing Grievant's actions on October 18, 1982, we do not believe they indicate gross misconduct or that he jeopardized anyone's

health or life. The mace incident does not demonstrate gross misconduct on Grievant's part. Gross misconduct means an offense so severe that standing by itself it justifies dismissal. We do not believe it is reasonable to conclude the mace incident was such an offense. However, Grievant did demonstrate negligence and poor judgment.

Negligence was indicated by his action of walking into the medium security area of WCCC without first checking his clothing to ensure he was not carrying weapons. He had worked as an intake officer and knew that all weapons had to be placed in a weapons box at the front desk. Certainly, he should have realized mace was a weapon. He then demonstrated poor judgment by taking the mace out of his coat pocket and displaying it to the correctional officer on duty in the presence of an inmate. While he did not jeopardize the health of anyone by this action, since no evidence indicates he threatened the correctional officer or inmate with discharging the mace or that the inmate actually could have taken the mace from Grievant, this action was irresponsible. Grievant had breached security and then flaunted the breach.

Accordingly, Superintendent Roof had just cause for imposing some disciplinary action on Grievant because of the mace incident. We now consider whether there was just cause to dismiss Grievant.

In Grievance of Colleran and Britt, 6 VLRB 235 (1983), at 268-269, we enunciated a number of factors that are relevant for consideration in determining the legitimacy of a particular disciplinary action.

The first factor is the nature and seriousness of the offense. If Grievant's actions concerning the mace incident were the only misconduct

he engaged in, we would not find that action serious enough to support his dismissal as a reasonable action. However, the mace incident was the culmination of numerous actions of Grievant which Superintendent Roof took into consideration in deciding to dismiss Grievant.

Grievant was given two written reprimands, was suspended for five days and was placed in a "probationary" period before he was dismissed. Grievant's actions resulting in these sanctions demonstrate refusal to accept the orders of supervisors, failure to properly perform important security measures (i.e., inaccurate headcount, neglecting mandatory intake procedures, failure to notice a security screen had been removed although he had performed security checks of the area, failure to respond immediately when he was informed the security screen was missing), failure to cooperate with fellow officers and tardiness.

Instances of repeated conduct insufficient of themselves may accumulate so as to provide just cause for dismissal, In re Brooks, supra, at 568. These actions of Grievant, taken together with the mace incident, were serious and because Grievant's misconduct was frequently repeated, demonstrated a substantial shortcoming detrimental to the State's interests. Grievant's actions of October 18, 1982, were simply "the straw that broke the camel's back". cf. Grievance of Paul Cook, 3 VLRB 105 (1980). (Molehills do not always become mountains.)

An application of the other relevant factors listed in Colleran and Britt, supra, add credence to Grievant's dismissal being a lawful exercise of management discretion. Grievant's past disciplinary record and work

performance, taken together with the mace incident, demonstrated he was unreliable to serve at a satisfactory level in a security role in a correctional facility. He demonstrated undependability in performing important security matters and inability to work cooperatively with supervisors and fellow officers. We have no reason to assume the penalty imposed was inconsistent with that imposed upon other employees for similar offenses. Grievant's repeated offenses, although he was warned such offenses would not be tolerated, indicate little potential existed to rehabilitate him and make him a satisfactory employee. Further, no mitigating circumstances exist which would diminish Grievant's culpability.

Nonetheless, Grievant claims he did not have fair notice such conduct would be grounds for discharge.

Grievant's first claim in this regard is that Assistant Superintendent McLiverty suspended him for five days without a contractually-required written reference to his right for representation. While it is true McLiverty did violate the Contract in this regard, no demonstrated harm to Grievant resulted. McLiverty called Grievant and told him of his right to have a VSEA representative present at a meeting where the suspension was going to be discussed, and a VSEA steward attended the the meeting. If Grievant believed the breach of his contractual rights prejudiced him in any way, he was required to file a grievance over the breach in order to obtain relief here. In re Grievance of Bushey, 142 Vt. 290 (1982). Morton v. Essex Town School District, 140 Vt. 345 (1981). He filed no such grievance.

Grievant's next claim of lack of fair notice is being placed in two overlapping 60-day "probation" periods; one commencing approximately six weeks before his dismissal and the other beginning approximately one week before his dismissal. Grievant claims that like the grievant in In re Grievance of Yashko, 138 Vt. 364 (1980), he found himself in a "status of complete uncertainty" as of September 11, 1982, having been placed on a "second" probation despite successfully passing probation in June, 1981.

In Yashko, the employee considered, albeit wrongly, that he had been placed in a probationary period thinking that at its termination he could be discharged without cause. The Court concluded that the relegation of Yashko to this "status of complete uncertainty" justified the reversal of his dismissal because the effect of Yashko believing he could be terminated without cause was "not just conjectural; it was in fact corroborated by expert psychological testimony". In re Grievance of Yashko, supra, at 366.

That is not the case here. No evidence before us indicates Grievant was in a status of "complete uncertainty". Grievant knew what was expected of him. When Grievant was placed in the probation period on September 11, 1982, by Assistant Superintendent McLiverty, McLiverty informed him he could be dismissed if his performance did not improve to a satisfactory level by the end of the probation period. When McLiverty realized in early October, 1982, he had improperly failed to provide Grievant with a performance evaluation before placing him in a warning period, he told Grievant the first "probation" period was being replaced

by a "new" 60-day period, and provided Grievant with a performance evaluation which detailed the areas of his performance needing improvement. We cannot assume Grievant was unclear about what was expected of him.

In any event, unlike Yashko, Grievant was not dismissed as a result of poor performance at the conclusion of a mis-named probationary period. Instead, he was dismissed in a "last-straw" manner as a result of his misconduct in the October 18 mace incident.

It is clear Assistant Superintendent McLiverty is guilty of procedural deficiencies in the handling of Grievant's five-day suspension and placement in a "probation" period. However, we cannot find the procedural shortcomings had any significant effect on Superintendent Roof's decision to dismiss Grievant. Absent proof of actual injury to Grievant resulting from these actions, we conclude he had fair notice his conduct could be grounds for dismissal. Without proof of actual injury to Grievant arising out of the breach of Contract, we have no authority to impose a fine on the employer or order him reinstated with back pay. Nzomo v. Vermont State Colleges, 138 Vt. 73 (1980). Carey v. Piphus, 435 US 247 (1978). As in the case of Rutz v. Essex Junction Prudential Committee, 142 Vt. 400 (1983), there was no total disregard for the substance, as well as the form, of the regulations to the point that the plaintiff might well have been prejudiced by the non-compliance.

Grievant's third claim of lack of fair notice is that the violation of regulations cited by Superintendent Roof in his November 9, 1982, addendum to the dismissal letter are not only inapplicable but based on rules not filed under the provisions of the Adminstrative Procedure Act (APA).

We doubt whether the APA applies to work rules since the term "rule" in the APA refers to statements which will affect the general public, 3 VSA §801, and particularly where there is the statutory mechanism of collective bargaining to establish work rules. 3 VSA §901-1007 (State Employees' Labor Relations Act). In any event, there is no showing that the failure to publish the rules under the APA had any effect on Grievant because he was personally aware of the rules cited by Roof prior to October 18, 1982.

There is no need to go into detail on the applicability of each of the rules cited by Roof in his November 9, 1982, letter. It is sufficient to point out that while the rules cited do not specifically state mace cannot be carried into WCCC by an off-duty employee, three of the rules (i.e., Department Policy 328, Department Policy 1041, WCCC Work Rule #18) make it clear that mace can only be used or handled with the approval of the supervisor on duty or the superintendent. These rules should have been sufficient notice to Grievant that he should not have carried his own personal can of mace into a medium security area of WCCC.

Even assuming the non-existence of the rules, Grievant was on fair notice he should not have carried the mace into the facility on October 18 and then displayed it. As previously stated, his experience as an intake officer made him aware weapons should be placed in the weapons box upon entering WCCC and should not be brought into a medium security area, and mace certainly qualifies as a weapon.

Grievant also was on notice on October 18, 1982, that management was not pleased with his overall conduct, in light of two reprimands, a suspension and placement in a "probation" period. This put him on

notice that any future misconduct could be grounds for dismissal. In fact, in the two letters of reprimand he received and the letter of suspension, Grievant was warned that further misconduct on his part could be grounds for more severe action. Two of the letters specifically mentioned dismissal as a possibility.

The remaining factor to be examined is "the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others". Colleran and Britt, supra, at 269.

Grievant contends he was subjected to a "shoot from the hip" form of discipline rather than being progressively disciplined as required in Article 15 of the Contract.

We disagree, and believe the evidence indicates the WCCC administration followed the dictates of the Contract by imposing the progressively-severe sanctions on Grievant of two written reprimands, a suspension without pay and then dismissal. While management did not impose demotion on Grievant before dismissing him, it was reasonable for them to bypass this step on the progressive discipline ladder. It was within management's legitimate discretion to conclude Grievant could no longer be expected to function responsibly in a security position given his repeated derelictions culminating in the mace incident.

We conclude there was just cause for Grievant's dismissal. However, we believe Superintendent Roof erred in not providing Grievant "with two weeks pay in lieu of notice". Article 15, Section 2, Contract. As we found infra, Grievant demonstrated substantial shortcomings detrimental to the State's interests which justified dismissal, but he was not guilty,

as charged, of gross misconduct and conduct which placed in jeopardy the life or health of a co-worker or of a person under the employee's care. If he had been found so guilty, two weeks pay would not have to be provided him under the Contract. Article 15, Section 3. Those charges not being supported, Grievant is entitled to two weeks pay.

ORDER

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

1. The Grievance of Gary Warren is ALLOWED to the extent that the State of Vermont, Department of Corrections, shall provide Grievant with two weeks pay, at his pay rate at the time he was dismissed October 27, 1982. The parties shall, within 10 days of the date of this Order, attempt to determine the monies owed Grievant and submit a stipulation to the Board indicating monies owed him. Such stipulation will be incorporated into a final order of the Board. Failing agreement on the amount of monies owed Grievant, a hearing will be scheduled before the Board.

2. The Grievance is DENIED in all other respects.

Dated this 19th day of September 1983, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Chaney, Chairman

William G. Kemsley, Sr.

James S. Gilson

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 82-69
GARY WARREN	)	

ORDER

Based on the findings of fact and for the reasons given in the September 29, 1983, Findings of Fact, Opinion and Order, and based on a December 7, 1983, stipulation of the parties as to the monies owed Gary Warren pursuant to the Board's order, it is hereby ORDERED:

1. The Grievance of Gary Warren is ALLOWED to the extent that the State of Vermont, Department of Corrections, shall pay Grievant $448.80, which sum represents two weeks pay at Grievant's pay rate at the time he was dismissed.

2. The Grievance is DENIED in all other respects.

Dated this 14th day of December, 1983, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.

James S. Gilson