VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 84-18
RONALD BENOIR	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On April 24, 1984, the Vermont State Employees' Association ("VSEA") filed a grievance with the Vermont Labor Relations Board on behalf of Ronald Benoir ("Grievant"). The grievance alleged the dismissal of Grievant from employment as Psychiatric Technician A at the Vermont State Hospital violated Article 15 of the collective bargaining agreement between the State of Vermont and VSEA effective July 1, 1982 to June 30, 1984 ("Contract").

Hearings were held before the Board on August 9, 1984, and September 6, 1984. Assistant Attorney General Scott Cameron represented the State. VSEA Staff Attorney Michael R. Zimmerman represented Grievant. The full Board was present at the August 9, 1984 hearing with the exception that Chairman Kimberly B. Cheney missed a portion of the testimony of Claudia Stone. Chairman Cheney has reviewed that portion of the record he missed. Chairman Cheney and Board Member William G. Kemsley, Sr., were present at the September 6 hearing; Member James S. Gilson was absent. Member Gilson has not participated in this decision.

Grievant filed Proposed Findings of Fact, Conclusions of Law and a Memorandum of Law on September 19, 1984. The State filed Proposed Findings of Fact and Conclusions of Law on September 20, 1984. VSEA and the State filed Reply Briefs on September 27, 1984.

FINDINGS OF FACT

1. Grievant was continuously employed by the State of Vermont, Department of Mental Health, Vermont State Hospital ("VSH") from December 27, 1977, until April 3, 1984, the date of his dismissal.

2. By letter dated April 3, 1984, from Claudia Stone, VSH Unit Administrator, Grievant was advised of his immediate dismissal. The letter provided in pertinent part as follows:

> You are being dismissed for the March 10, 1984 incident on Dale I which involved tipping a male patient out of a wheelchair and handling him in a rough manner when you placed him back in the chair, and also an earlier incident on Dale I of smearing food in a female patient's face, which came to light during our investigation of the March 10, 1984, incident.
>
> We consider these incidents as gross misconduct and conduct which placed in jeopardy the health and welfare of clients under your care. Your actions are in direct violation of the Vermont State Hospital conditions of employment (Section A, paragraph 4, Section B(4) and Section C which you signed December 27, 1977.
>
> Both of these incidents alone or together are sufficient cause for bypassing progressive discipline and warrant immediate dismissal. Because you are being dismissed for gross misconduct you will not receive two weeks notice or pay in lieu of notice.
>
> (State's Exhibit 1)

3. During hearings on this matter, the State withdrew its allegations concerning the smearing of food in a female patient's face.

4. When he was hired in December, 1977, Grievant received and signed a document entitled, "Conditions of Employment" which provided in pertinent part as follows:

A. As a prerequisite to employment, and prior to undertaking work in this hospital, I agree to abide by the terms of the following employment conditions in all respects, in order that the high standards of service may be maintained...

I will do my best to further the recovery of patients and insure their comfort and safety.

I will avoid any improper conduct with patients and hold myself to the highest personal standards of conduct with them...

B.

...

4. I understand that I may be subject to discipline up to and including discharge for improper conduct with patients, violence, drinking on the job, or coming to work intoxicated, or for refusing to obey an order of my supervisor...

C. I have read these conditions of employment prior to reporting for duty. I understand them and accept the conditions. I understand that failure to observe these conditions may mean disciplinary action up to and including immediate discharge.

(State's Exhibit 14)

5. Also, on October 12, 1978, Grievant received and signed the VSH Personnel Handbook. The Handbook provided in pertinent part as follows:

... Employee Relations with Patients

...(A)ny threatening or physical abuse of patients... is... considered a serious offense and may... be grounds for personnel action up to and including dismissal.

(State's Exhibit 4)

6. At all times relevant herein, Grievant knew the VSH policies against verbal and physical abuse of patients, and that such conduct could subject him to discipine, up to and including dismissal.

7. During his employment at VSH, Grievant's annual performance evaluations all rated his overall performance as "3" ("consistently meets job requirements/standards") (Grievant's Exhibit 6).

8. On August 30, 1981, Grievant's position was reallocated to Psychiatric Technician A (Pay Scale 7), which position he held until his dismissal. As a Psychiatric Technician A, Grievant performed nursing care work at a para-professional level involving care and treatment of patients on a VSH ward (Grievant's Exhibit 1).

9. In late 1983, Grievant was assigned to Dale I, the medical ward at VSH.

10. The charge made in the dismissal letter that Grievant tipped a male patient out of a wheelchair and handled him in a rough manner when he placed him back in the wheelchair stemmed from an incident occurring on the Dale I day hall on March 10, 1984, at approximately 2:00 p.m. The incident involved Grievant and a patient named Cedric Lahue. The investigation of Grievant's actions resulted from a complaint made by Lahue at approximately 6:00 p.m. on March 10, 1984 to Dr. Richard Katzman, a physician employed at VSH, that Grievant had deliberately tipped him out of his wheelchair and struck him earlier that day in the day hall. Another patient, Mildred Scott, told Katzman at that time that she had observed the incident and that Lahue had reported it correctly. Linda Lessor, a third patient, told Katzman she had not seen Grievant tip or hit Lahue but had observed Grievant take Lahue, then on the floor, by the front of the shirt and say to him, "you're crazy anyway". Katzman reported what the three patients had told him to Dr. George Brooks, VSH Superintendent, in a memorandum dated March 10, 1984 (Grievant's Exhibit 7, Page 1). Claudia Stone, Dale I Unit Administrator, investigated the allegations. She interviewed and/or obtained written statements from employees and patients who were in the day hall area at

the time of the incident (Grievant's Exhibits 9, 10, 11; State's Exhibits 5, 6, 7). As a result of her investigation, Stone concluded that Grievant had tipped Lahue out of his wheelchair on March 10 and had handled him in a rough manner when he placed him back in the wheelchair. Stone recommended to Leslie White, VSH Administrator, and Patricia Walton, Deputy Commissioner of Mental Health, that Grievant be dismissed. White and Walton approved of Grievant's dismissal. Following are our findings of fact regarding the March 10, 1984, incident, based on a preponderance of the credible evidence.

11. On March 10, 1984, Grievant was 43 years of age, stood 5 feet 11 inches tall, and weighed about 260 pounds.

12. Lahue is a man in his early 60's, stands about 6 feet tall and weighs about 185 pounds. Lahue has been hospitalized at VSH off and on for several years. He has been diagnosed as schizophrenic, and subclassified as being paranoid. Schizophrenia is a group of mental disorders characterized by disturbances of thinking, mood and behavior. Schizophrenics have an altered concept of reality and, in some cases, suffer delusions and hallucinations. A person who is suffering from paranoia is one whose beliefs, at times, have no basis in fact.

13. Lahue is an extremely moody person; at times jovial and friendly while at other times agitated to the point where he becomes loud and threatening to others to the extent he will strike other people. Over the years, Lahue has at times expressed the wish that various VSH staff members be discharged from employment. He is in the habit of making a variety of threats and demands of VSH employees. Lahue has also threatened employees with physical violence. He is prone to grandiose ideas and apparently believes he possesses magical powers. At times he is delusional.

14. On March 10, 1984, Lahue was a patient on Dale I, the medical ward, for post-operative recuperation from recent surgery on his left foot. After he was assigned to Dale I, Lahue, who was normally mobile and not confined to a wheelchair, was given a wheelchair and was advised by his doctor to "go slow" with respect to putting weight on his left foot.

15. The day hall on Dale I is a room which contains tables and chairs and a television. This room is used as a lounge by employees and patients.

16. On March 10, 1984, Grievant was working the day shift. The hours of the day shift are from 6:30 a.m. to 3:00 p.m. At about 1:45 p.m., Grievant and Lucy Perry, a Ward Aide, went to the day hall on Dale I for a break. Other than Grievant and Perry, the only people present at that time were two elderly, chair-ridden women. Grievant and Perry sat at a table. Perry, looking at a newspaper, and Grievant, smoking a cigarette, conversed intermittently.

17. At about 2:00 p.m., Lahue and Mildred Scott, another patient, came into the day hall for a cigarette break. Lahue was in a wheelchair. The wheelchair's foot rests were up so that Lahue's feet could touch the floor. Lahue and Scott sat smoking at a table about 10 feet away from Grievant's table.

18. At the table, Lahue seemed very upset and agitated about something. He was talking very loudly and using foul language.

19. Grievant, concerned that Lahue may become increasingly agitated and physically injure someone, called to Lahue in a raised voice and asked him to use different language as there were ladies present. Lahue paid no attention to Grievant as if he did not hear him.

20. Grievant then walked over to where Lahue was seated, and stood behind and to the left of Lahue. Grievant bent down so as to speak into Lahue's ear, and at the same time lightly placed his right hand on Lahue's left shoulder. Grievant then said to Lahue, "We don't have to listen to that kind of language. Clean up your language a little bit", or words to that effect.

21. Lahue suddenly turned so as to look at Grievant, and said, "I'm not afraid of you", or words to that effect, and, at the same time, raised up on his right foot, and brought his right arm back as though to strike Grievant.

22. Fearing that Lahue was going to strike him, Grievant reached out with his left hand and grabbed Lahue's right arm to stop the blow. As he did so, Lahue and the wheelchair started to tip over to Lahue's right. Grievant did not deliberately push the chair over.

23. As Lahue's wheelchair started over, Grievant grabbed it so as to break the fall. Lahue and the wheelchair went over together although Lahue did not fall out of the wheelchair. Because Grievant's action broke the fall somewhat, the wheelchair hit the floor with a fairly loud noise but did not strike the floor with a crash.

24. After the wheelchair had reached the floor, Grievant held the wheelchair as Lahue (who still had his cigarette) got out and got to his feet under his own power. Grievant set the wheelchair back up and Lahue sat down in it. Lahue was quiet after he sat down. Grievant did not touch Lahue while he was on the floor, did not, at any time, grab Lahue's shirt, and did not, at any time, tell Lahue he was "crazy anyway".

25. Grievant asked Lahue if he was all right, but Lahue did not answer. Lahue did not complain of any injury. Grievant then returned to his table and watched Lahue for about five minutes in order to make certain that he was all right.

26. At the time of the above incident, Sharon Degree, the "charge" for the day shift on Dale I and Grievant's immediate supervisor; Barbara Duprey, Psychiatric Technician A; and Linda Lessor, a patient; were in the vicinity of the nurses' station which was about 27 feet from the entrance to the day hall. From that area they heard the wheelchair hitting the floor. Soon after, the three of them walked to the day hall. By the time Duprey, Lessor and Degree reached the door to the day hall, Lahue was seated in his wheelchair, and Grievant was seated at his table. It was silent in the day hall. Lahue's face was beet red, and, looking at Degree, he placed his finger to his lips as if to say, "be quiet". Degree then returned to her desk, and waited to see if anyone would report what had occurred.

27. After Grievant satisfied himself that Lahue was all right, he left the day hall and went to the nurses' station in order to write a summary of the incident on Lahue's chart (which is standard practice). Grievant was not upset or angry. Degree asked Grievant what had happened, and he told her. Grievant then wrote a summary of the incident on Lahue's "F sheet"(a plain sheet of paper in a patient's chart which is used to document events of importance), as follows:

> Cedric came into the dining room on Dale I swearing up a blue streak, "cocksucker this, and fuck that". I asked him to clean up his language a little as we had women present. It didn't seem as though he heard me, so I went over to him,

bent down and asked him again. He immediately pulled his arm back as though to strike me tipping his chair over when he did, as I grabbed his arm just in case he was going to hit. Cedric got up, wasn't hurt, did sit quiet for awhile and stop swearing... Cedric did state, "I ain't affraid (sic) of you", just before he drew back his arm. This action caused me to believe he was going to strike.

(Grievant's Exhibit 8)

28. Based on a preponderance of the evidence, we find the State did not prove that Grievant tipped Lahue's wheelchair over, did not prove Grievant handled Lahue in a rough manner, and did not prove Grievant verbally abused Lahue.

29. 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:

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 or his authorized representative may dismiss an employee for just cause with two weeks' notice or two weeks' pay in lieu of notice...

3. Notwithstanding the provisions of Paragraph 2 above, an employee may be dismissed immediately without prior notice or pay in lieu of notice for any of the following reasons:

a. gross neglect of duty;
b. 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 co-worker or of a person under the employee's care...

OPINION

At issue is whether there is just cause for the dismissal of Grievant. Grievant was discharged for allegedly tipping a male patient out of a wheelchair and handling him in a rough manner when he placed him back in the chair and for smearing food in a female patient's face. 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 Grievance of Muzzy, 141 Vt. 463 (1982).

As indicated in our Findings of Fact, the State has not met its burden of proof. We have determined after hearing sharply divergent testimony, that neither charge against Grievant has been proven by a preponderance of the credible evidence. The State presented no evidence on the food-smearing charge. With regard to the wheelchair incident, we have concluded that the State has not established by the required legal standard that an injury to a patient was a result of a deliberate action by an employee rather than an accident. c.f. Grievance of Bishop, 5 VLRB 347 (1982). Further, the State did not demonstrate Grievant handled the patient in a rough manner.

We now turn to determining what remedy to apply in this matter. Grievant contends that the Contract between VSEA and the State which went into effect just prior to the hearing, the Contract effective

July 1, 1984 to June 30, 1986, is applicable to this matter in a limited sense. Grievant concedes the 1982-84 contract alone should be applied in determining the correctness of the State's decision to dismiss Grievant. However, since this matter was heard before the Board after the 1984-86 contract went into effect, Grievant maintains that the Board's exercise of its authority should be governed by the 1984-86 contract. Specifically, Grievant maintains Section 10 of Article 13 of the 1984-86 contract applies. That section provides:

> In any case involving a suspension or dismissal, should the Vermont Labor Relations Board find just cause for discipline, but determine that the penalty was inappropriate or excessive, the Vermont Labor Relations Board shall have the authority to impose a lesser form of discipline.

We need not reach the issue of whether a contract executed after a grievance over a dismissal is filed but prior to the grievance hearing before the Board applies to the Board's authority in deciding the case. The above Section 10 would be relevant only in a case where we determined management did not have just cause to dismiss an employee but had just cause to impose a lesser form of discipline. Here, just cause does not exist for any discipline against Grievant.

Accordingly, he should be reinstated with back pay and other emoluments from the date of the improper discharge less sums of money earned or that without excuse should have been earned from that date. In re Grievance of Brooks, 135 Vt. 563, 570 (1977).

ORDER

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

> The Grievance of Ronald Benoir is GRANTED and he shall be reinstated to the position of Psychiatric Technician A (Pay Scale 7), Vermont State Hospital, Waterbury, Vermont and a hearing before the Vermont Labor Relations Board is scheduled for October 25, 1984, at 9:30 a.m., at the Board hearing room, 13 Baldwin Street, Montpelier, Vermont, for the purpose of determining the back pay and other benefits due Grievant from the date of his improper discharge until his reinstatement.

Dated this 10th day of October, 1984, at Montpelier, Vermont

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.

VERMONT LABOR RELATIONS BOARD

Grievance of:)	Docket Number 84-18
)	
RONALD BENOIR)	ORDER FOR REINSTATEMENT AND OTHER RELIEF

The Board having determined that no just cause existed for disciplinary action against Grievant, and the parties having submitted a stipulation concerning restored benefits for the Board's consideration,

ITS IS HEREBY ORDERED THAT:

1. Grievant shall, forthwith, be reinstated to his position as Psychiatric Technician A (pay scale 7), Vermont State Hospital;

2. That the dismissal letter, accompanying personnel action, and all other documents relating to said dismissal be removed from Grievant's personnel file(s) and destroyed;

3. The State pay to Grievant an amount representing back pay, said sum being calculated in accordance with the terms of the stipulation of the parties (the terms of which are incorporated herein by reference), with interest at the rate of Twelve Percent (12%) per annum;

4. The State restore to Grievant all benefits (e.g. sick leave, annual leave, insurance), in accordance with the parties' stipulation, as though he had not been dismissed; and

5. The Board shall retain jurisdiction until the expiration of a period of Thirty (30) days following payment by the State to Grievant of back pay for the purpose of resolving any disputes or

disagreements between the parties as to amounts owed to Grievan
Any disputes or disagreements not brought to the Board's attent
during said period shall be deemed to have been waived by the
parties.

Dated this 4th day of November, 1984, at Montpelier, Verm

VERMONT LABOR RELATIONS BOARD

KIMBERLY B. CHENEY, Chairman

WILLIAM G. KEMSLEY, Sr., Member

JAMES S. GILSON, Member