VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 84-17
RICHARD SHERMAN	)	

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 Richard Sherman ("Grievant"). The grievance alleged the dismissal of Grievant from employment as a Psychiatric Technician B 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 July 12 and 19, 1984. VSEA Staff Attorney Michael R. Zimmerman represented Grievant. Assistant Attorney General Michael Seibert represented the State. Board Members William G. Kemsley, Sr., and James S. Gilson were present at the July 12 hearing. Chairman Kimberly B. Cheney was absent and Member Gilson served as Acting Chairman. The full Board was present at the July 19 hearing, at which the Board ruled that Chairman Cheney would participate in the decision in the event of disagreement between the other Board members, in which case he would review that portion of the record he missed. Members Gilson and Kemsley have agreed on all the facts with the exception of Finding #29 infra, with which Member Kemsley dissents, but disagree as to what decision to reach based on those facts. Thus, Chairman Cheney has reviewed the record and has participated in the decision.

Requested Findings of Fact and Memoranda of Law were filed by the State and VSEA on August 9, 1984. VSEA and the State filed Reply Briefs on August 17, 1984.

Subsequently, the Board reopened the record to take evidence on the bargaining history and applicability of that portion of the 1984-86 Contract relating to the Board's authority in reviewing disciplinary cases. A hearing on those issues was held in the absence of Board Member Kemsley on November 15, 1984. VSEA and the State filed briefs on those issues on November 28 and 29, 1984, respectively.

FINDINGS OF FACT

1. On July 10, 1973, Grievant began employment with the Vermont Department of Mental Health, Vermont State Hospital, as a Psychiatric Aide A (Pay Scale 3). On May 19, 1979, at which point Grievant was a Psychiatric Technician Day Charge (Pay Scale 6), Grievant resigned his position (for personal reasons) and left State service. On December 26, 1979, Grievant returned to employment as a Psychiatric Technician (Pay Scale 5). On July 6, 1980, Grievant's position was reallocated to the class of Psychiatric Technician A (Pay Scale 7). On June 21, 1981, Grievant was promoted to Psychiatric Technician B (Pay Scale 9), a position he held until the dismissal which is being contested herein (Grievant's Exhibit 2).

2. Once Grievant passed his original probationary period in early 1974, all performance evaluation reports he subsequently received until his dismissal gave him at least an overall rating of "adequate" or "consistently meets job requirements/standards". In addition, he was given an overall rating of "fully satisfactory" on the performance evaluation covering the period March 10, 1974 to September 10, 1974, and received an overall rating of "frequently exceeds job requirements/standards" on the performance evaluation covering the period May 23, 1977 to November 23, 1977 (Grievant's Exhibit 3).

3. When he was originally hired in 1973, and when he was rehired in 1979, Grievance received and signed a document entitled "Conditions of Employment". The "Conditions of Employment", which were substantially the same in 1973 and in 1979, provided in pertinent part as follows:

> 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 employment 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...
>
> I will either report in writing directly to the Superintendent, or through my superiors or other appropriate channels of communication any case of cruel abuse or improper conduct toward patients which I observe or hear about. Examples of such treatment may include but are not limited to: 1) rough handling, 2) violent manner, 3) teasing, 4) profanity. Failure to report these instances may be grounds for discipline.
>
> B... I understand that I may be subject to discipline up to and including discharge for improper conduct with patients...
>
> 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 8).

4. Also, on September 29, 1978, Grievant received the Vermont State Hospital Personnel Handbook. The Handbook provided in pertinent part as follows:

> ...(A)ny threatening or physical abuse of patients or employees is... considered a serious offense and may... be grounds for personnel action up to and including dismissal.
> (State's Exhibit 7)

5. Grievant was aware that striking of patients was not permitted by the management of Vermont State Hospital, and expected discipline to follow from striking patients.

6. As a Psychiatric Technician B (or "Charge", as the position is referred to at the Vermont State Hospital), Grievant performed supervisory and para-professional-level nursing care work involving mentally disturbed patients at the Hospital. Grievant was essentially in charge of a shift of employees, generally Aides and Trainees, working on his ward (Grievant's Exhibit 1).

7. At all times relevant herein, Grievant worked as a "Charge" on Weeks I. That ward is an admittance (or "locked") ward. Patients there

are often agitated and seclusions (i.e., where patients are placed in a locked, bare room by themselves) are frequent.

8. The chain of command, beginning with Grievant and working up, was, at all times relevant herein, as follows:

a) As a "charge" on Weeks I, Grievant's immediate superior was the Registered Nurse Direct Care Supervisor for that ward. On March 27, 1984, the regular supervisor was off, and Patricia Mitchell was serving in that capacity.

b) The Registered Nurse Direct Care Supervisor for Weeks I reported directly to Robert Lagor, Unit Administrator. Lagor was responsible for the day-to-day operation of the entire Weeks Unit (i.e., staffing, proper performance, budget, etc.), and had authority to hire employees, discipline them, and to participate in rating their performance. Prior to this matter, he had never participated in the dismissal of an employee. Lagor had the authority to recommend the discharge of employees but could not actually discharge employees without the approval of his superiors.

c) As Unit Administrator, Lagor was answerable to Leslie White, Hospital Administrator. On March 28, 1984, Dr. George Brooks, Superintendent in contemplation of his impending retirement, delegated many of his duties to White in order to accomplish a smooth transition.

d) For the entire period that Lagor served as Unit Administrator, the Superintendent of the Vermont State Hospital was Dr. Brooks, to whom White was answerable.

9. During the entire period of his employment, Grievant had never been demoted, suspended without pay, or given a letter of reprimand. In November of 1983, Grievant came to work with a "hang over" from drinking and Lagor gave him a "verbal warning" for that conduct.

10. About one month prior to March 27, 1984, Grievant and Lagor had a conversation concerning layoffs of staff members at the Vermont State Hospital. Lagor expressed satisfaction that the layoffs which had occurred over the previous year were at an end, and told Grievant that there would be no further staff reductions through layoffs. Lagor also told Grievant that the hospital administration was looking to eliminate an additional five to ten positions through "terminations". Lagor did not explain what he meant by "terminations" and Grievant did not ask him for an explanation.

11. When patients are disruptive, it is the responsibility of staff members to intervene in order to prevent harm to the patient or to others.

12. Employees of the Vermont State Hospital are required to undergo training in "N.A.P.I." (which stands for "Non-abusive Physical Intervention"). The philosophy of N.A.P.I. is that the least amount of force necessary to restrain patients should be used. The training consists of two 5-hour sessions taught by staff members who have been trained by experts in N.A.P.I.

13. On Tuesday, March 27, 1984, Grievant worked as the "Charge" for the second shift (i.e., from 2:30 p.m. to 11:00 p.m.) on Weeks 1. Staff members working under his supervision that day were Rachel Cubit (as assistant "charge"), Peter Letourneau, Psychiatric Technician Trainee, Leroy "Joe" Pearson, Psychiatric Technician Trainee, Denise Peet, Psychiatric Technician Trainee, and Bonnie Robtoy.

14. Camille was a patient on Weeks 1 that day. She is 27 years old, stands about 5'5", and weighs about 270 lbs. On March 27, 1984, Camille had been a patient on Weeks 1 for over a year. She is self-abusive and has put her fists through windows, swallowed flashlight batteries, slashed her arms with broken glass, torn out stitches, and forced pencils through her arms. As a result of her self-abuse, Camille is covered with scars. Camille, because of her tendency to misbehave, is frequently "secluded". During such seclusions, Camille typically struggles with the staff members who are placing her in seclusion, at times biting employees, spitting on them, kicking them and striking them.

15. The day hall on Weeks I is a large room which is the lounge area for the ward. It contains a television, couches, a table and chairs.

16. Shortly after 5:00 p.m. on March 27, Camille began kicking a trash can in the day hall. Letourneau asked her to stop kicking the can and sit down. Camille stopped kicking the can but refused to sit down. Grievant intervened and attempted to calm Camille down, but in the process of his attempt Camille struck Letourneau in the face. Letourneau told Camille that she had just "bought herself two hours in seclusion".

17. There is a room roughly 30 or 40 ft. down the hall from the day hall which is used as the seclusion room. On March 27, however, another patient had just been placed in that room. Thus, a standby seclusion room, which was then being used as a bedroom for another patient, had to be cleared of furniture before Camille could be placed in seclusion there.

18. While Letourneau and Grievant restrained Camille in the hallway, Cubit, Peet and Pearson went into the room and began clearing out furniture.

19. When the standby seclusion room had been cleared of all furniture except a vinyl mattress, Pearson, Grievant and Letourneau attempted to escort Camille up the hallway. However, Camille was not cooperative, and began to kick, bite and spit at her three escorts. Grievant, Letourneau and Pearson tried to carry Camille up the hallway, but because they could not, dragged her up the hallway.

20. The standby seclusion room in which Camille was placed measured about 9 ft. by 12 ft. There was a window on the outside wall, and, under the window and running along the entire length of the wall, a covered radiator. The radiator cover measured about 2 1/2 feet tall and was 10 inches deep. There was one door, 3 1/2 feet wide, into the hallway. The door, which opened into the room, had a glassless 4 inch by 6 inch window in it. The bare vinyl mattress measured 75 inches by 37 inches, was centered (more or less) between the side walls of the room, and the top edge was about one or two feet from the radiator cover.

21. Pearson, Letourneau and Grievant dragged Camille into the seclusion room. They placed her partly on her back and partly on her left side on the mattress with her head toward the outside wall and centered on the mattress approximately 2 1/2 feet from the radiator. Camille's head did not strike the radiator when she was placed on the mattress. Grievant placed himself over Camille's upper body with his hands and arms restraining her arms and shoulders. Letourneau stood next to Camille's left side near her head. Camille grabbed one of his

legs in an attempt to bite his leg. Pearson knelt toward the end of the mattress closest to the door and hallway and attempted to keep Camille's feet under control.

22. When Camille was placed in the seclusion room, Cubit and Peet stood in the hallway, about 15 feet away, looking into the room.

23. It is standard practice at Vermont State Hospital when a patient is being secluded to remove all items with which he or she could injure him or her self. It is also standard practice that when such removal (and related search) involves a female patient, a female staff member must be present. In this case, the female staff members (i.e., Cubit and Peet) observed from their vantage points in the hallway as Pearson removed Camille's shoes and socks.

24. Shortly after he had removed Camille's shoes and socks, Pearson had to leave the room for a matter of seconds and direct a patient named Ricky away from the room and towards the day hall. When Pearson returned to the seclusion room, he stood inside the room but by the door.

25. Shortly after Pearson took up his position at the door, Camille turned her head to face Grievant, and spat in his face. Grievant reacted by very quickly striking Camille on the right side of her head, just above the ear, with his right hand. Grievant then warned Camille in a loud voice in words to the effect of, "do it again, and I'll hit you again". Once again, Camille spat and Grievant struck her in the same manner. Again, Grievant warned Camille he would hit her if she spat again. Again, Camille spat and Grievant struck her in the same manner.

26. After Grievant struck Camille for the third time, Letourneau said to Grievant, "That's enough, Richard. Let's go", or words to that effect. Letourneau then pulled Grievant off Camille, turned him around, and escorted him out of the seclusion room.

27. Peet had left her viewing area outside the seclusion room shortly before Grievant struck Camille and stood at a desk in the hallway approximately 11 feet from the seclusion room door. From that desk, she did not see Grievant strike Camille but heard what sounded like a slap.

28. Pearson remained just outside the door to Camille's seclusion room as the other employees returned to their stations. Camille came to the door and said to Pearson words to the effect, "I guess you're going to cover this incident up, too". Camille then began to bang her head on the seclusion room door. Camille did not bang the sides of her head on the door but only her forehead. Pearson attempted to calm Camille down. He stayed at Camille's door until Nursing Supervisor Pat Mitchell arrived to make a routine examination of the patient after seclusion.

29. Mitchell arrived for an examination of Camille not long after the seclusion had been accomplished. It was routine practice for her to be notified whenever a patient was placed in seclusion. As Nursing Supervisor, it was Mitchell's responsibility in every instance of patient seclusion to make an assessment whether the seclusion was "worthwhile" and should be continued. She had the authority to order that a patient be removed from seclusion. When Mitchell examined Camille, Camille was rubbing the right side of her head above her ear and saying, "he hit me, he hit me". Mitchell did find Camille's head was injured in a spot above her right ear. Mitchell treated the injury, which was a "soft tissue injury" with an application of ice and a check of Camille's vital signs. Although Camille had been banging her forehead on the seclusion room door, Mitchell did not examine her forehead for any sign of injury.

Mitchell only examined the area of the head Camille was complaining about at the time. Camille was seen by a doctor on the following day and the doctor prescribed no further treatment for the head injury treated by Mitchell.

30. None of the employees involved in the seclusion of Camille prepared patient abuse reports although hospital rules require employees to report to superiors any case of abuse or improper conduct toward patients which they observe.

31. On Thursday, March 29, 1984, two days after Camille's seclusion, Lagor found a note on his desk from Helen Strachen, a morning nurse. The note said that Camille was claiming she had been struck three times by Grievant. Lagor spoke to Roy Raymond, treatment manager, and asked him to speak to Camille. Raymond later submitted to Lagor a written summary of his conversation with Camille wherein she alleged Grievant had hit "her side of the head three times" after she had been placed in seclusion on March 27, 1984. Lagor did not speak personally to Camille about her allegations (State's Exhibit 5).

32. Based upon Strachen's note and Raymond's written summary of his conversation with Camille, Lagor briefed Leslie White, Hospital Administrator, on March 29, 1984. Lagor recommended an investigation into the allegations. White agreed with the recommendation.

33. Lagor informed Grievant by letter of March 29, 1984, that he was immediately being temporarily relieved from duty with pay pending a full investigation of charges that he had slapped the face of a female patient (State's Exhibit 2).

34. Within the next few days, Lagor requested and received written statements concerning the March 27, 1984, seclusion of Camille from

Peet, Letourneau, Mitchell, Pearson and Grievant. Lagor did not seek to obtain a written statement from Cubit.

35. Peet's statement, which was submitted on March 29, 1984, subsequent to her meeting with Lagor, provided in pertinent part, as follows:

> I was standing in the corridor outside of the seclusion room. I then saw Richard sitting on (Camille)... I saw (Camille) spit on Richard's face. At this time I heard what sounded like a slap of a hand, but I did not see anyone slap (Camille). At this time I walked away from the seclusion room doorway... (State's Exhibit 6).

36. On March 29, 1984, Lagor met with Pearson. Lagor asked Pearson if he had witnessed any patient abuse with respect to Camille's seclusion, and Pearson answered that he had not. Lagor told Pearson that he had a report alleging patient abuse, and that if it was proved that Pearson was lying, he could be prosecuted for perjury.

37. On April 2, 1984, Lagor received a written statement from Pearson which provided in pertinent part, as follows:

> I went back into the seclusion room just in time to see (Camille) spit on Richard Sherman and to hear Richard tell that if she spit on him again, he was going to punch her. (Camille) again spit on Richard Sherman, and he in turn punched her beside her head. This was repeated three times, as (sic) which time Peter Letourneau went and pulled Richard Sherman off of (Camille).
>
> (State's Exhibit 3)

38. On March 30, 1984, Lagor met with Letourneau. Lagor told Letourneau there was a report that Camille had been abused. Lagor asked Letourneau if he knew anything about it, but Letourneau indicated he did not. Lagor told Letourneau that if the investigation showed that what he said was not true, then he could be disciplined, along with the perpetrator.

39. On April 2, 1984, Lagor received a written statement from Letourneau. The statement provided in pertinent part as follows:

> I was standing by (Camille's) side looking the opposite way when (Camille) had hit me in the mouth with the back of her hand which resulted in a filling to be knocked out... (Camille) was then dragged to seclusion by myself and Richard Sherman and Joe Pearson while two female aides stood at the door looking in (D.P. R.C.)... (Camille) then turned to Richard Sherman and spit in face where he responded by slapping pt. about the head. Richard stated to (Camille) to spit again in which (sic) she did and Richard responded by slapping her again. I then grabed (sic) Richard about the waist and pulled him off her and out of the seclusion room...
>
> (State's Exhibit 4)

40. Letourneau and Pearson were not disciplined for having failed to make earlier reports on the March 27 seclusion of Camille.

41. On April 3, 1984, Grievant submitted to Lagor a statement on the March 27 seclusion of Camille. The statement provided in pertinent part as follows:

> ...I found myself draped over (Camille), trying to pin her shoulders to the mattress while she was being searched. My face was no more than 12 to 18 inches from hers. (Camille) then spat repeatedly in my face. I placed the open palm of my left hand on the side of her head and attempted to turn her face away from me so as to avoid her saliva. I would like to stress the fact that this was purely a defensive gesture on my part. I did not at any time, as (Camille) alleges, hit or strike her in any way, nor did I verbally threaten to do so.
>
> (State's Exhibit 9)

42. On April 3, 1984, following his receipt of Grievant's statement, Lagor met with White and Department of Mental Health Deputy Commissioner Patricia Walton. Based primarily on the complaint by Camille and the statements of Letourneau, Pearson and Peet (which he believed), Lagor recommended to White and Walton that Grievant be dismissed.

43. Lagor recommended the dismissal of Grievant, rather than a lesser discipline, because he concluded Grievant had slapped Camille three times. If this had been a situation where Grievant had slapped Camille once as part of a reflex action from being spit upon, Lagor probably would not have recommended dismissal. Lagor felt Grievant's actions were inexcusable given his responsibility as a "charge". Lagor did not recommend Grievant should be demoted because he determined that Grievant should not be working with patients. Lagor did not consider Grievant's past disciplinary record because he believed the incident involving Camille warranted dismissal standing alone. Lagor concluded the repetitive nature of Grievant's slapping outweighed the mitigating circumstances of the stressful environment generated by Camille. In making his recommendation, Lagor considered that the bruise on Camille's head treated by Mitchell on March 27 had been inflicted by Grievant.

44. Lagor briefed and consulted with White and Walton prior to a decision being reached on the discipline to impose on Grievant. Both White and Walton read the statements and reports submitted to Lagor by employees concerning the March 27 incident, and they were aware that Grievant had been an employee of Vermont State Hospital for a number of years. After such consultation, both White and Walton approved of Lagor's recommendation to dismiss Grievant.

45. By letter dated April 5, 1984, Lagor notified Grievant of his dismissal. That letter provided in pertinent part as follows:

> I have completed the investigation surrounding the incident which took place March 27, 1984, on Weeks (1) at Vermont State Hospital. The allegation stated that you slapped the face of a female patient under your care. The investigation has revealed that in fact the charge against you of patient abuse is correct.

We consider this incident to be gross misconduct and conduct which placed in jeopardy the health and welfare of a patient under your care. Your action is in direct violation of the Vermont State Hospital Conditions of Employment (Section A, paragraphs 3 & 4 and Section B (6 & 7) which you signed December 21, 1979.

Your action also violated the responsibilities you are charged with as a Psychiatric Technician B. Specifically, "you are to direct, coordinate and participate in providing care and treatment of patients; assess and deal with crisis situations and... maintain control and composure during high stress periods."

This incident alone is sufficient cause for bypassing progressive discipline and warrants immediate dismissal... (Y)ou will not receive two weeks notice or pay in lieu of notice.

(State's Exhibit 1)

46. The July 1, 1982 - June 30, 1984 Contract provides in pertinent part, as follows:

DEFINITIONS

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

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. Written notice of dismissal must be given to the employee within twenty-four hours of verbal notification. 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 or any of the following reasons:

a. gross neglect of duty;
b. gross misconduct...
...
e. *conduct which places in jeopardy the life of* health of a... person under the employee's care...

6. 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...

(Grievant's Exhibit 8)

47. Thomas Whitney became VSEA's Executive Director in October, 1982. At that time, Whitney discovered there were then pending 65 to 70 cases at the Board and Supreme Court levels. Because of the cost to VSEA of appeals from the Board, he saw there was a need to bring some finality to Board decisions, which under the existing contract did not exist because of the Supreme Court's view of the powers of the Board. Whitney decided to address that issue during negotiations for the next contract negotiated by the parties.

48. Negotiations between the State and VSEA for the Contract in effect from July 1, 1984 to June 30, 1986, commenced on August 9, 1983.

49. VSEA's initial bargaining proposal concerning disciplinary action, which was submitted to the State on August 9, 1983, provided in pertinent part:

> The Vermont Labor Relations Board, as the exclusive arbiter in Step IV hearings, may determine the appropriateness of disciplinary action. The Vermont Labor Relations Board

> shall have the authority to determine that if lesser discipline is warranted, the VLRB may order such discipline. However, in no event may they impose greater discipline.
>
> (Grievant's Exhibit 10, Page 5)

50. It was the intent of the VSEA when submitting this proposal to allow the Board to have similar responsibility to an arbitrator in fashioning a different penalty than that imposed by the State; to essentially give the Board the authority it thought it had prior to the Supreme Court's opinion in In re Grievance of Carlson, 140 Vt. 555 (1982). This intent was made known to the State.

51. On October 26, 1983, the State presented a counterproposal to VSEA concerning the disciplinary language initially proposed by VSEA. That counterproposal contained the following pertinent language:

> In any case involving dismissal or suspension in excess of ten work days, should the VLRB find just cause for discipline but find also that the disciplinary penalty was excessive, the VLRB shall have the power to impose a lesser form of discipline (subject to appeal by the State).
>
> (Grievant's Exhibit 11, Page 2)

52. During negotiations, the State was represented by Alan Drachman, who was assisted at every bargaining session by Thomas Ball, Director of Employee Relations, Department of Personnel. During the course of negotiations, Ball wrote a handwritten note next to the State's above counterproposal. That note provided:

> No substitution of judgment by VLRB except firings and heavy suspensions.
>
> (Grievant's Exhibit 11, Page 2)

53. Ball's note reflected the State's understanding as to the meaning of its counterproposal as phrased in the negative. If phrased in the

positive, this would mean that the Board may substitute its judgment for the State in cases concerning dismissal and heavy suspensions, but not otherwise.

54. On November 16, 1983, VSEA presented a counterproposal to the State concerning disciplinary action. That language provided in pertinent part:

> In any cases involving a suspension, demotion or dismissal, should the VLRB find just cause for discipline, but determine that the penalty was inappropriate or excessive, the VLRB shall have the authority/power to impose a lesser form of discipline.
>
> (Grievant's Exhibit 12, Page 2)

55. As negotiations progressed, the parties continued to exchange proposals and counterproposals, including those dealing with disciplinary action. At no point during bargaining was there any discussion concerning whether certain kinds of offenses (e.g., violence, theft) would be excluded from the Board's power to change punishments. At no point during negotiations was there any discussion about whether the Board's authority to mitigate punishment would affect suspensions or dismissals occurring prior to July 1, 1984.

56. On March 6, 1984, the parties reached a tentative agreement on the language of the disciplinary article. The language tentatively agreed to, which ultimately became part of the Contract effective July 1, 1984 to June 30, 1986, provided in pertinent part:

> 9. 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.
>
> (Grievant's Exhibit 19, Page 6)

57. While it is clear that there was no discussion at the bargaining table concerning whether the new powers of the Board could be invoked in grievances filed prior to July 1, 1984, under the non-management or corrections unit agreements, there was discussion, away from the bargainin table, concerning State Police Unit grievances filed before July 1, 1984. While it is not clear whether that discussion took place before or after the March 6, 1984 tentative agreement on the disciplinary article, it is clear the discussion took place some time in March of 1984. In a telephone conversation between Whitney and Ball, it was agreed that any State Police Unit grievance filed prior to June 30, 1984 would be processed under the State Police Unit agreement in effect for the period July 1, 1982 to June 30, 1984.

MAJORITY OPINION

At issue is whether there is just cause for the dismissal of Grievant. Grievant was discharged for gross misconduct and conduct which placed in jeopardy the health and welfare of a patient under his care by slapping a female patient under his care three times in the head. The facts of this case turn on the question of whose version of events to believe, Grievant's version or the version given by employees Letourneau and Pearson which was relied on by the State. We have determined the Letournea Pearson version is more credible and have concluded the State proved by a preponderance of the evidence Grievant did strike the patient Camille three times in the head.[1]

[1]We note that the dismissal letter states Grievant was being dismissed because he "slapped the face of a female patient" and the evidence indicates he struck a female patient on the right side of the head above the ear, not on the face. We do not consider this discrepancy of significance. The evidence indicates management dismissed Grievant because of the repetitive nature of his striking of the patient and was not particularly concerned about the specific area of the head he did strike. Also, unlike Member Kemsley, we do not believe the severity of the injury to the patient is important.

Once the underlying facts have been proved, we must review management's penalty and determine whether there was just cause for Grievant's dismissal given the proven misconduct.

Our duty to review is at issue in this case. Grievant has raised an issue as to which contract applies to the Board's exercise of its authority in reviewing his dismissal; the 1982-84 Contract or 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. Grievant maintains the 1984-86 Contract 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 him. 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 that Section 9 of Article 17 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.

The State contends that there is no support for the proposition that the parties ever intended, expected or desired that the provisions of the 1984-86 Contract be applied ex post facto to disciplinary actions taken under the previous contract. At the hearing, the State expressed the concern that it would be unfair to apply the 1984-86 contract to cases which arose before its effective date since State managers were relying on the 1982-84 Contract to govern their actions.

We reject this ex post facto argument of the State. An ex post facto law refers to creating a law which punishes an act as an offense after the act was committed, which act when it was committed was not an offense. Black's Law Dictionary, 4th Ed., pg. 662-663. The State's argument would have merit if the section of the 1984-86 Contract at issue contained new and different duties imposed on managers, and if those duties were after the fact used as the standard by which to judge an action already taken. However, that is not the case here. The provision in question deals with the Board's authority in reviewing disciplinary action, not with the duties of managers in imposing disciplinary action. At issue is simply a question of what standard of review the Board will apply; the State's power in imposing disciplinary action is not affected.

Moreover, the parties negotiated a change of responsibility for this Board, presumably to create better labor relations, and bargained for those changes to become effective July 1, 1984. Following the State's position could mean the new provisions of the Contract would not be invoked until the better part of a year passes after the Contract went into effect, since some cases arising out of the old contract are still awaiting hearing. Absent express language in the Contract supporting the State's position, we cannot presume the parties intended such a result. Rather, we conclude all provisions of the new Contract are to be given effect on its effective date.

Accordingly, we conclude Article 17, Section 9, of the 1984-86 Contract is applicable to this matter. We turn now to determining what effect this provision has on our duty of review.

Under the 1982-84 Contract, our duty of review was to determine whether the discipline imposed by the employer is within the range of its discretion given the proven misconduct. Grievance of Colleran and Britt, 6 VLRB 235, at 266 (1983). If management responsibly balanced the relevant factors in a particular case, and struck a balance within tolerable limits or reasonableness, its penalty decision will be upheld. Id. The Board is not given any authority by the 1982-84 Contract to substitute its own judgment for that of the employer, exercised within the limits of the law or contract. Grievance of Goddard, 142 Vt. 437 (1983).

Under the 1984-86 Contract, a question arises whether the parties intended the Board to have the authority to substitute its disciplinary judgment for that of the employer, where dismissal or suspension is imposed.

The issue presented is the latest development in a long, complex history. The negotiated changes in Article 17, Section 9, indicate the parties wanted to make changes regarding our existing duty of review. We believe it is worthwhile to examine the historical development of State employee disciplinary matters in order to determine precisely what these changes mean.

The 1976-79 Contract negotiated by VSEA and the State provided the State could "dismiss an employee for cause", but did not expressly provide for progressive discipline. In the leading decision under this contract, In re Grievance of Brooks, 135 Vt. 563, the Supreme Court defined "just cause":

> Just cause means some substantial shortcoming detrimental to the employer's interests which the law and a sound public opinion recognize as a good cause for his dismissal... The ultimate criterion of just cause is whether the employer acted reasonably in discharging the employee because of misconduct. A discharge may be upheld as one for

> "cause" only if it meets two criteria of reasonableness: one that it is reasonable to discharge employees because of certain conduct, and the other, that the employees had fair notice, express or fairly implied, that such conduct would be ground for discharge. Id., at 568.

The Court in Brooks rejected the Board's conclusion that progressive discipline is inherent in just cause but held:

> This is not to say that the parties could not negotiate the requirement of progressive discipline into the collective bargaining agreement. Nor do we mean to preclude the parties from varying the above stated definition of just cause either expressly in the agreement or implicitly by their conduct. Id., at 569.

In a further decision under the 1976-79 contract, In re Grievance of Gage, 137 Vt. 16 (1979), the Court delineated the scope of the Board's review:

> 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 the statute or by the agreement, any authority to substitute its own judgment for that of the employer, exercised with the limits of law or contract. Id., at 19.

Subsequent to the Brooks and Gage decisions, the parties negotiated a contract covering the period 1979-81. That contract contained a specific procedure of progressively severe discipline with the proviso that "there are appropriate cases that may warrant the State bypassing progressive discipline or applying discipline in different degrees so long as it is imposing discipline for just cause". That language was also contained in the subsequent contracts covering the periods 1981-82 and 1982-84.

The Board believed that this change in the contract language changed the law as stated in Brooks and Gage concerning the Board's function.

In subsequent cases arising under this language, the Board likened its responsibility and authority in disciplinary cases to that of an arbitrator. The Board held that where the parties have expressly agreed to a policy of progressive discipline designed to correct misconduct, and the Board finds a particular disciplinary action excessive, it is within the authority and responsibility of the Board to impose a penalty commensurate with the employee's offense. Grievance of Kindestin, 3 VLRB 288 (1980) (police dispatcher asleep; dismissal reduced to 30-day suspension). Grievance of Cook, 3 VLRB 105 (1980)(park ranger's cumulative, relatively minor derelictions; dismissal reduced to 60-day suspension). Grievance of Carlson, 3 VLRB 303 (1980)(middle manager's failure to prevent misuse of State property; dismissal reduced to demotion and 30-day suspension). Grievance of Goddard, 4 VLRB 107 (1981) (correctional officer's striking of inmate; dismissal reduced to suspension and demotion).

However, the Supreme Court's decisions, In re Grievance of Carlson, 140 Vt. 555 (1982), and In re Grievance of Goddard, 142 Vt. 437 (1983), reversed the Board, holding the progressive discipline policy could be by-passed. In Goddard, the Court referenced its quote in Gage, supra, regarding the Board not being given "by the statute or by the agreement" any authority to substitute its own judgment for that of the employer, exercised within the limits of law or contract, and stated:

> (T)he essence of the Board's order here is that it disagrees with the action taken by the employer... (w)e have consistently reminded the Board that by substituting its own judgment for that of the employer, the Board "misconstrues its function".

Thus, Goddard, if viewed narrowly, established standards for determining when progressive discipline could be by-passed; and if viewed broadly, removed all discretion from the Board in discipline selection. The Board's response to Goddard was Grievance of Colleran and Britt, supra.

In Colleran and Britt, the Board enunciated 12 factors to consider to determine whether management exercised its discretion within the limits of law or contract. Id., at 266-269. The majority of the Board further concluded that the Board had the authority to determine the appropriate disciplinary action where management had not done so within the limits of the law or the contract, rather than remand to management for determination of the appropriate disciplinary action. Id., at 269-272.

It is in light of this history that the parties negotiated the provision in the 1984-86 Contract regarding the Board's authority. In Goddard, the Court implicitly invited the parties to determine through negotiations whether the Board had the power to substitute its judgment for the employer through the statement that "the Board is not given, by statute or by the agreement any authority to substitute its own judgment for that of the employer..." (emphasis added). This was a reiteration of an invitation previously extended by the Court in its Brooks and Gage decisions. The parties took the Court up on its invitation and negotiated the language at issue.

We believe that, in negotiating the present disciplinary provisions, the parties recognized the legislature intended this Board to have the final say on grievances within the executive branch, and hoped to impose some finality on the resolution of grievances.[2]

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[2]At the hearing, both parties expressed a wish for finality. It is evident this is becoming an acute problem (e.g., Grievance of Bishop - dismissal case decided by Board October 13, 1982, appeal still pending before Supreme Court; Grievance of Murphy - dismissal case decided by Board on remand August 12, 1982, appeal pending before Supreme Court; Grievance of Cronin - dismissal case decided by Board April 1, 1983, appeal pending before Supreme Court; Colleran and Britt, disciplinary cases decided by Board September 22, 1983, appeal still pending before Supreme Court), and most commentators stress the importance of promptness in resolving grievances. Elkouri and Elkouri, How Arbitration Works, 3rd ed., BNA, 1973, pages 8-10.

Our broader scope of review under this newly-negotiated language will potentially result in uniformity being brought to State employee disciplinary actions since the overall discretion in determining the appropriateness of penalties will now be with the Board, instead of individual State managers.

Given the language of the provision in question in view of the pertinent history, it is evident the parties intended the Board make an independent judgment whether a penalty imposed by management is "inappropriate or excessive". In so doing, the parties contracted that we would substitute our judgment for management and not simply ensure that management was exercising its discretion within tolerable limits of reasonableness, as was the case under Colleran and Britt. We conclude our duty is to apply the criteria for reasonableness established by the Court in Brooks, supra, and cases following it, to determine whether "just cause" exists for discipline. However, we are now required to exercise our own judgment to determine whether the penalty is reasonable. In doing so, we will guided by the Colleran and Britt factors to govern exercise of our discretion, rather than solely to review management's discretion.

However, before we apply the Colleran and Britt factors to our own independent review, we consider it appropriate to review management's application of the relevant factors in a particular case. We believe management still retains the initial authority to impose discipline and primary responsibility to do so. Moreover, in exercising our oversight responsibility, we believe it appropriate to review the basis for management's decision, so if there if disagreement between the Board and management the reason for it will be clear. Our review is aided by a thorough articulation of the principles applicable to the case, and we believe such action will result in consistent decisions.

At the hearing, the State took the position that even if the Board now has the authority to mitigate discipline, that authority does not extend to certain offenses since the Supreme Court has determined that certain offenses - i.e., violence against co-workers, violence against inmates and residents, and theft - are per se just cause for dismissal. That view is presumably based on the Supreme Court's views expressed in Brooks, supra, (violence against co-worker), Goddard, supra (violence against inmates), and Carlson, supra (pattern of fraud).

We refuse to hold that some dismissals are per se just. The language of the provision at issue here expressly provides that the Board's authority of review extends to "any case involving a...dismissal", and the facts indicate there was no discussion during bargaining about excluding certain offenses from consideration under that provision. Moreover, each case involves a question of degree and we must look to all the circumstances of a case to determine whether a dismissal is just.

We turn now to the application of those standards to the dismissal of Grievant. We look to the specific factors enunciated in Colleran and Britt, supra, to determine the legitimacy of the disciplinary action. The pertinent factors here are the nature and seriousness of the offense, Grievant's supervisory role, Grievant's past work record, the effect of the offense upon supervisors' confidence in Grievant's ability to perform assigned duties, the notice to Grievant that such conduct would be grounds for disciplinary action, and mitigating circumstances.

As indicated above, we first consider whether responsible managers balanced the relevant factors in deciding to dismiss Grievant. Unit Administrator Robert Lagor, Grievant's supervisor, was management's chief investigator and recommended the dismissal of Grievant. It is

apparent Lagor did not analyze the case specific to the factors we enunciated in Colleran and Britt. It would be preferable if Lagor analyzed the 12 factors explicitly since they provide a framework to guide management in determining the legitimacy of a particular disciplinary action. However, the evidence indicates Lagor was generally aware of the relevant factors in this case. Before recommending Grievant's dismissal, he balanced the relevant factors and concluded the repetitive nature of Grievant's slapping was inexcusable, particularly given his supervisory position, and outweighed Grievant's past work record and the mitigating circumstances of the stressful environment created by the patient Grievant slapped. Lagor briefed and consulted the managers who ultimately made the decision to dismiss Grievant, Hospital Administrator Leslie White and Deputy Commissioner of Mental Health Patricia Walton, and they approved the dismissal. Under these circumstances, it is apparent those responsible for dismissing Grievant weighed the relevant factors in coming to their decision.

In applying the Colleran and Britt standards to our own independent review, we conclude the dismissal of Grievant was for just cause and was neither "inappropriate" nor "excessive", although it is a close call. The closeness of the case is indicated by the disagreement of the Board. The difficulty of this case is that an employee with 10 years of satisfactory employment with one slip in a stressful situation is dismissed. We must weigh 10 years of blameless employment with one incident.

Grievant's offense was of a serious nature. He violated established Hospital procedures for dealing with a patient in deliberately and thrice striking a patient. In so doing, he jeopardized the health of a patient

under his care. He was fully aware he could expect discipline for striking patients. Moreover, the seriousness of the incident is not simply that he struck the patient Camille three times, but that he goaded her before striking her. The seriousness of the offense is further aggravated by the fact he was in a supervisory position as a "charge". As a supervisor, Grievant was obligated to provide an example to those under him who may emulate his conduct. We believe the distinction made by Lagor in concluding dismissal, rather than a less severe penalty, was warranted is a viable one; namely that the repeated, deliberate acts engaged in by Grievant are different and more serious than a single, reflexive act.

We now look to mitigating circumstances surrounding Grievant's offense. We first determine whether Grievant had any "unusual job tensions." Colleran and Britt, supra, at 268. Camille was a difficult patient to deal with given her spitting, biting, kicking and general struggling. In his dissent, Member Kemsley places weight on the fact that Grieva was working under a great deal of stress on the day in question. We agree the amount of stress an employee is under is an appropriate factor to consider. However, we believe further analysis is required. The only evidence of stress here is the nature of the incident itself; transporting a recalcitrant patient to seclusion. We believe an experienced and appropriately-trained employee such as Grievant should have been able to deal with such stress. There is no evidence here that the "stress" was unreasonably caused by management failures, such as understaffing, poor training, inadequate supervision, or the like. Rather, this incident appears to be within the competence of Grievant to deal with, and the "stress" was within his own control. Therefore, we do not find unusual job tensions sufficient to warrant mitigation of the penalty.

The final mitigating factor to consider is Grievant's ten years of satisfactory employment. This is the most significant factor in Grievant's favor. However, since we conclude Grievant was under no unusual stress beyond his control, the repeated, deliberate slappings by Grievant constituted serious patient abuse and outweigh his length of satisfactory service. Through his actions, Grievant demonstrated to his superiors he could no longer be trusted to perform his assigned duties of working with patients.

We agree with Member Kemsley that discharge is the capital punishment of labor relations. By the same token, unexcused violence by employees against people in their charge is a capital offense.c.f., Grievance of Bishop, 5 VLRB 347 (1982). In our judgment, Grievant engaged in gross misconduct and dismissal is an appropriate penalty.

Nonetheless, Grievant maintains that the dismissal letter he received was defective because it was not signed by the appointing authority, and the State failed to show Robert Lagor, who signed the letter, had been delegated the authority to do so. The Contract provides the "appointing authority or his authorized representative may dismiss an employee". We find no violation of the Contract by the State. There is no dispute Hospital Administrator White and Deputy Commissioner Walton had the authority to dismiss Grievant and they approved of Grievant's dismissal before Lagor wrote the dismissal letter.

Kimberly B. Cheney, Chairman

James S. Gilson

DISSENTING OPINION

I agree with the majority as to the facts of the underlying incident leading to Grievant's dismissal, with one exception discussed below, but disagree as to the propriety of the penalty imposed. I further concur with my colleagues that the 1984-86 Contract applies to this case, and agree with the majority statement of our scope of review. However, I disagree that management's dismissal decision is supportable. I would reverse management's dismissal decision because I believe the penalty was "excessive" and "inappropriate".

In reviewing disciplinary action taken against a State employee, we must not look beyond the reasons given by the employer in the disciplinary letter for the action taken. Grievance of Patterson, 5 VLRB 376 (1982). Grievance of Swainbank, 3 VLRB 34 (1980). The reason given by Robert Lagor for Grievant's dismissal in the dismissal letter was that Grievant "slapped the face of a female patient under (his) care". This offense, while serious, does not rise to the level of a dismissable offense given all the circumstances of this case.

First, Grievant is not charged with physically injuring the patient but simply slapping her. While I do not condone abuse of any kind against patients, the severity of the abuse must be weighed alongside the severity of the punishment. There is no more severe punishment for an employee than discharge, which is the capital punishment of labor relations.

Second, Grievant was working under a great deal of stress on the day in question. His job duties generally involved stress since he was working with mentally disturbed patients who were oftentimes agitated. It is understandable that employees working under such stress will

sometimes "crack" and engage in behavior that is not ideal. This is particularly so when dealing with a patient like Camille who has a history of destructive behavior, not only to herself but towards Vermont State Hospital employees. Thus, while Grievant's actions of slapping Camille after she spit at him and struggled with him cannot be condoned, the stressful environment Grievant was working in mitigated his action.

Third, prior to this incident, Grievant had a satisfactory work record of over ten years duration. During this period, Grievant consistently received satisfactory performance evaluations and the only disciplinary action he received was a verbal reprimand.

Also, unlike my fellow Board members, I place very little credence on the testimony of Nursing Supervisor Mithcell, who claimed that she observed and treated a "soft tissue" injury on the side of Camille's head caused by Grievant slapping her. That Mitchell could discern this injury while not noticing any injury on Camille's forehead caused by her repeated banging of her forehead on the window frame of the seclusion room door is beyond my comprehension. I further disagree with my colleagues who are of the opinion that the repeated slapping of Camille by Grievant warrant his dismissal, but infer they would not have upheld the dismissal if there had been just one slap. I do not believe it appropiate to so base a dismissal on the very number of slaps.

Given these circumstances, dismissing Grievant was too severe a penalty. I recognize that one reason for firing an employee who abuses patients is to serve a warning on other employees that abuse will not be tolerated. While that may be a valid and laudable concern, here we we have an employee who had a lengthy and satisfactory work record and the misconduct he engaged in came in the heat of a stressful moment and did not cause injury to a patient. It creates additional, needless and

terrible stress on employees to know that if they step over the line of permissable conduct under the circumstances of a case like this, they will be fired. On the other hand, disciplinary action such as a suspension and/or demotion would have provided the same warning while simultaneously showing a measure of concern by management for employees in stressful situations.

The facts of this case call for the use of progressive discipline, not dismissal. A suspension would have been a reasonable approach to discouraging patient abuse. Dismissal was an excessive penalty, tantamount to capital punishment.

William G. Kemsley, Sr.

ORDER

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

The Grievance of Richard Sherman is DISMISSED.

Dated this ___ day of December, 1984, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

James S. Gilson