

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 84-35
RAYMOND GADREULT)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On June 22, 1984, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Raymond Gadreault ("Grievant"). The grievance alleged the State of Vermont, Department of Corrections ("Employer") dismissed Grievant, a Correctional Officer at the St. Johnsbury Community Correctional Center, in violation of Articles 8, 15 and 49 of the collective bargaining agreement between the State and VSEA for the non-management unit, effective for the period July 1, 1982 to June 30, 1984 ("Contract").

On October 12, 1984, Grievant amended his grievance to allege a two-day suspension he received in February 1984 violated Articles 15 and 49 of the Contract, and a performance evaluation report he received covering the period February 3, 1983, to February 3, 1984, which resulted in Grievant being placed in a warning period, violated Articles 13 and 49 of the Contract.

Hearings were held before the Board on November 8, 15 and 29, 1984; December 13, 1984; and January 10, 17 and 24, 1985. The full Board was present at the November 8 and January 10, 17 and 24 hearings. Board Member William Kemsley, Sr., was absent from the November 15 and 29 hearings and has reviewed that portion of the record he missed. Board Chairman Kimberly E. Cheney was absent from the December 13, 1984, hearing and has reviewed that portion of the record he missed. VSEA staff

Attorney Michael Zimmerman represented Grievant. The Employer was represented by Assistant Attorney General Michael Seibert.

Grievant filed Requested Findings of Fact, Conclusions of Law and Memorandum of Law, and the Employer filed a Memorandum of Law, on February 19, 1985. The Employer and Grievant each filed Reply Briefs on February 25, 1985.

FINDINGS OF FACT

Background

1. On May 25, 1984, Grievant was dismissed from the position of Correctional Officer C at the St. Johnsbury Community Correctional Center ("SJCCC") "as a result of your performance and accumulated instances of misconduct since your last performance evaluation, which demonstrate a serious lack of professional judgment". Numerous incidents were cited to support the dismissal (State's Exhibits 45, 46). Prior to his dismissal, Grievant had been placed in a six-month warning period on February 23, 1984, as a result of an adverse performance evaluation he received covering the period February 3, 1983, to February 3, 1984 (State's Exhibit 20), and had been suspended for the days of February 21 and 22, 1984, for the way he handled a situation involving a visitor to SJCCC whom he suspected to be intoxicated (State's Exhibit 21). The evaluation, suspension and dismissal are the subject matter of this grievance.

2. Grievant was continuously employed by the Employer at SJCCC from April 1980 until his dismissal, which was effective on May 29, 1984. Grievant worked consecutively as a Correctional Officer (Pay Scale 8), Correctional Officer B (Pay Scale 9), and on July 4, 1982, was promoted to Correctional Officer C (Pay Scale 11). He remained in that position

until his dismissal. At all times relevant herein, Grievant was a permanent-status employee (Grievant's Exhibit 4, pages 1-5).

3. Until the performance evaluation grieved herein, performance evaluations Grievant received all gave him an overall rating of "3" ("consistently meets job requirements/standards") (Grievant's Exhibit 5). During his employment, Grievant received various letters of praise and recognition (Grievant's Exhibit 6, pages 1-6, 10).

4. From April, 1980, until April 12, 1982, Grievant worked at the "old" SJCCC. On April 12, 1982, a "new" SJCCC was opened and from then until his dismissal Grievant worked there. The two facilities were quite different. The "old" facility was small, with 45-50 inmates concentrated in one small area and operated with three to four employees a shift. The new facility is much larger and has nine to 10 employees working each shift. There is less personal contact between officers and their supervisors in the new facility. Also, in the new facility there are many more rules than existed in the old facility.

5. The SJCCC Personnel Rules and Regulations, of which Grievant was aware, provide in pertinent part as follows:

...3. No employee shall engage in "loafing" to include non-productive activity, reading books other than case histories or professional literature, unnecessary phone use or conversation, coffee breaks in excess of 15 minutes in the morning and 15 minutes in the afternoon (whenever possible).

4. No employee shall leave his work station unnecessarily, or without authorization and proper relief.

5. No employee or volunteer shall maliciously use profane or abusive language toward others or about any resident or staff member.

6. No employee shall destroy, abuse, or misuse state property nor shall he/she use state property for personal use unless he/she has written permission from the Superintendent or Assistant Superintendent.

7. No employee shall be tardy without good reason, nor shall they be excessively or habitually tardy...

...

11. No employee or volunteer shall disobey the direct or written order of a superior.

...

* 14. No employee shall wilfully (sic) violate or ignore the enforcement of any written regulation, rule or policy for inmates or staff. (Example: visiting policy, inmate handbook rules/regulations, control room policy, etc.)

* 15. No employee shall engage in any type of behavior or lack of behavior which constitutes negligence and/or endangers the safety of staff or residents.

16. No employee shall engage in horseplay with other staff members or residents.

...

26. No employee or volunteer shall use the State telephone system for long distance personal business.

...

30. No employee or volunteer shall report to work in an unconventional or untidy manner.

Example: Dirty or holey clothing, shorts, body shirts, T-shirts, skirts shorter than three inches above the knee, braless, skirts for female counselors, untrimmed or ungroomed hair, beard or mustache.

...

35. Every employee or volunteer shall report any accident with a State vehicle to the Superintendent or Assistant Superintendent within 24 hours from the incident.

...

41. All employees will adhere to the chain of command as outlined in the Institutional Flow Chart. All employee issues will be resolved at the lowest supervisory level prior to being brought to the attention of higher authority.

This facility subscribes to a policy of progressive discipline. Repeated offenses warrant increased discipline and serious offenses draw higher penalties than lesser ones.

* - Indicates suspension or dismissal may occur at first offense.

There are five categories of discipline in order of severity:

- 1) Oral reprimand
- 2) Written reprimand
- 3) Suspension without pay
- 4) Demotion
- 5) Dismissal

(State's Exhibits 2, 3)

6. In January or February of 1983, Grievant delivered to State Senator Scudder Parker written allegations of impropriety or inefficiency in government. Specifically, Grievant charged SJCCC Superintendent Raymond Pilette, Assistant Superintendent Heinz Arenz, Shift Supervisor Raymond Flum, and Chief of Security Gerard Goupee had, at various times, engaged in certain improper conduct. The general nature of the charges and allegations were as follows:

- 1) falsification of pay records;
- 2) personal use of State property;
- 3) use of inmates and State employees in the cleaning of a personal residence;
- 4) "coverup" of serious breaches of security resulting from acts of negligence;
- 5) favoritism in the imposition of discipline;
- 6) condonation of improper use of force;
- 7) intimidation concerning the use of the grievance procedure;
- 8) nepotism;
- 9) manipulation of the classified system (including falsification of personnel records) to reward favorites.

7. Grievant made these allegations in good faith, and as a result of such allegations, he was entitled to the "whistleblower" protection of the Contract, which provides as follows:

ARTICLE 49

WHISTLEBLOWER

A "Whistleblower" is defined as a person covered by this Agreement who makes public allegations of inefficiency or impropriety in government. No provision of this Agreement shall be deemed to interfere with such an employee in the exercise of his constitutional right of free speech, and such person shall not be discriminated against in his employment with regard thereto.

8. Shortly after Grievant delivered such written allegations to Senator Parker, the persons named in the allegations became aware of Grievant's allegations against them.

9. As a result of a Department of Corrections internal investigation, all of the named individuals were exonerated of Grievant's charges.

10. In January or February of 1983, after Pilette and Arenz had learned of Grievant's allegations against them, Grievant, Pilette and Arenz had a meeting in Pilette's office. During that meeting, Arenz did not tell Grievant that when he got ready to fire him, he would do so first, then think of reasons afterward. Arenz said nothing to that effect.

11. In April, 1982, when the new facility opened, the Vanguard program was begun at the facility. The program involved a "therapeutic community" of inmates living and working together. Casework Supervisor Tom Hunter was in charge of the Vanguard program. In February, 1983, Hunter selected Grievant to serve as the first Vanguard Assistant Director.

12. Grievant was Assistant Vanguard Director until September 1983. Hunter ended Grievant's Vanguard assignment in September, 1983, and told Grievant his assignment was ending because he required too much direction and counseling from his supervisors and that he was inadequate as a team member and team leader. Grievant's Vanguard assignment was also ended so that other staff could share the assignment and because Correctional Officer C's, like Grievant, were needed to supervise inmate work crews.

13. In August or September, 1983, Grievant told Pilette that an employee who had recently been promoted to Correctional Facility Shift Supervisor did not have enough time in service to be promoted to that position, and that his personnel records had been falsified for him to get the promotion. Grievant mentioned to Pilette the Attorney General's office might be interested in that information. Subsequent to that conversation, Arenz did not tell Grievant that if Grievant talked to the Attorney General, he would "make a fool" out of Grievant and would fire him, and made no statements to that effect.

14. At a date uncertain, probably during the summer of 1983, Grievant and Correctional Officer C Ed Thomas were assigned to pick up an inmate who had violated his furlough. Grievant drove the facility van to the inmate's work place in Montpelier. Once there, Grievant accidentally backed the van over an embankment, resulting in the van becoming stuck. The inmate's employer hooked a chain to the vehicle and easily pulled the van up the embankment. There was no damage to the van, and no cost incurred in towing it.

15. Thomas mentioned the incident to Superintendent Pilette, either the same day, or a couple of days after it happened. Thomas did not file a written report of the incident and Grievant did not report the incident. The inmate involved filed a report on the incident, and that report was received by Daniel Florentine, Chief of Security and Operations (State's Exhibit 9). Grievant did not violate Rule 35 of SJCCC Personnel Rules and Regulations, concerning reporting of accidents, by failure to report the incident because it was reasonable for him to conclude no accident had occurred.

16. Grievant's superiors did not discuss the incident involving the van with him or criticize him for it until criticism appeared in an annual performance evaluation, which placed Grievant in a warning period, covering the period February 3, 1983, to February 3, 1984 (State's Exhibit 20, pages 4 and 5).

17. In September, 1983, SJCCC entered into an agreement with the Northeast Kingdom Community Action Agency ("NEKCA") whereby the facility agreed to refurbish a NEKCA building in Barton, Vermont. An inmate work crew and Grievant, as work crew supervisor, were assigned to complete that job. Grievant and his work crew worked on that assignment from October 1983 to the day before Thanksgiving, 1983. During that period, Security and Operations Chief Florentine was Grievant's immediate supervisor.

18. Florentine told Grievant to ask his permission to make special stops with the inmate work crew. Grievant, unbeknownst to Florentine, entered into an arrangement with a NEKCA official to store NEKCA material at Grievant's home. Thereafter, Grievant, with the inmate work crew and without Florentine's authorization, stopped at Grievant's house on a

number of occasions to pick up the materials. Also, without the authorization of Florentine, Grievant, with the inmate work crew, stopped at the home of a fellow correctional officer to pick up a drill to use on the Barton project.

19. In early December 1983, an inmate alleged Grievant had made unauthorized stops with the work crew. Following the investigation into the inmate's allegations, Florentine gave Grievant a verbal warning for storing the NEKCA material in his home without authorization and for the unauthorized stops at Grievant's home and the home of the fellow correctional officer and told Grievant not to let it occur again. Florentine told Grievant to clear any such actions with him or Pilette prior to taking such actions (State's Exhibit 10, Page 4).

20. During the evening hours of December 20, 1983, Grievant, who was in an off-duty status, was in Luigi's, a Lyndonville restaurant and bar. Linda Fournier, a former SJCCC employee, was present. During a conversation between Fournier and Grievant, Grievant, who was upset with Assistant Superintendent Arenz for not having selected him for promotion to Correctional Facility Shift Supervisor, said he would like "to rip his (Arenz') face off", or "put out his (Arenz') lights", or words to that effect. Fournier asked Grievant how he would do it, and Grievant said that he would kick open the door to Arenz' office and "blow him away with a shotgun".

21. Immediately thereafter, Fournier telephoned SJCCC Supervisor Ray Flum and reported that she thought Arenz' life might be in jeopardy. As a result of Fournier's phone call, SJCCC management investigated Grievant's statements. On December 22, 1983, Grievant was temporarily relieved from

duty with pay. He remained in that status until January 4, 1984, when he was allowed to return to work. Grievant was not disciplined for his comments concerning Arenz. However, Superintendent Pilette suggested Grievant undergo counseling through the Employees' Assistance program and Grievant agreed he would do so (State's Exhibit 13). Subsequently, Grievant did not undergo counseling.

22. It was Grievant's responsibility, as supervisor of an inmate work crew, to turn in time sheets for each inmate so the inmates could be paid for their labor. Time sheets were due on December 21, 1983, for inmates' labor that week. Grievant was on sick leave December 21, 1983, and was on temporary relief from duty from December 22, 1983 through January 3, 1984, and failed to turn in time reports on December 21. As a result, inmates were not paid on time. Upon Grievant's return to work on January 4, 1984, Florentine told Grievant it was his responsibility to provide the time reports, and to get the reports in. Subsequently, Grievant was unable to find the time reports.

23. On January 24, 1984, David LaFlower, Grievant's Shift supervisor for the day, ordered Grievant to have a full-sized garbage can cleaned. Grievant, in turn, ordered one of the inmates to wash the garbage can in the inmate shower. Grievant did so even though there was a garbage can cleaner in the kitchen and even though he had never previously ordered an inmate to wash a garbage can in the inmate shower and had never seen another officer do so. There existed no specific facility rule prohibiting the washing of garbage cans in inmate showers.

24. After the garbage can was washed, the inmate concerned filed a grievance against Grievant, alleging Grievant was "harassing" him. LaFlower spoke to Grievant about the incident the same day, and told

Grievant he thought washing garbage cans in the shower was "inappropriate" and that Grievant should not do so again (State's Exhibit 16).

25. During the period February 3, 1983, to February 3, 1984, there were several instances where Grievant and his shift supervisor got into shouting matches. Grievant was counseled several times by his supervisors concerning his job performance during this period and his supervisors frequently had to give him directions in completing his job assignments to ensure the assignments were done and done properly.

26. Article 13 of the Contract provides in pertinent part:

During the rating year, the immediate supervisor shall call the employee's attention to work deficiencies which may adversely affect a rating, and, where appropriate, to possible areas of improvement.

Warning Period Evaluation

27. On February 23, 1984, Grievant received a performance evaluation covering the period February 3, 1983, to February 3, 1984. The evaluation was prepared by LaFlower, Florentine and Hunter, who were identified as the "raters" on the evaluation. Grievant received an overall rating of "2" ("inconsistently meets job requirements/standards") and a "2" rating in eight factors (i.e., follows rules and regulations, attention to detail and accuracy, resident care and treatment, employee-resident interaction, relationship with co-workers, relationship with supervisors, efficiency and productivity, adaptability). In the remaining four individual factors, Grievant received "3" ("consistently meets job requirements/standards") ratings (i.e., alertness-concern for safety and security, absenteeism and tardiness, physical strength and stamina and creativity and resourcefulness). (State's Exhibit 20, pages 3, 4)

28. Under "areas needing improvement", the evaluation cited the following incidents as evidence of poor judgment: the unauthorized Barton work crew stops, threatening to kill Assistant Superintendent Arenz, ordering the inmate to clean the garbage can in the inmate shower, failing to submit the work crew time report on December 21, 1983, and backing the van over the embankment and not reporting the incident (State's Exhibit 20, Page 5).

29. With regard to Grievant's performance on the Vanguard assignment, the evaluation noted:

Ray's strength during this period was his commitment and energy to the Vanguard program. Ray's attitude during his work improved significantly during this period. He enjoyed a positive relationship with his program supervisors and received a great deal of feedback and support.

Ray's weaknesses during this special assignment were that he required too much counseling and direction from his supervisors, the net result, he did not respond sufficiently to criticism so that the same direction had to be given over and over. Ray was inadequate as a team member and a team leader. His job assignment ended because of these inadequacies, because of our plan to share this special assignment with other deserving staff, and because COC's were needed for supervision of work crews (State's Exhibit 20, pages 5, 6)

30. The evaluation further stated:

If continued employment at this facility is anticipated, Officer Gadreault must begin to address identified problematic areas in a reasonable and timely fashion.

In view of the above situation, Officer Gadreault is being placed on probation for a period of six months, effective on the date this evaluation is reviewed with Officer Gadreault. During this probationary period, the following issues will be addressed:

1. Communication between he and supervisory staff will improve.
2. He will file all such required reports in a timely fashion.
3. His overall appearance will become presentable.

4. His rapport with peers and inmates will improve.
5. He will abide by all rules in accordance with St. Johnsbury CCC Facility Policy and Procedure.

(State's Exhibit 20, Page 6)

31. Along with the performance evaluation, Grievant received an accompanying letter from Pilette, informing him he was being placed in a "six month warning period", and that he would be expected to meet monthly with Florentine regarding his performance (State's Exhibit 20, Page 2).

32. Grievant was given the performance evaluation and accompanying letter from Pilette on February 23, 1984, at a meeting attended by Grievant, Hunter, LaFlower, Florentine and Grievant's VSEA steward, Harold Colleran. At the meeting, Grievant's supervisors discussed the five areas of improvement expected of him noted in Finding #30 above.

33. The Contract contains the following definitions:

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

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

34. Inasmuch as Grievant was, at all times relevant herein, a permanent status employee, he could not be required to serve another probationary period.

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

2.043 WARNING PERIOD means 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.

(Grievant's Exhibit 29)

36. The performance evaluation used the term "probation" and "probationary period" to describe the status Grievant was being placed in, while Pilette's letter described Grievant's status as "warning period". This discrepancy was not discussed during the February 23, 1984, meeting, and Grievant did not notice the discrepancy during the meeting. As a result of the meeting, Grievant understood that if he did not live up to management's expectations noted on the performance evaluation, he could be dismissed. At no time before Grievant's dismissal did he or VSEA inform SJCCC management they were confused about Grievant's status as a result of the discrepancy between the evaluation and Pilette's letter. Grievant's supervisors were aware they would need just cause to dismiss Grievant.

37. At the second step of the grievance procedure on the warning evaluation, the hearing officer, Michael Chater, ordered that the individual rating factors "attention to detail and accuracy" and "resident care and treatment" be upgraded from "2" ratings to "3" ratings.

Period Between End of Rating Period and Placement in Warning (February 4, 1984 to February 22, 1984)

38. Prior to late January, 1984, the practice in the maximum security unit had been to allow inmates to trade or borrow cigarettes from each other. It came to the SJCCC administration's attention, however, that stronger inmates had begun to "strongarm" more passive ones into giving away their cigarettes. In order to put a stop to that practice, Security and Operations Chief Florentine, about a week or two prior to February 4, 1984, promulgated a rule prohibiting inmates in that unit from trading or borrowing cigarettes. A copy of the rule was posted in that unit.

39. On February 4, 1984, Grievant was assigned to work the maximum security unit. Grievant was responsible for knowing the rules of that

unit before he worked there. Grievant was not aware of the new policy concerning trading or borrowing cigarettes, and it was possible the copy of the rule had been torn down by that time. During the course of his shift, Grievant allowed inmates to exchange cigarettes.

40. On February 5, 1984, James Husband, who was Grievant's Shift Supervisor that day, asked Grievant if he was the officer who had allowed inmates to exchange cigarettes the day before. Grievant replied, "Yes, I did, and I will continue to do so". Husband asked Grievant if he was aware of the new rule and Grievant told Husband he was not aware of it. Husband told Grievant of the new rule and his expectation Grievant would abide by it in the future. Grievant replied as long as it was a rule he would abide by it but he felt the rule was "stupid" and stated he was going to see Florentine "and get that rule changed" (State's Exhibit 17).

41. Grievant did not willfully violate the new cigarette policy and thus was not in violation of SJCCC Rules and Regulations #14 concerning willful violation of policy. However, Grievant was at fault for not making himself aware of the policy before working the shift.

42. On February 5, 1984, the SJCCC rules concerning visitors, of which Grievant was aware, provided, in pertinent part, as follows:

Reception Area Officer's Duties

...will have thorough knowledge of rules governing visiting (behavior, allowed gifts, money policy, authorized number of visitors per inmate).

Visitors will not be allowed in the building if they, in the opinion of the supervisor are under the influence of alcohol.

(State's Exhibit 48, Pages 2 and 4,
State's Exhibit 3)

43. It was the Reception Area Officer's responsibility to notify the supervisor when he suspected a visitor may have been drinking and to let

the supervisor determine whether the visitor was under the influence of alcohol.

44. The facility has an alco-sensor machine. The primary use of the machine is for testing to determine if inmates returning from furlough have been drinking, to test all incapacitated persons admitted into custody in the facility and to test inmates suspected of drinking in the facility.

45. On Sunday, February 5, 1984, Grievant was working the first shift at the facility. Shift Supervisor James Husband was Grievant's immediate supervisor that day. At about 1:00 p.m., Grievant was working as the Reception Area Officer and was in charge of admitting visitors to the facility. Grievant thought he detected the slight odor of alcohol on a person among a group of visitors. Grievant asked the visitor whether he had been drinking on the way to the facility. The visitor denied having anything to drink that day and suggested his breath still carried the odor of a few beers he had drunk the night before. Grievant asked the visitor if he would be willing to take a breath test. The visitor agreed.

46. Grievant took the visitor to the Admissions Control area to administer the test. To get to the Admissions Control area, Grievant and the visitor had to pass through three secure doors which were electronically controlled by the control room operator, Judy Corrow. Grievant did not seek prior approval from Husband to bring the visitor to that area. Corrow opened the three electronically controlled doors for Grievant. Corrow, when she observed Grievant in Admissions Control administering the alco-sensor test, notified Husband as to what Grievant was doing. Husband called Grievant on the intercom while Grievant was in the process

of administering the test, and asked him what he thought he was doing. Grievant explained what he was doing. Husband "chewed out" Grievant because he viewed the bringing of a possibly intoxicated visitor into Admissions Control to be a breach of security, Grievant had acted without authorization and because he did not think there was any right to administer an alco-sensor test to a citizen (i.e., non-inmate). Husband ordered Grievant to escort the visitor off the facility property (State's Exhibits 51, 54).

47. On February 20, 1984, Florentine gave Grievant a letter of suspension, dated February 15, 1984, and signed by Pilette, Florentine and Husband. The letter provided in pertinent part as follows:

This letter is to serve as a written notice of suspension for your actions of February 5, 1984, while you were acting as the Reception Area Officer during which time you were processing visitors to the institution.

Specifically, you are in violation of Institutional Procedure 400.10 Section N, "report all incidents, comments, etc. to Shift Supervisor or designee". To wit: you failed to report to the Shift Supervisor that you had a visitor on the premises which you suspected of being intoxicated.

In addition, Section B, "Reception Area Officer's Duties", Section D, states that you "will have a thorough knowledge of ruling governing visiting..." To wit: your actions did not reflect that you had a thorough understanding of the visiting rules and regulations that are posted on the wall in the administrative area and also contained on Page 15 of the Inmate Handbook.

In addition, you also violated Rule 15 of the Personnel Rules and Regulations of the St. Johnsbury Correctional Center, "no employee shall engage in any type of behavior which constitutes negligence and/or endangers the safety of staff or residents".

To wit: you proceeded to take a visitor that you believed to be under the influence of alcohol through the S-1 door, through the MC sallyport area, into the admissions

control area, and administered the alco-sensor test to this individual. This action on your part causes two areas of concern:

1. You subjected the facility to a potentially hazardous situation by introducing a possible intoxicated person into the secure perimeter of the institution, thereby, endangering staff as well as inmates.
2. You did not have the authority or approval of the Shift Supervisor on duty to permit entry of this individual into the secure perimeter of the facility.

In consideration of the number of years that you have been employed by the Department of Corrections and also the present rank that you hold that you would have an indepth, thorough knowledge of existing rules and regulations.(sic) You are not permitted the flexibility of making arbitrary and independent decisions in those situations where it is clear that a higher authority's approval is necessary. Such independent action as your's (sic) seriously affects the orderliness of the institution.

You are thereby suspended without pay for two days, February 21 and 22, 1984. Any further disciplinary action incurred may result in additional punishment up to and including dismissal" (State's Exhibit 21).

48. On February 5, 1984, Grievant knew that on previous occasions Shift Supervisors LaFlower and Flum had administered alco-sensor tests to visitors. LaFlower and Flum had administered alco-sensor tests to visitors in the administration section of SJCC but had not taken visitors into Admissions Control to administer the test. Superintendent Pilette was aware of this and at some point before February 5, 1984, told LaFlower and Flum not to give such tests to visitors again. Pilette considered such directives to be oral reprimands. Outside of Grievant's action, there is no evidence of any other employees at SJCC administering alco-sensor tests to visitors in Admissions Control.

49. Through his actions of February 5, 1984, concerning the visitor, Grievant violated the facility's rules by taking it upon himself to ascertain whether the visitor was intoxicated without notifying his supervisor. He also violated SJCCC Personnel Rules and Regulations #15 in "endangering the safety of staff or residents". He did this by breaking the facility's security perimeter in taking the visitor to the Admissions Control area to administer the alco-sensor test.

50. No other comparable breaches of security of which the SJCCC administration was aware went unpunished.

51. At some point after the February 5, 1984, incident, a new rule was promulgated at the facility specifically prohibiting also-sensor tests for visitors.

52. At some time in early to mid-February of 1984, Grievant, while riding to work with Corrow, told her the staff were "tired" of her writing petty reports on staff members. Grievant told Corrow she was human too and could make mistakes. Grievant told Corrow that "she had better cool" the reports she was writing for her "own good". Grievant asked Corrow if she knew what he meant. Corrow felt threatened by Grievant's comments because he was giving her a warning which she did not understand (State's Exhibits 38, 39).

53. The following day, Corrow told Supervisor Flum about her conversation with Grievant. Flum told Florentine of the communication the next day. Nothing was done about this incident at this time. Corrow mentioned this incident further in a written report she did in late April, 1984, complaining about actions of Grievant (State's Exhibits 38, 39).

54. It was inappropriate for Grievant to suggest Corrow stop writing reports which were making her supervisors aware of any problems or violations occurring on her shift. In addition, Grievant's manner of making the suggestion appeared to Corrow to be threatening her.

55. On February 13, 1984, at about 11:37 a.m., Grievant, using the facility telephone while in a duty status, telephoned Fenway Park in Boston, Massachusetts, to obtain tickets to a Red Sox game. Grievant spoke on the phone for four minutes at a cost of \$1.75. While another call was made to Fenway that day from the facility, we do not find by a preponderance of the evidence Grievant made that call (State's Exhibit 19).

56. Grievant's phone call to Fenway Park violated Rule 26 of SJCCC Personnel Rules and Regulations which prohibits use of the telephone for long distance personal business and Rules #3 (i.e., non-productive activity), #6 (i.e., misuse of State property) and #14 (i.e., willful violation of written rule).

57. SJCCC management became aware of this call by Grievant at some unspecified time after February 13, 1984, when they reviewed a February 13, 1984, report of Corrow which indicated Grievant had called Fenway Park that day (State's Exhibit 18). Grievant was not asked whether he had made any calls to Boston on February 13, and no action was taken against Grievant for the telephone call until it was cited as a basis for his dismissal.

58. It was the practice of the SJCCC administration to prohibit personal long-distance calls unless permission was received to make such calls.

59. On February 1, 1984, the cook at the facility issued a memorandum to all facility supervisors and minimum security officers. The memo was entitled "Portion Control", and provided as follows:

This a.m. a minor problem occurred regarding kitchen crews eating items other than what is listed on the menu.

Kitchen crews will not eat other than what is on the line.

Staff will also adhere to this policy (of eating what is being served on the line), one meal per shift.

To not follow these guidelines will cause numerous grievances and discontent.

This reference in the memo to "kitchen crews" was to inmate kitchen workers, not employees. The reference to "staff" was to employees (State's Exhibit 52).

60. The memorandum did not explicitly address the question of what to eat when the serving line was closed, but it was the practice at the facility for the employees to ask the kitchen officer if any portion of the meal was left over and to be served that by the kitchen crew.

61. On February 18, 1984, Grievant, having been delayed in his duties, arrived in the kitchen five to 10 minutes after the noon meal serving line had been closed down. The meal served that day had consisted of cold cuts. Grievant did not ask the kitchen officer if any cold cuts were left. Instead, he went to the refrigerator, got some pieces of cold chicken and then ate them in the presence of inmates. This action by Grievant violated the established practice at the facility.

62. Shift Supervisor Scott Shafer wrote a report on the chicken incident that day to Florentine (State's Exhibit 22). The first notice Grievant had he was being criticized for the incident was in a letter temporarily relieving him from duty in May, 1984 (Grievant's Exhibit 14, Page 4).

Period Between Placement in Warning Period and Dismissal (February 23, 1984 to May 24, 1984)

63. Under the facility's rules, the only staff members authorized to sign an inmate's furlough authorization (allowing an inmate to be away from the facility) are the superintendent or designee.

64. On February 29, Hunter, who had the authority to sign furlough authorizations, called Grievant at Admissions Control and requested that Grievant make a log entry indicating a particular inmate had been allowed

to extend his furlough 24 hours and sign the furlough authorization itself. Grievant made the log entry, but told Hunter he would need the order to sign the furlough authorization in writing. Hunter told Grievant it was customary for him to make similar requests of the Admissions Control officer, and that Grievant should put "per Tom Hunter" next to the change. Grievant remained hesitant, so Hunter walked from his office to Admissions Control and signed the furlough document himself (State's Exhibit 23). We find Grievant's action of not following Hunter's instructions demonstrated poor judgment.

65. On March 9, 1984, at about 7:20 a.m., LaFlower (who was first shift supervisor) called Admissions Control officer Wayne Gammell and instructed him to tell Grievant (who was also working the first shift) that Grievant would be working in A Unit that day. When Gammell told Grievant what LaFlower had said, Grievant, acting upset, asked Gammell if he was LaFlower's messenger. Grievant then said LaFlower would have to tell him himself, and LaFlower didn't have "enough sack" to tell him himself. Gammell asked Grievant why LaFlower would be afraid to tell Grievant himself. Grievant replied that every time LaFlower asked to speak to Grievant, Grievant asked for a VSEA representative to be present because "they are messing with me" (State's Exhibit 24, 25).

66. Following Grievant's comments, Gammell called LaFlower and told him what Grievant had said. LaFlower attempted to speak to Grievant about his comments, but Grievant refused to do so without a VSEA representative present. Grievant went to A Unit to assume his post (State's Exhibits 24, 25).

67. Later in the morning, following a Step I meeting on Grievant's grievances from his performance evaluation and two-day suspension, LaFlower told Grievant his earlier actions that day at Admissions Control were

inappropriate, and that repetition could have adverse consequences on his evaluation.

68. Grievant's actions in this regard were inappropriate in that he undermined a supervisor's authority by disparaging LaFlower in front of another employee.

69. On March 15, 1984, an inmate in the maximum security unit told Grievant he was planning to commit suicide that day at 4:00 p.m. Grievant, as he was required to do, wrote a report at 1:14 p.m., addressed to Supervisors Flum and Hunter. On his report, Grievant used the wrong date (i.e., March 16, 1984) both for the date of the report, and for the date the inmate said he would kill himself. When Hunter saw the written report with the date March 16 used, he immediately clarified with Grievant those dates were incorrect and the threat was that very day the inmate would kill himself. The situation was clarified before the end of Grievant's and Hunter's shift, and there was no suicide (State's Exhibit 26).

70. Grievant's error on the suicide report was clerical. We do not find Grievant's error violated SJCCC Rule #15 (i.e., negligence and/or endangers the safety of residents).

71. At all times relevant, SJCCC Rules provided the food service officer is responsible for the kitchen in the absence of the cook. Specifically, the Rules provide: 1) a count of the silverware will be made before and after every meal, and the officer will add the count to the count sheet; and 2) the kitchen crew will thoroughly clean the kitchen before leaving and all garbage cans will be emptied and clean bags inserted. Grievant was aware of these rules (State's Exhibit 3, 53). In addition, while there

were no written rules on the issues, it was established practice the inmate kitchen crew be summoned to the kitchen by the kitchen officer at 2:30 p.m., although a leeway of five minutes was tolerated; that knives are kept in a lock box in the kitchen if not being used, and that knives are allowed to be used by inmates only if the food service officer is present in the kitchen (State's Exhibit 49).

72. On March 17, 1984, Grievant was working the first shift and was assigned to run the kitchen. He violated SJCCC rules and established practice that day by the following actions: 1) failing to make any entries in the "missing" column for knives, forks and spoons on the "silverware count" sheet for breakfast and lunch and not signing or dating the sheet; 2) failing to ensure garbage cans were emptied after lunch; 3) summoning the kitchen crew at 2:46 p.m. although the normal time for calling them was 2:30 p.m.; and 4) by allowing an inmate to continue using a knife and not securing it in the lock box although Grievant was leaving the kitchen and no other officer was present (State's Exhibits 27, 50).

73. Grievant was also faulted by his supervisors for failing to properly fill out pass/fail sheets on residents on March 17. Officers are trained to make entries when residents either "pass" or "fail" in a given area during the day. However, officers commonly at SJCCC make entries only when inmates are failed, and this is what Grievant did on March 17. This practice is condoned by management and it was improper to fault Grievant for conforming to the common practice.

74. On March 25, 1984, and April 6, 1984, Grievant was working the first shift as unit leader in the A Unit. As unit leader, Grievant was

responsible for ensuring his unit was clean at the end of his shift. Grievant failed in that duty on March 25 by leaving the utility room messy and because spitballs were found on the walls of the unit at the end of his shift. Grievant failed in that duty on April 6 by leaving the utility room messy (State's Exhibits 28, 32).

75. Article 27, Section 2(b)(v), of the Contract provides that employees too ill to come to work are required to call their work locations "no later than the first hour of the beginning of the scheduled work day".

76. On March 30, 1984, Grievant was scheduled to work the first shift, with a starting time of 7:30 a.m. Grievant was ill with the flu and did not report to work. At 7:55 a.m., LaFlower telephoned Grievant's home and spoke to Grievant. Grievant told LaFlower he was about to call him and would not be in to work that day due to the flu. The State concedes, and we find, Grievant committed no impropriety in this situation (State's Exhibit 30).

77. On April 5, 1984, Florentine met with Grievant to review Grievant's performance since being placed in the warning period. At the beginning of the meeting, Grievant stated the meeting was a "bunch of crap". Florentine mentioned the February 29 furlough incident and the March 9 comments about LaFlower as an indication that his relations with supervisors needed improvement. Florentine did note Grievant's relations with Supervisor Flum had improved. Florentine mentioned the March 17 deficiencies of Grievant while he was working in the kitchen as the failure to file all reports required by procedure/policy and a failure to abide by facility rules. Florentine told Grievant his appearance had been more acceptable. At the conclusion of the meeting, Grievant stated his being placed in a

warning period was "bullshit". He also stated he would like to be corrected on the spot if he was to be corrected (State's Exhibits 31, 37).

78. At the beginning of the April 5 meeting, Grievant requested that a VSEA representative be present, and this request was denied by Florentine. This issue was not raised by Grievant in the grievance filed with the Board. Thus, the issue of whether the Employer violated the Contract by this action is not timely before the Board.

79. One of the rules of the facility is inmates are only allowed to have two towels in their possession. In early April, 1984, Grievant was working as a unit leader. An inmate went to the infirmary for treatment by Physician's Assistant Dennis Smith. Smith was not a supervisor of Grievant. The treatment required a towel but the inmate had no towel because both of his issued towels were in the laundry. Smith instructed the inmate to go to the unit leader to get a towel. The inmate went to Grievant and ask him for a towel. The inmate explained to Grievant he needed the towel in the infirmary and both his towels were in the laundry. Grievant refused. Smith then called Grievant and asked him to give the inmate a towel. Grievant stated he would not do that because the inmate would be over the personal property limit of two towels. Smith explained it would be used only in his office but could not persuade Grievant. Smith then called LaFlower, who ordered Grievant to give the inmate a towel. Grievant obeyed that order (State's Exhibit 41).

80. Grievant was not at fault in the towel incident because he was placed in a warning period partly for disobeying facility rules and he had a legitimate concern giving the inmate a towel might be a violation of the facility two-towel rule.

81. Due to the pressures of the job inside a correctional facility, employees need a release which they sometimes find in playing practical jokes on each other.

82. During the week of April 18, 1984, Correctional Caseworker Roger Heywood was seated at his desk doing paperwork. Grievant came into his office and began shuffling Heywood's papers and grabbing at his pen. Grievant also wet his fingers and smudged Heywood's glasses. Heywood asked Grievant to stop the horseplay as he had work to do and had no time to be "screwing around". Grievant continued to mess Heywood's papers and grab his pen. Heywood informed Grievant he would report him to the shift supervisor if he continued. Grievant then left the office and, a few seconds later, called Heywood on the telephone. Grievant asked Heywood about baseball scores, something about which Heywood knew nothing. Heywood told Grievant to get off the phone and then hung up the phone. Grievant called Heywood back, and told him Heywood could not hang up on him. Heywood again hung up on Grievant. On April 30, 1984, Heywood filed a report with Florentine, complaining about Grievant's actions (State's Exhibit 43).

83. Grievant's actions after Heywood asked him to stop the horseplay constituted violations of SJCCC Personnel Rules and Regulations #3 (i.e., engaging in non-productive activity), #6 (i.e., misuse of State property) and #16 (i.e., engaging in horseplay).

84. Article 8 of the Contract provides in pertinent part as follows:

1. No Discrimination, Intimidation or Harassment:
In order to achieve work relationships among employees, supervisors and managers at every level which are free of any form of discrimination, intimidation or harassment, neither party shall discriminate against nor harass any

employee because of race, color, religion, creed, ancestry, sex, marital status, age, national origin, handicap, membership or non-membership in the Association, or any other factor for which discrimination is prohibited by law.

...

3. Enforcement Responsibilities:

a. By the Employer - The State acknowledges its duty to practice good faith implementation of the goals contained in this Article. The employer further acknowledges its duty to inform employees of their obligation not to discriminate, intimidate or harass employees under applicable law, policy or this Agreement... The employer will notify employees, supervisors or managers at every level that any person who by action or condonation subjects another employee to harassment in the form of uninvited physical attention, racial insults or jokes, or who invites or provokes such conduct, shall be subject to appropriate discipline.

85. In 1982, Celeste Girell, a caseworker at SJCCC, complained to Assistant Superintendent Arenz that Grievant had called her "worthless" and had told her she had "two strikes" against her; being a woman and being a caseworker. Arenz told Grievant that whether Girell's complaints about his behavior had occurred or not, he did not want Grievant to engage in any behavior that could be construed as sexual harassment. Grievant was aware it was a contract violation to sexually harass a female employee (State's Exhibits 4, 5). However, we do not find the incident to be "sexual harassment". However, it did put Grievant on notice to be circumspect.

86. On April 21, 1984, at about 9:30 a.m., Correctional Officer Judy Corrow was working in the Control Room and Grievant was working in the Admissions Control area. The Control Room and Admissions Control were in close proximity, and Corrow could see into Admissions Control from the Control Room. The Control Room operator is extremely busy and must be continually alert. Grievant, using the "attorney line" (which was

designed to be used by attorneys calling into the facility), telephoned the Control Room. Corrow answered the phone. Grievant said it was an obscene call, started breathing heavily and laughed. Corrow immediately recognized Grievant's voice, and she could see Grievant on the telephone, facing her and laughing. Corrow immediately hung up. Corrow immediately called Grievant back on the intercom and told Grievant to "cut the bull". Grievant started laughing and asked Corrow what was wrong. Corrow, unamused, hung up. Corrow, on April 25, 1984, filed a written report to LaFlower on this incident, stating she felt threatened by Grievant's actions (State's Exhibit 38).

87. This action of Grievant violated SJCCC Personnel Rules and Regulations #3 (i.e., non-productive activity). Further, it constituted sexual harassment within the meaning of Article 8 of the Contract, because of sexually-suggestive conduct. We do not find Grievant's use of the telephone constituted misuse of State property in violation of Rule #6 of the SJCCC Personnel Rules and Regulations.

88. Later that same day, between 11:35 and noon, Corrow was on her lunch break in the staff lounge. Grievant entered the lounge. Grievant repeatedly asked Corrow for a back rub and asked her to take him out and get him drunk. Corrow told Grievant to get lost. On April 25, 1985, Corrow filed a written report on this incident, stating she felt threatened by Grievant's actions (State's Exhibit 38).

89. These comments by Grievant also constituted sexual harassment within the meaning of Article 8 of the Contract, because they were unwanted suggestions of sexual contact.

90. At the time Grievant and Corrow were in the lounge, Grievant also asked Corrow what he could do to "fuck up" a co-worker's locker. Grievant mentioned that he had previously put toilet paper in the employee's locker as a joke. We find these remarks by Grievant without significance and not warranting any discipline.

91. Later that same day, at about noon, Grievant, using a pay phone in the admissions control area, called the operator. Identifying himself as Ray Gadreault, he told the operator he was placing a collect call to the facility. The operator then rang the number into the Control Room. Correctional officer Dennis Belanger, who was relieving Corrow during her lunch break, answered the telephone just as Corrow entered the bubble. Belanger refused to accept the collect call. Grievant then went over to the Control Room window and laughed.

92. This action by Grievant violated SJCCC Personnel Rules and Regulations #3 (i.e., non-productive activity) and #16 (i.e., horseplay). We do not find Grievant's use of the telephone constituted misuse of State property in violation of Rule #6.

93. Article 15, Section 8 of the Contract provides in pertinent part:

An appointing authority may relieve employees from duty temporarily with pay for a period of up to 30 workdays to permit the appointing authority to investigate or make inquiries into charges and allegations concerning the employee, or if in the judgment of the appointing authority the employee's continued presence at work during the period of investigation is detrimental to the best interests of the State, the public and ability of the office to perform its work in the most efficient manner possible, or well being or morale of persons under his care... Employees temporarily relieved from duty shall be notified in writing within 24 hours with specific reasons given as to the nature of the investigation, charges and allegations.

94. By letter dated April 30, 1984, and signed by Pilette, Grievant was advised of his temporary relief from duty, effective May 2, 1984. The letter provided in pertinent part as follows:

Such action is being taken in accordance with Article 15 ... of the Agreement between the State of Vermont and the Vermont State Employees Association, which states that "an appointing authority may relieve employees from duty temporarily with pay for a period of up to 30 workdays..." for the reasons which follow: It is our judgment that your "continued presence at work during the period of investigation

is detrimental to the best interest of the State, the public and ability of the office to perform its work in the most efficient manner possible, and to the well being or morale of persons under (your) care".

Your overall behavior during the past several months has caused us considerable concern. You have not responded to corrective action; we are unable to determine the reasons for your continued poor performance and misbehavior...

In view of our concerns that your behavior jeopardizes the safety and welfare of the institution, inmates and staff, you are ordered to undergo a psychiatric evaluation...

Upon completion and receipt of the evaluation, a determination will be made as to your future with this institution (Grievant's Exhibit 14).

95. The letter of temporary relief cited the following incidents as "a basis for this action":

- a. April 21, 1984, incidents (i.e. phone call to Corrow, comments to Corrow in the staff lounge, call to Belanger, and comments about having put toilet paper in an employee's locker);
- b. Comments to Corrow in February about her report writing;
- c. early April "towel incident";
- d. April incident with Heywood;
- e. February 29 furlough incident with Hunter;
- f. March 9 incident with Gammell and LaFlower;
- g. March 17 incidents involving kitchen duties;
- h. two days (March 25 and April 6) Grievant left his unit messy;
- i. two-day suspension in February concerning the alco-sensor test.
- j. February 18 "chicken incident";
- k. February 13 telephone call to Fenway Park;
- l. March 30 incident when Grievant was ill and was called at home by LaFlower;
- m. March 15 report of a suicide threat;
- n. February 4 cigarette incident in the maximum security unit;
- o. January 24 garbage can incident;
- p. December 20, 1983, threat against Arenz;
- q. Barton work crew incident involving unauthorized stops;
- r. failure to submit work crew time sheets in December, 1983;
- s. the incident involving the van in the summer of 1983; and
- t. removal of Grievant from his position as Assistant Director of Vanguard because of certain "inadequacies".

(Grievant's Exhibit 14)

96. Following the beginning of his temporary relief from duty (on May 2, 1984), Grievant did not return to work at the facility.

97. Pilette required Grievant to go to a psychiatrist because he believed Grievant had to be mentally diminished due to his behavior which Pilette viewed as "bizarre". Pilette wanted to determine whether Grievant had a psychiatric disturbance which would account for his behavior. Pilette was looking for some direction from the psychiatrist as to how to "salvage" Grievant as an employee.

98. On May 5, 1984, Grievant was interviewed for about two hours by Dr. William Woodruff, a psychiatrist. During this interview, Grievant discussed the complaints he had made about Pilette and Arenz in January, 1983.

99. The appointment with Dr. Woodruff was arranged by Pilette. Prior to the interview with Grievant, Pilette sent Woodruff a packet of material concerning the incidents for which Grievant was temporarily relieved from duty. Dr. Woodruff reviewed this material.

100. On May 10, 1984, Dr. Woodruff wrote his report to Pilette, which report provided in pertinent part:

It is my opinion that Mr. Gadreault does not suffer from any serious psychiatric disturbance which would account for the problems that have arisen. The difficulties which he and the Corrections system have been experiencing are attributable to his personality and to his habitual way of handling life.

He is an intelligent man who knows exactly what he is doing and why he is doing it. He is apparently prepared to take the consequences of any of his actions even though he recognizes that at times those actions may indeed lead him into trouble.

I suggest that your response to his behavior should be conditioned entirely in terms of his ability to function as a competent Corrections Officer.

(State's Exhibit 44)

101. When asked for his opinion about Woodruff's report at the hearing, Grievant testified the report referred to his complaints to Senator Parker in September 1983 about Pilette and Arenz, and had nothing to do with the warnings given him; that his difficulties stemmed from the dishonesty and corruption of people he worked with and his refusals to put up with it. The significance of this to the Board is Grievant's view other employees were corrupt and acted wrongly, but that he was blameless, indicates Grievant lacks insight into his own behavior.

Dismissal

102. Article 15 (entitled "Disciplinary Action") 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. Written notice of dismissal must be given to the employee within 24 hours of verbal notification. In the dismissal notice, the appointing authority shall state the reason(s) for dismissal.

103. By letter dated May 25, 1984, Pilette informed Grievant of his dismissal, effective May 29, 1984. Grievant was given two weeks' pay in

lieu of notice. The letter provided:

This action is being taken as a result of your performance and accumulated incidents of misconduct since your last performance evaluation, which demonstrate a serious lack of professional judgment. These incidents have damaged necessary relationships with both staff and inmates, have negatively impacted on morale at the facility, and have generally led us to conclude that the termination of your employment is in the best interests of this institution and the Department of Corrections.

(State's Exhibit 45, Page 1)

104. The dismissal letter cited the following "acts and omissions" as a basis for dismissal:

- a. the April 21 "obscene" telephone call to Corrow and comments Grievant made to Corrow in the lounge that day about her giving him a back rub and taking him out to get him drunk, which were characterized as "sexual harassment";
- b. Grievant's comments to Corrow in February, 1984, about her report writing, which was termed "harassment" and it was stated it was "inappropriate to make even the slightest suggestion that she discontinue writing such reports";
- c. the April incident involving Heywood which was cited as "harassment" and in violation of SJCCC Personnel Rules and Regulations #3, #6 and #16;
- d. the February 29 furlough incident involving Hunter and the April "towel incident" which were cited as demonstrations of "poor judgment";
- e. two calls to Fenway Park on February 13, 1984, which were characterized as "misuse of State property, theft of services, neglect of duty" and in violation of SJCCC Rules and Regulations #3, 6, 14 and 26.

(State's Exhibit 45, Pages 1 to 3)

105. The dismissal letter further provided:

In making this decision to terminate your employment it is noted that you have in the past received counseling relative to these areas of conduct; that you have been disciplined previously, including written reprimands and a period of suspension in February, 1984; and that you are currently in a performance warning period as a result of your last annual rating. Your conduct as mentioned above, and other incidents as dealt with in your final performance evaluation which you will receive with this letter, indicate that you have failed to improve in three of the five areas cited, to wit:

- #1 Communications between yourself and supervisory staff has not improved, but has worsened, due to your attitude, lack of judgment and misconduct.
- #2 Rapport between yourself, the inmates with whom you are in contact, and your fellow staff members has not improved, but has worsened, due to your attitude, lack of judgment and misconduct; and
- #3 You have failed to abide by all rules mandated by St. Johnsbury Correctional Facility policy and procedure (See performance evaluation for period 2/3/83 - 2/3/84, page 2, attachment).

In addition to the reasons expressed herein, the decision to dismiss you also rests in part on several other, more minor incidents which are set out in detail on your separation evaluation. It is felt that these other incidents reveal a general pattern of poor judgment, neglect of duty, and your inability or unwillingness to conduct yourself in an appropriate manner toward other staff. Taken as a whole we find ample just cause for your dismissal.

(State's Exhibit 45, pages 3, 4)

106. In addition to the dismissal letter, Grievant received a separation performance evaluation prepared and signed by Florentine and LaFlower and concurred in by Pilette. The evaluation listed the following additional incidents cited as occurring during the period February 3, 1984 to May 2, 1984, as a further basis for Grievant's dismissal:

- a. The April 21 phone call to Belanger which was cited as causing Grievant "to be neglectful of his duty, distracted other employees, and tied up a facility phone line";
- b. the April 21 incident involving putting toilet paper in an employee's locker;
- c. the March 9 incident involving Garmell and LaFlower;
- d. the March 17 incidents involving kitchen duties and the two days (March 25 and April 6) Grievant left his unit messy, which were cited as "irregularities" which it was Grievant's responsibility to prevent and not leave to the oncoming shift;
- e. the two-day suspension in February concerning the alco-sensor test;
- f. the February 18, 1984, "chicken incident" which was cited as contrary to a memorandum prohibiting staff from eating anything other than what is placed on the serving line;

g. the March 15 report of a suicide threat, which was cited for the proposition that had Grievant's report been solely relied upon, "a serious, life-threatening situation could have occurred";

h. the February 4 cigarette incident; and

i. the January 24, 1984, garbage can incident, which was cited as reflecting on Grievant's judgment and abilities in the supervision of inmates".

(State's Exhibit 46, pages 3 to 5)

107. The separation evaluation misdated Grievant's suicide reports as March 16, 1984; misdated the garbage can incident as February 6, 1984; and misdated the cigarette incident as February 5, 1984 (State's Exhibit 46, Page 5). The Employer concedes it committed an error by mentioning the garbage can incident on the separation evaluation since it occurred during the rating period covered by the February 23, 1984, warning evaluation.

108. The separation evaluation also cited the March 30, 1984, incident when Grievant was on sick leave due to the flu as a further basis for his dismissal. However, that claim was withdrawn by the Employer during the hearing (State's Exhibit 46, Page 5).

109. Grievant received an overall rating of "1" ("unsatisfactory") on his separation performance evaluation which covered the period February 3, 1984, to May 2, 1984. He was given "1" ratings in the following five individual rating factors: follows rules, regulations and procedures; attention to detail and accuracy; employee-resident interaction; relationship with co-workers; and adaptability. He received "2" ("inconsistently meets job requirements/standards") ratings in the following five individual rating factors: alertness/concern for safety and security; resident care and treatment; relationship with supervisors; efficiency and productivity; and creativity and resourcefulness. He received "3" ratings ("consistently meets job requirements/standards") in absenteeism and tardiness, and

physical strength and stamina (State's Exhibit 46, pages 1, 2).

110. In deciding to dismiss Grievant, Pilette concluded Grievant had deteriorated from a satisfactory employee to one of the worst employees he ever supervised. He considered that Grievant had an extremely demoralizing influence on other employees due to his violation of rules and other misconduct and performance deficiencies. Pilette concluded Grievant's violation of rules and other behavior was intentional; that he seemed to be begging Pilette to fire him. A major factor in the decision to dismiss was what Pilette perceived as Grievant's poor relationship with other officers and with supervisors. Up to the time he received Dr. Woodruff's report, he thought there was potential for Grievant's rehabilitation. When Pilette received the report, he concluded there was no way to salvage Grievant as an employee; that he had tried everything to "fit" Grievant into the workings of the facility but had failed.

111. Article 17, Section 9, of the July 1, 1984 - June 30, 1986, Contract between VSEA and the State applies to this matter [See Grievance of Sherman, 7 VLRB 380, 394-399 (1984)]. It 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.

OPINION

Whistleblowing Activities

At issue here is whether three actions taken by the Employer against Grievant - adverse performance evaluation/placement in warning period, two-day suspension and dismissal - violated various provisions of the Contract. Central to Grievant's claim in all these actions is they were

taken in retaliation for Grievant's protected whistleblowing activities. We address this issue first.

When an employee claims management took action against him/her for engaging in protected activity, the employee first must demonstrate the conduct was protected and then show the conduct was a motivating factor in the action taken. Then the burden shifts to the employer to show by a preponderance of the evidence it would have reached the same decision even in the absence of the protected conduct. Grievance of Morrissev, 7 VLRB 129 (1984). Grievance of Roy, 6 VLRB 163 (1983). Grievance of Cronin, 6 VLRB 37 (1983). Grievance of Sypher, 5 VLRB 102 (1982).

It is undisputed Grievant was engaging in activity protected by the whistleblowing provision of the Contract, Article 49, when he delivered to State Senator Scudder Parker allegations of impropriety against senior officials at SJCCC in January 1983. Thus, there is no question of balancing the interests of Grievant and the Employer to determine whether Grievant's activity was protected, as was the case in Morrissev, *supra*.

The second step in the analysis we employ here is Grievant must show his protected conduct was a motivating factor in the subsequent actions taken against him. We conclude by the evidence Grievant's allegations were not a motivating factor in actions taken against him.

We thus dismiss Grievant's claims he was retaliated against for his whistleblowing activities. We turn now to considering each adverse action taken against Grievant in turn in light of the remaining alleged Contract violations.

Adverse Performance Evaluation/Placement in Warning Period

Grievant alleges the performance evaluation he received on February 23, 1984, covering the period February 3, 1983 to February 3, 1984, and placing him in a six-month probation/warning period, violated Article 13 of the Contract in that it is incorrect and Grievant was not warned of purported performance deficiencies during the rating period.

Article 13 provides that during the rating year, the immediate supervisor "shall call the employee's attention to the work deficiencies which may adversely affect a rating, and, where appropriate, to possible areas of improvement". Under this language, a supervisor is required to give an employee clear indication of dissatisfaction with that employee's performance. Grievance of Smith, 5 VLRB 272, 277 (1982). The Contract provides an employee be told when his/her work behavior or performance is unacceptable so there will be no "surprises" at evaluation time. Grievance of Rathburn, 5 VLRB 286, 293 (1982).

Article 13 was violated in one instance by the Employer. Grievant's supervisors never discussed with him the incident involving Grievant backing a facility van over an embankment before it appeared to support his adverse evaluation. Moreover, the Employer's claim Grievant was at fault for the incident because he failed to report the incident in violation of facility rules requiring reporting of accidents is not supported by the evidence. It was reasonable for Grievant to conclude no accident had occurred.

However, the evaluation contains many instances of performance deficiencies of Grievant which were brought to his attention during the rating period. The evidence supports the Employer's claim on the performance

evaluation that Grievant demonstrated poor judgment by his unauthorized Barton work crew stops, threatening to kill Assistant Superintendent Arenz, ordering an inmate to clean the garbage can in the inmate shower and failing to submit the work crew time report on December 21, 1983. These deficiencies were brought to Grievant's attention during the rating period and it should have been evident to Grievant his superiors were dissatisfied with his performance. Also, Grievant was counseled several times by his supervisors concerning his job performance during this period and supervisors frequently had to give him directions in completing his job assignments. Further, Grievant's special assignment to Vanguard ended, in part, because of his inadequacies as a team member and team leader and he was informed of those deficiencies during the rating period.

In sum, the incidents cited to support Grievant's performance evaluation demonstrate valid performance reasons for his overall "2" ("inconsistently meets job requirements/standards") rating, and the "2" ratings he received in six individual rating factors. This is so even in the absence of the "van incident".

Accompanying the adverse performance evaluation was placement of Grievant in what was variously termed on the evaluation and accompanying letter a "probationary period" and "warning period". Grievant cites In re Grievance of Yashko, 138 Vt. 364 (1980), for the proposition that the performance evaluation is defective in that it used conflicting terms (i.e., probation and warning period) to describe his status.

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 on 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 understood that if he did not live up to management's expectations noted on the performance evaluation, he could be dismissed. No evidence indicates Grievant believed he could be dismissed without cause and his supervisors knew just cause was required to dismiss him. We cannot assume Grievant was unclear in any way what was expected of him. At no time before his dismissal did he or VSEA inform management of any confusion.

In any event, unlike Yashko, Grievant was not dismissed as a result of poor performance at the conclusion of a six-month probationary period. Instead, he was dismissed in the middle of that period for a combination of misconduct and performance reasons.

Suspension

Grievant alleges his two-day suspension in February, 1984, violated Article 15 of the Contract in that 1) no just cause existed for disciplinary action, 2) the progressive discipline requirements of the Contract were not followed, 3) Grievant had already received an oral reprimand for the same incident, 4) the punishment was disproportionate to the alleged offense and 5) the punishment was not consistent with that imposed for similar alleged offenses.

Our scope of review in this case is guided by Section 9, Article 17 of the 1984-86 Contract. That section provides:

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

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 we would substitute our judgment for management and not simply ensure management was exercising its discretion within tolerable limits of reasonableness. Grievance of Sherman, 7 VLRB 380, 404 (1984). Our duty is to apply the criteria of reasonableness established by the Court in In re Grievance of Brooks, 135 Vt. 563 (1977)¹, 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. Grievance of Sherman, supra, at 404.

In applying these standards to the two-day suspension of Grievant for the way he handled the situation involving a visitor to the facility whom he suspected to be intoxicated, we look to the specific factors enunciated in Grievance of Colleran and Britt, 6 VLRB 235, 266-269 to determine the

¹In Brooks, the Court stated:

Just cause means some substantial shortcoming detrimental to the employer's interest 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 employee had fair notice, express or fairly implied, that such conduct would be ground for discharge. Id., at 568.

legitimacy of the disciplinary action. The pertinent factors here are the nature and seriousness of the offense, the effect of the offense upon supervisors' confidence in Grievant's ability to perform assigned duties, the consistency of the penalty with those imposed upon other employees for similar offenses, the clarity with which the employee was on notice of any rules that were violated in committing the offense and the adequacy of alternative sanctions for deterring such conduct in the future.

Grievant's offense was of a serious nature because he committed a security breach by taking a visitor into the secure perimeter of the institution, without the approval of his shift supervisor, to administer an alco-sensor test. This constituted negligence in violation of SJCCC Personnel Rules and Regulations #15 in that he endangered other staff and inmates by allowing a potentially volatile person into the secure area of the facility.

The seriousness of the offense is further indicated in that Grievant acted in direct violation of the facility's rules concerning visitors, of which he was aware, by failing to notify his shift supervisor when he suspected the visitor may be intoxicated, as is required. Instead, he took it upon himself to ascertain whether the visitor was intoxicated without notifying his supervisor.

Grievant was on clear notice of the rules he violated and was aware no other employee had ever administered an alco-sensor test to a visitor in the secure area of the facility. By the offense, Grievant eroded his supervisor's confidence in his ability to follow rules and demonstrate good judgment in serious situations. The sanction of the two-day suspension is not inappropriate or excessive given the seriousness of the offense. Any lesser punishment would be inadequate to deter such conduct in the

future by Grievant or other employees. We do not find the penalty inconsistent with those imposed upon other employees for similar offenses because in evidence are no other instances where employees breached security by administering an alco-sensor test to a visitor in the security perimeter of the facility and no other instances where a non-supervisory employee failed to notify his/her shift supervisor when he suspected a visitor was intoxicated. Thus, there was just cause for the two-day suspension.

We note we do not believe Shift Supervisor Husband "chewing out" Grievant at the time of the incident constituted an oral reprimand which precluded imposition of a more severe discipline. Husband was simply reacting to the heat of the moment and was not imposing a final disciplinary action on Grievant.

Dismissal

In determining whether just cause exists for Grievant's dismissal, the issue as we see it is when do "molehills" of misconduct or performance deficiencies become "mountains" sufficient to constitute grounds for dismissal. Instances of repeated conduct insufficient of themselves may accumulate so as to provide just cause for dismissal. Grievance of Cook, 3 VLRB 105, 126-127 (1980).

We begin by indicating that while the majority of charges against Grievant have been established by the Employer, some of the bases for Grievant's dismissal are not sustained by the evidence. Specifically, we have concluded Grievant did not engage in misconduct or demonstrate performance deficiencies through the early April towel incident, the March 30 sick leave incident, his method in doing the pass/fail sheets on March 17, the April

21 "toilet paper" incident and the March 15 suicide report. Further, the Employer did not establish Grievant made two personal long-distance telephone calls to Fenway Park in Boston in February as charged, although we conclude he made one such call.

The fact all charges against Grievant have not been sustained does not mean management's dismissal action must be reversed. See Grievance of Bishop, 5 VLRB 347 (1982). If the facts of the underlying incident are different than those relied on by management when it imposed the penalty, we will determine whether the proven facts justify the penalty. Grievance of Collieran and Britt, *supra*.

Grievant cites In re Grievance of Muzzy, 141 Vt. 463 (1982) for the proposition the dismissal decision was defective in that it was based, in part, on incidents which occurred prior to the warning period. In Muzzy, the employee had been dismissed at the conclusion of a warning period. Therein, the Court ruled if the employee "was in reality dismissed for deficiencies which occurred prior to the warning period, then it was not a warning period at all, and notice might well be inadequate". *Id.*, at 473.

Muzzy is not directly on point here because Grievant was not dismissed at the conclusion of a warning period only for performance deficiencies. Instead, he was dismissed in the middle of a warning period for the combined reasons of misconduct and performance problems. The Employer here relied on incidents which occurred during the 20-day period between the end of the rating period which served as the basis for placing him in a warning period and the date he actually started his warning period. We consider it appropriate for management to rely on incidents which occurred during this period. Otherwise, Grievant would have an "insulated" period

where his deficiencies could not be redressed. We think Muzzy applies here to the limited extent that incidents which served as the basis for placement of Grievant in the warning period cannot be relied on as a basis for dismissal. This means the Employer's reliance on the January 24 garbage can incident as a basis for dismissal was inappropriate.

We note that while reliance by the Employer on incidents occurring during the hiatus between the end of the rating period and placement in warning is appropriate, we find most significant in our review incidents occurring during the warning period which involve areas of deficiencies noted in the warning evaluation.

Three areas of central concern in the warning evaluation which also were of central concern to the Employer in dismissing Grievant were his relationship with supervisors, his relationship with peers and his violation of facility rules and procedures. The sustained charges against Grievant indicate serious deficiencies in all those areas during the warning period.

The February 29 furlough incident involving Hunter demonstrates poor judgment in dealing with supervisors as he failed to carry out a supervisor's instructions. The March 9 incident in which he made disparaging comments about Supervisor LaFlower to another employee constituted inappropriate undermining of a supervisor's authority. In addition, and perhaps most importantly, the numerous times Grievant violated facility rules and procedures during the warning period indicated he was not willing to carry out supervisory orders and directions.

Grievant's relationship with co-workers during the rating period was extremely poor. The most serious incidents were his sexual harassment of Judy Corrow on April 21 and his harassment of Caseworker Heywood in

early April. Grievant contends he did not sexually harass Corrow because Article 8 refers to harassment as "uninvited physical attention" and that is not involved here. In construing Article 8 as a whole, it is evident the parties intended "uninvited physical attention" as being an example of sexual harassment but not as a definition of it. Uninvited verbal statements and suggestions, such as occurred here, are also sexual harassment. Grievance of Lyons, 3 VLRB 131, 141 (1980).

The April 21 phone call to Belanger is further evidence of Grievant's practice of distracting other employees from their work. The March 17 deficiencies of Grievant while he was kitchen officer and the two days (March 25 and April 6) Grievant left his unit messy are indications of poor relations with co-workers. They indicate co-workers could not depend on Grievant to do his duties properly so they would not have to "pick up" after him.

On numerous occasions, Grievant violated facility rules and procedures during his warning period. His actions in the April 21 "obscene" phone call to Corrow and other comments he made to her that day in the staff lounge, the April 21 phone call to Belanger, the Heywood incident, and the March 17 kitchen incident all involved violations of facility rules and procedures.

In addition to these actions of Grievant during the warning period, his behavior during the hiatus prior to placement in the warning period indicate misconduct and performance deficiencies. Grievant's comments to Corrow about her report writing, his phone call to Fenway Park, the "chicken incident", the two-day suspension in February concerning the alcohol sensor test and the cigarette incident are further indications of Grievant's failure to follow facility rules and establish an adequate working relationship with peers and supervisors.

In determining whether these various "molehill" incidents constituted a "mountain" sufficient to sustain Grievant's discharge, we look to the Colleran and Britt factors. The pertinent factors here are the frequently repeated nature of Grievant's offenses; Grievant's past disciplinary record; Grievant's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability; the effect of Grievant's offenses upon his supervisors' confidence in his ability to perform assigned duties; consistency of the penalty with those imposed upon other employees for similar offenses; the notice to Grievant; and the potential for Grievant's rehabilitation.

In sum, we conclude Grievant's relatively "minor" derelictions accumulated to the point where he became an undependable employee who was unable to sustain an effective working relationship with his peers and supervisors. As a result of his misconduct and performance deficiencies, supervisors could not depend upon him to follow facility rules and their orders in performing his duties. Peers could no longer expect to perform their duties without the potential of being harassed by Grievant and could not depend on him to do his duties adequately so they would not have to "pick up" after him. Grievant's contentious and litigious behavior disrupted the facility and, in sum total, warranted his dismissal.

Grievant had fair notice his performance deficiencies and misconduct could be grounds for dismissal. His adverse performance evaluation, placement in warning period and suspension provided him with fair warning from management the derelictions which resulted in his dismissal would not be tolerated. Yet his overall behavior towards supervisors and peers

and frequent violations of facility rules during his warning period indicated he chose not to heed those warnings. Grievant's behavior after being warned indicates his potential for rehabilitation at the time of his dismissal was slight. We find no inconsistency with the penalty imposed against Grievant with those imposed against other employees for similar offenses. The evidence indicates no employee engaged in the accumulation of derelictions to the extent Grievant did.

The essence of this case is to make certain Grievant's shortcomings, if any, were based on objective standards rather than defects in Grievant's personality. On many occasions he acted inappropriately. We acknowledge no place has more rules than correctional facilities; and rule-making is endemic. No employee could work long without stumbling over a rule. The seven days of hearing were tedious, involving many trivial incidents. We have set forth 111 findings of fact, in an attempt to protect Grievant from subjective assessment of his behavior by his supervisors. We are convinced on a review of all the evidence that Grievant's behavior represented a "substantial shortcoming detrimental to the employer's interest" warranting his dismissal. Brooks, supra, at 568. Where such behavior might be tolerable in other employment, it is unacceptable in a correctional facility where needs of security are met as much by adherence to rules as sensitivity to the needs of inmates, co-workers and supervisors.

We conclude the dismissal of Grievant was for just cause and was neither inappropriate nor excessive. We note that we conclude the overall rating and all the ratings in individual factors Grievant received on his separation performance evaluation are supported by the evidence.

ORDER¹

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

The Grievance of Raymond Gadreault is DISMISSED.

Dated this 2nd day of May, 1985, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney
Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.
William G. Kemsley, Sr.

James S. Gilson
James S. Gilson

¹Findings of Fact #60, 61, 81, 83, 87 and 92 and the second to the last paragraph on Page 135 contained herein differ from the original Findings of Fact, Opinion and Order of May 2, 1985, and reflect revisions made by a Board order of May 23, 1985. See 8 VLRB 171-174.