VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 84-41
RICHARD CAROSELLA	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On August 15, 1984, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Richard Carosella ("Grievant"). The grievance alleged the State of Vermont, Department of Mental Health, Brandon Training School ("Employer") violated Article 13 of the contract between the State and VSEA effective for the period July 1, 1984 to June 30, 1986 ("Contract") by: 1) failing to inform Grievant of his rights to have a VSEA representative present during questioning on allegations of abuse against him; 2) temporarily relieving Grievant from duty without informing him of the precise nature of abuse allegations against him; 3) failing to give Grievant written notice of temporary relief from duty within 24 hours of Grievant being orally notified; and 4) dismissing Grievant from his position as Mental Retardation Program Specialist B at the Brandon Training School.

On January 22, 1985, Grievant filed a motion to amend his grievance to allege a performance evaluation report Grievant received covering the period from March 25, 1984 to June 25, 1984, wherein Grievant's warning period was extended for a period of four months, was without basis in fact. The Employer informed the Board on January 24, 1985, it would not object to Grievant's Motion to amend the grievance.

Hearings were held before the Board on January 31, 1985, and March 12, 1985. The full Board was present at the January 31 hearing. Member

William G. Kemsley, Sr., was absent from the March 12 hearing and has not participated in this decision. Assistant Attorney General Michael Seibert represented the Employer. Grievant was represented by VSEA Staff Attorney Michael Zimmerman.

Grievant filed Requested Findings of Fact and a Memorandum of Law on March 28, 1985. The Employer filed a Memorandum of Law on April 1, 1985. Grievant filed a Reply Memorandum on April 8, 1985. The Employer filed no Reply Brief.

FINDINGS OF FACT

1. Brandon Training School is Vermont's only State-run facility for the retarded. Generally, about 200 residents are housed at BTS. There are about 500 staff members at Brandon, 280 who are involved with administrative services, clinical services and direct care of the residents. The ages of the residents run the entire spectrum, with the youngest in the mid-teens, and the oldest in the late 80's.

2. From the Fall of 1977 until his dismissal, Grievant was continuously employed at Brandon. From 1977 until September of 1979, Grievant was employed as a temporary employee in a Mental Retardation Aide A position. On September 25, 1979, he was hired into a permanent classified position (Mental Retardation Program Specialist A), and completed his probationary period in March of 1980, thereby becoming a permanent status classified employee. He was promoted to Mental Retardation Program Specialist B (Pay Scale 7) on September 29, 1980, which position he held until his dismissal (Grievant's Exhibit 5, pages 1-4; Grievant's Exhibit 6, pages 1-4).

3. As a Mental Retardation Program Specialist B, Grievant's essential tasks involved feeding and "toileting" residents, and providing them with basic care. That position is not a supervisory one.

4. From the time he began employment at Brandon until June, 1983, Grievant mostly worked in the residence dorms. From 1981 until July, 1983, Grievant worked in Dorm F, a "moderate" dorm where residents are able to function. From 1977 through March 30, 1980, Grievant received performance evaluations which gave him overall ratings of "3" ("consistently meets job requirements/standards"). For the periods March 24, 1980 to September 29, 1980, September 29, 1980 to March 29, 1981, and March 30, 1981 to March 30, 1982, Grievant received overall ratings of "4" ("frequently exceeds job requirements/standards"). For the rating year March 30, 1982 to March 30, 1983, Grievant received an overall rating of "3" (Grievant's Exhibit 6).

5. Since August 1980, Dr. James Morrey has been the Superintendent of Brandon. In February, 1981, Morrey promulgated Policy 2030, which concerned abuse of residents. That policy, which remained in effect at all times, provides in pertinent part:

> I. PURPOSE
>
> Resident rights must be respected and encourgement given to each resident to attain his/her full potential. Physical or verbal abuse of residents will not be tolerated and substantiated evidence of such staff action will result in a serious disciplinary response.
>
> II. DEFINITIONS
>
> A. PHYSICAL ABUSE shall mean any act, including incitement of others to act, which results or could result in physical harm to a resident. A charge of physical abuse may be substantiated without an observable injury. Spanking, hitting, or rough treatment shall be considered physical abuse...
>
> B. VERBAL ABUSE is any action, including incitement of others to act, which vilifies, intimidates, degrades or threatens a resident with harm.

III. POLICY AND PROCEDURE

> C. ...If the Superintendent finds by a preponderance of the evidence that an employee has... physically or verbally abused a resident, that employee shall be disciplined in accordance with the seriousness of the offense. Ordinarily, such resident abuse is a removal offense, but mitigating or extenuating circumstances may be considered.
>
> (State's Exhibit 1)

6. Policy 2030 also set forth a procedure for handling allegations of abuse, which is summarized as follows:

> a. Witnesses of abuse are required to report it to the Assistant Superintendent for Habilitation Services or designee.
> b. The Assistant Superintendent for Habilitation Services causes a preliminary investigation to be conducted and if it shows physical abuse may have occurred, the employee shall be suspended with pay pending further investigation. If the investigation indicates verbal abuse may have occurred, the Superintendent decides what action to take.
> c. If the preliminary investigation shows abuse may have occurred, the Superintendent assigns one or more staff persons to investigate the incident and submit a report.
> d. The Superintendent, following review of the report, determines if abuse has occurred and, if so, what disciplinary action to take against the employee.
>
> (State's Exhibit 1)

7. At all times relevant, Grievant was aware of Policy 2030.

8. On August 25, 1982, Grievant was in Dorm F. While sitting at a table with three residents, another resident was being bothersome by repeatedly clearing training materials off the table and putting them in the cupboard. Grievant, using a U bolt (which was being used in the classroom as an instructional device), secured the resident to a chair for about three minutes. After Grievant released the resident, he sat quietly. Grievant was charged with abuse as a result of that incident.

9. Assistant Superintendent for Habilitation Services Peter Aines recommended to Superintendent Morrey that Grievant be suspended, not

dismissed, as a result of the incident because of his exemplary work record. On August 30, 1982, Aines informed Grievant he was suspended for five days as a result of the incident and informed Grievant, "you are cautioned that continued rule violation may result in additional disciplinary actions, up to and including dismissal" (State's Exhibit 3).

10. After Grievant's suspension, Aines told Grievant he had "gone out on a limb" for Grievant concerning the incident, but the next time a similar incident occurred he would not be able to help. Aines discussed Policy 2030 with Grievant at that time. This case was not grieved.

11. Brandon residents are housed in five units, which are organized according to the residents' stage of development. Residents at the lowest level of development, who are severely mentally handicapped with physical infirmities, are housed in the Primary Development Unit ("PDU"). On June 4, 1983, Grievant was transferred to PDU because the dorm he had been working in closed (State's Exhibit 4).

12. PDU is housed in one building and is comprised of three areas - an infirmary, K-3 and K-4. Residents in the infirmary receive primarily medical care. Residents in K-3 and K-4 have serious medical problems but can participate in an on-going rehabilitation program, although to a lesser extent than other Brandon residents. PDU residents generally have no mode of communication and generally cannot understand words. While 45 to 50 percent of Brandon residents have no independent toileting skills, no PDU residents have independent toileting skills. There are generally about 30 residents in PDU.

13. While working in PDU, Grievant spent approximately 80 percent of his time in direct care activities - toileting, dressing, feeding and changing diapers of residents. Grievant spent the remainder of his time in habilitation activities.

14. During the time Grievant worked in PDU, the chain of command from Grievant to Superintendent Morrey was as follows:

a. Grievant was answerable to his "charge", Mental Retardation Program Specialist C Beverly Sabatini.

b. The "charge" was answerable to Sharon Brutowski, Assistant Program Supervisor for PDU.

c. Brutowski reported to John Choppa, Program Supervisor.

d. Choppa reported to Duane Fortier, Administrative Coordinator.

e. Fortier reported to Aines.

f. Aines was answerable to Morrey.

15. On October 21, 1983, Grievant received a memorandum from Sabatini stating that since his transfer to the PDU Unit, he had used 10 sick days and informing him that if his attendance did not improve, further disciplinary action would be taken, up to and including dismissal (State's Exhibit 4).

16. On November 28, 1983, Aines informed Grievant he was suspended for five days for "excessive absenteeism" as a result of being "late once and out six days" since receiving the October 21, 1983, memorandum. Aines informed Grievant that "a repetition of this offense can result in additional disciplinary action, up to and including dismissal" (State's Exhibit 5).

17. On Saturday, April 7, 1984, Grievant became ill after having worked a couple of hours. Grievant reported his illness to Barbara Tuttle, his acting supervisor for the day, who gave him permission to go home. Grievant did not work the rest of that day, nor on Sunday, April 8, 1984, because of his illness. Grievant did not obtain a doctor's

excuse for that absense because his physician did not work on weekends, and Grievant did not wish to incur the expense of a hospital emergency room visit for a temporary condition (diarrhea).

18. When Grievant returned to work on Monday, April 9, 1984, Brutowski asked Grievant for a doctor's excuse for April 7 and 8, but Grievant did not provide one. Brutowski never followed up on her initial request.

19. On April 10, 1984, Sabatini and Brutowski gave Grievant an annual performance evaluation covering the period March 25, 1983 to March 25, 1984. It was signed by Sabatini, Brutowski, Aines and Morrey. The evaluation was written by Sabatini, with help from Brutowski. In the evaluation, Grievant's overall performance was rated as "2" ("inconsistently meets job requirements/standards"). He received a "2" rating in only one individual area (i.e., "absenteeism and tardiness"). The rest of his individual ratings were "3"'s with two "4"'s in the factors of "Alertness -Concern for Safety and Security" and "Adaptability" (State's Exhibit 6, pages 2 and 3).

20. Along with the performance evaluation, Grievant was given a letter, signed by Aines, wherein Grievant was informed he was being placed in a three-month warning period, and that he would receive another evaluation on June 25, 1984. Aines informed Grievant:

> Failure to demonstrate improved performance in the identified areas in which your performance is not satisfactory, may result in further disciplinary action up to and including dismissal.
>
> (State's Exhibit 6, page 4)

21. Grievant's warning period began on April 10, 1984, the date he received the evaluation and accompanying letter. On that day, Brutowski informed Grievant he needed doctor's slips for absences.

22. On May 8, 1984, Grievant was ill and missed work. Grievant obtained a doctor's slip for that absence, and, upon his return to work, provided it to his supervisors. Brutowski approved his sick leave request for that date and Supervisor Turchin acknowledged receipt of the doctor's slip on May 11, 1984 (Grievant's Exhibit 12, page 3).

23. On June 5, 1984, Grievant was ill and missed work. Grievant obtained a doctor's note for that absence and provided it to his supervisors.

24. On June 25, 1984, Grievant was given a performance evaluation covering the period March 25, 1984 to June 25, 1984. In it, Grievant received an overall "2" rating, and received a "2" rating in the area of "absenteeism and tardiness". He received two "4" ratings (in "resident care and treatment", and in "adaptability"), and "3" ratings in all other individual areas. The only criticisms leveled against Grievant on the evaluation related to use of sick leave. Sabatini and Gregory Frederick, who prepared the performance evaluation, made the following comment:

> During this three-month warning period, Richard used 3 3/4 sick days. He was required to bring in a doctor's statement during this rating period for any sick time utilized. He failed to bring in a statement for 2 3/4 days used, this is not acceptable.

Duane Fortier, in expressing agreement with the evaluation, stated:

> Richard is not using his sick time benefits according to stipulations as stated in his previous evaluation (that he present a doctor's slip when he utilizes sick time). It is recommended that he continue on a warning status for an additional four months, and be required to bring in a doctor's statement for any sick time used...
>
> (State's Exhibit 7, pages 1-3)

25. The reference to Grievant's use of 3 3/4 days of sick leave were to his absences on April 7 (for 3/4 of the day), April 8, May 8 and June 5. Grievant did bring doctor's slips for his absences on May 8 and June 5, and, while it is true he did not provide a doctor's slip for his absence on April 7 and 8, those absences occurred prior to his warning period, which began April 10.

26. Accompanying the performance evaluation was a letter from Aines to Grievant, informing Grievant his warning period was extended for an additional four months (State's Exhibit 7, page 4).

27. Grievant's warning period was extended for the sole reason of a perceived continued problem with absenteeism.

28. Grievant is accused of abusing a resident named Elizabeth on Saturday, July 7, 1984.

29. On July 7, 1984, Elizabeth was a 20 year old woman who was able to walk with the assistance of braces. She suffered from a seizure disorder, and was incontinent (both bladder and bowels). Her difficulty was compounded by a seizure medication, which was a diuretic. Elizabeth's "program" included toilet training, which required that she be placed on the toilet every hour. As part of the program, Elizabeth was praised if she defecated or urinated in the toilet. Elizabeth was unable to understand all human speech although she could respond to some directions and could understand the tone of communications. She was unable to speak and did not understand profanity. However, she was able to communicate on a primitive basis. For example, if someone said the word "coat" to her, she would not exhibit any reaction. However, if she was shown her coat, she understood it meant she was going somewhere, and she became excited.

If a staff member told Elizabeth it was time to eat and put their arm out, Elizabeth would take the staff member's arm and go to the dining room. She was also able to distinguish food, and would push away a plate which contained food she disliked. Elizabeth was "tactile defensive", which meant she disliked certain textures. She did not like water and would draw away when an effort was made to wash her hands. When she was in discomfort or was displeased, for example when her hands were being washed, Elizabeth would make a groaning sound.

30. The incident with Elizabeth occurred in the bathroom of the K-4 area of PDU. The bathroom is about 30 feet across. It contains at least two bath tubs, three toilet stalls, potty chairs, hydraulic lifts and sinks. It is crowded during the morning hours between 6:00 a.m. and about 8:00 a.m., when the residents are prepared for breakfast. On July 7, the unit had six staff members rather than the usual seven, and it was very hot (about 90° Farenheit) in the bathroom due to a broken air conditioner in the unit.

31. On July 7, staff members assigned to the first shift began work at 5:45 a.m., and began toileting the residents at 6:00 a.m. Each staff member was assigned three to four residents for toileting, and Elizabeth was one of the residents for whom Grievant was responsible.

32. On several occasions on that morning prior to the incident in question, Elizabeth defecated and/or urinated in her clothing. Grievant had personally cleaned feces from Elizabeth and changed her clothing twice before the incident in question.

33. At about 7:30 a.m., Grievant was in the bathroom. There were four other staff members (Linda Rivers, Tonia Mulcahy, John Robinson and Donald Crichton) in the room at the time and approximately five residents. Grievant had almost completed getting his other residents ready to go to

the dining room, when another staff member indicated Elizabeth was wet. Elizabeth was wet, and was covered with feces as she had defecated and had "painted" (a euphenism for the act of smearing feces). Grievant angrily took Elizabeth by the arm and escorted her to the sink, where he proceeded to wash the feces from her hands. As he washed Elizabeth, Grievant angrily called her a "fucking hog" several times, and said she belonged in J Building (a reference to a unit for ambulatory females) with the other "animals". Elizabeth groaned as this was occurring. We are unable to find this "groaning" was caused by the language used toward her or because she disliked water. We think the distinction is unimportant. He then took Elizabeth to the toilet, changed her clothes, and placed her on the toilet (State's Exhibit 11, pages 4 - 9).

34. About 15 minutes after the incident, Crichton, who had been in the bathroom at the time of the incident, told Mental Retardation Program Specialist Donna Hopkins, who was the acting "charge", about the incident. She, in turn, informed Brutowski, when the latter reported for work at about 7:35 a.m., that some staff members had alleged Grievant had verbally abused a resident (State's Exhibit 11, page 4).

35. After Brutowski was informed of the allegations, she notified her supervisor, John Choppa, and Officer of the Day Avi Freund, by telephone. Brutowski then spoke to Crichton about the incident. Following that, Brutowski went to Grievant, who was in the dining room feeding a resident, and summoned him to her office. Brutowski told Grievant allegations were made Grievant had verbally abused Elizabeth that morning. Brutowski asked Grievant to write a statement of the incident involving Elizabeth. Brutowski did not advise Grievant he had a right to have a

VSEA representative present. Grievant wrote a statement, which he gave to Brutowski. Upon receiving Grievant's statement, Brutowski informed Grievant he was relieved from duty, with pay, pending investigation (State's Exhibit 11, pages 4, 8).

36. Following the meeting with Grievant (which took about 10 minutes), and after Grievant was sent home on temporary relief from duty, Brutowski went to each of the witnesses to the incident (Mulcahy, Rivers, Robinson and Crichton), and asked each to write a statement describing the incident. In his statement, Robinson stated Grievant had placed Elizabeth on a "toileting chair rather forcefully, more force than is needed". After obtaining statements from all of the witnesses, Brutowski prepared a summary in writing, of what she had done, prepared a checklist as required by policy 2030, and placed all of that material in an envelope for her supervisor, John Choppa (State's Exhibits 9, State's Exhibit 11, pages 5-7 and 9).

37. On Monday, July 9, 1984, Brutowski's package of material was presented to Aines, who, by letter of that date, informed Grievant of his temporary relief from duty. Aines' letter provided, in pertinent part, as follows:

> In accordance with the provisions of Paragraph 12.041 of Vermont's Personnel Rules and Regulations, and with the provisions of Article XV of the Agreement between the State of Vermont and Vermont State Employees' Association, Inc., you are being temporarily relieved from duty, with pay, effective July 7, 1984, pending the results of the investigation of alleged resident abuse.
>
> You have the right to representation in any interrogation connected with this investigation, or any hearing resulting therefrom. You may consult with the BTS Personnel Officer, if you wish additional information.
>
> (State's Exhibit 10)

38. Following Aines' review of the material submitted by Brutowski, he took the material to Morrey, and recommended to Morrey that an investigative panel, under Policy 2030, be convened. That recommendation was followed.

39. By its report, dated July 11, 1984, the investigatory panel found Grievant had verbally abused Elizabeth. It made no findings concerning the question of physical abuse mentioned by Robinson (State's Exhibit 11, pages 1, 2).

40. Following the panel's submission of its report, Morrey made the decision to dismiss Grievant. By letter dated July 19, 1984, Morrey informed Grievant of his dismissal, but offered to allow Grievant to resign in lieu of dismissal (State's Exhibit 13).

41. Grievant refused to resign his position, and by letter dated July 24, 1984, Morrey advised Grievant of his dismissal. That letter provided in pertinent part:

> This is to advise you that you are hereby dismissed from your position... effective July 19, 1984. Outlined below are reasons that led to this action:
>
> > On August 25, 1982, you were involved in an incident of resident mistreatment, for which you were suspended from duty, without pay, for five workdays.
> >
> > On October 21, 1983, you received a written reprimand regarding problems with attendance. On November 28, 1983, after noting no improvement in this area, you were suspended from duty, without pay, for three workdays.
> >
> > On March 25, 1984, you were placed in a 90-day warning period for having received an annual performance evaluation rated "2"... Deficiencies in the area of Absenteeism and Tardiness were noted.

> On June 25, 1984, your warning period was extended by 120 days. Again deficiencies in the area of Absenteeism and Tardiness were noted.
>
> On July 7, 1984, you were involved in an incident of resident abuse, specifically verbal abuse, in violation of Brandon Training School Policy 2030.
>
> We consider this violation of Policy 2030 and these performance deficiencies to be severe enough to justify your immediate dismissal from State service, for gross misconduct, under Article 13, Section 3, of the current collective bargaining agreement (disciplinary action article). As such, you are being dismissed without two weeks notice or two weeks pay in lieu of notice.
>
> (State's Exhibit 14)

42. In deciding to dismiss Grievant, Morrey considered the incident involving Elizabeth to be an extremely serious offense; that Brandon's job is to take fragile, dependent persons and help, console and train them. He viewed Grievant's offense to be in the opposite direction; that he undermined, belittled and degraded a resident in front of other residents. He viewed Grievant's offense as verbal abuse even though Elizabeth may not have understood what Grievant was saying to her; further Elizabeth was not the only resident affected here since other residents were also present. Morrey views verbal abuse as equal, if not superior, to physical abuse because it can carry more scars. Morrey considered in his decision that Grievant had "roughly handled" Elizabeth even though that charge is not contained in the dismissal letter. Grievant's attendance problems and placement in a warning period and warning extension were seen by Morrey as evidence of deteriorating performance on Grievant's part. However, Morrey would have dismissed Grievant in the absence of attendance problems and even if he was not in a warning period at the time of his dismissal; that the abuse of Elizabeth and the 1982 incident of abuse warranted dismissal without more. Morrey considered

Grievant's suspension for abuse in 1982 to be the start of a continuing deterioration in performance and to constitute a history of questionable resident interaction. Morrey reviewed Grievant's personnel file before deciding to dismiss him and was aware of all his past performance evaluations and disciplinary actions. Morrey concluded dismissal was an appropriate offense since Grievant was on notice abuse would not be tolerated and had ample opportunity to correct his work. Morrey believed Brandon's abuse policy dictated Grievant's dismissal. Morrey did not consider the fact Grievant had to clean feces off Elizabeth and change her for the third time that morning as a mitigating circumstance because that was Grievant's job. Morrey did not consider the extreme heat in the bathroom as a mitigating circumstance because it was hot for everyone.

43. Article 17 of the Contract provides in pertinent part:

ARTICLE 17
DISCIPLINARY ACTION

1. No permanent... status employee covered by this agreement shall be disciplined without just cause. 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;
c. impose a procedure of progressive discipline... in increasing order of severity;
d. In misconduct cases, the order of progressive discipline shall be:
i. oral reprimand;
ii. letter of supervisory counseling (applicable to those agencies/departments which utilize this letter);
iii. written reprimand;
iv. suspension without pay;
v. dismissal.
... f. The parties agree that there are appropriate cases that may warrent the State:

i. bypassing progressive discipline...
ii. applying discipline... in different degrees;
iii. applying progressive discipline for an aggregate of dissimilar offenses, except that dissimilar offenses shall not necessarily result in automatic progression;

as 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 reasons(s) for dismissal...

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

a. gross misconduct...

... 6. Whenever an employee is called to a meeting with management where the purpose of the meeting is to determine whether discipline shall be imposed, the employee shall be notified of his/her right to request the presence of a VSEA representative and, upon such request, the VSEA shall have the right to accompany the employee to any such meeting... Notices of temporary relief from duty with pay shall contain a reference to the right of the employee to request representation by VSEA or private counsel in any interrogation connected with the investigation or hearing resulting therefrom.

7. The appointing authority... may suspend an employee without pay for disciplinary reasons for a period not to exceed thirty (30) workdays...

8. The 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 made... concerning the employee... 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.

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... Board shall have the authority to impose a lesser form of discipline.

OPINION

Extension of Warning Period

The first issue raised by Grievant is the validity of his June 25, 1984, performance evaluation and simultaneous extension of his warning period. Grievant contends the evaluation and resultant warning period extension have no basis in fact, and thus the Board should order both the evaluation and the warning period extension rescinded. We note the evaluation and warning period extension played a part in the Employer's decision to dismiss Grievant, and if they are without basis in fact, that is a factor which must be weighed in determining whether just cause existed for Grievant's dismissal.

The State's expressed basis for the unsatisfactory performance evaluation Greivant received on June 25, 1984, and extension of warning period was a perceived continued problem with absenteeism; specifically his absences of April 7, April 8, May 8 and June 5, and his purported failure to provide medical excuses for those absences.

With respect to Grievant's absences on April 7 and April 8, those absences occurred before the initial warning period began. Section 2.043 of the Personnel Rules and Regulations defines a warning period as "a specified period immediately following the receipt of a marginal or unsatisfactory performance rating by a non-probationary employee during which he is expected to achieve an adequate level of performance" (emphasis added). Grievant's warning period commenced on April 10, 1984, when he was given a performance evaluation covering the period March 25, 1983, to March 25, 1984, and informed he was being placed in a three-month warning period.

Absences occurring prior to a warning period cannot be used to justify an extension of a warning period, since such extension must be based on performance during the initial warning period. We find the Supreme Court's decision, In re Grievance of Muzzy, 141 Vt. 463 (1982), persuasive here. 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. Analogously, we think Muzzy dictates deficiencies occurring prior to a warning period cannot be used to justify an extension of that warning period.

With respect to Grievant's absences on May 8, 1984, and June 5, 1984, which clearly fell during the warning period, Grievant obtained a doctor's note for those absences and provided them to his supervisors. When Grievant was placed in a warning period on April 10, he was informed by his supervisor, Sharon Brutowski, he needed doctor's slips for absences. This he did on May 8 and June 5 and cannot be faulted in any way for those absences.

Inasmuch as the State's reasons for the June 1984 evaluation and extension of Grievant's warning period are without basis in fact, they are invalid and should be rescinded.

Grievant's Right to VSEA Representation

Grievant's next claim is the Employer violated Article 17, Section 6, of the Contract when Supervisor Brutowski failed to advise Grievant of his right to request the presence of a VSEA representative when she summoned Grievant to her office on July 7, 1984, and asked him for a

written statement of his alleged abuse of a resident.

Article 17, Section 6 provides an employee "shall be notified" of the right to request the presence of a VSEA representative whenever an employee is "called to a meeting with management where the purpose of the meeting is to determine whether discipline shall be imposed". This places an affirmative duty on a supervisor to inform the employee of their right to VSEA representation at such a meeting. Here, the purpose of Brutowski calling Grievant to her office was to initiate management's investigation of whether Grievant should be disciplined. While Brutowski did not call Grievant to the meeting for the purpose of determining whether she would impose discipline, the meeting nonetheless was called for the express purpose of contributing to management's determination whether discipline would be imposed. Grievant was required to write out a statement which was reviewed by the panel investigating Grievant's alleged abuse of a resident. It became evidence against him at a time when he was entitled to representation. Under such circumstances, Brutowski was contractually obligated to notify Grievant of his right to a VSEA representative at the meeting.

While we find the Employer in violation of the Contract in this regard, Grievant requested no specific remedy to redress the violation and there is no evidence of actual harm to Grievant due to the Employer's violation. Given these circumstances and our ultimate resolution of this case, we make no specific remedy.

Notice of Relief from Duty

Grievant alleges the notices, both oral and written, he received of temporary relief from duty violated Article 17, Section 8 of the Contract

in that: 1) by neither was Grievant informed of the specific charges against him; and 2) the written notice was not given to him within 24 hours of his temporary relief from duty.

Once again, we find the Employer in violation of procedural provisions of the Contract. Article 17, Section 8, provides, "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". The Employer did not notify Grievant in writing until July 9, two days after his temporary relief from duty, when Assistant Superintendent Aines informed Grievant by letter of his temporary relief. When Aines did so, he did not provide Grievant with "specific reasons". He simply informed Grievant he was temporarily relieved "pending the results of the investigation of alleged resident abuse".

The evidence indicates no actual harm resulting to Grievant from these violations. He should have been aware of the specific reasons for the temporary relief from duty on April 7, when Brutowski told him allegations had been made he had verbally abused a resident, Elizabeth, that morning and then subsequently temporarily relieved him from duty. There being no actual harm demonstrated to Grievant and Grievant having requested no specific remedy, we make no specific remedy for these violations.

However, procedural rights of employees in disciplinary cases were negotiated by the parties with the intent they be given effect, and in some cases procedural violations can have negative consequences on employees. While we do not believe a monetary award is appropriate in this case, in the past we have awarded employees monetary damages for procedural violations where the violations had negative consequences on

the employee. Grievance of Sypher, 5 VLRB 102 (1982). Grievance of Peck, 4 VLRB 434 (1981). The Employer should be forewarned of that possibility in future cases, since if an employer can violate procedural rights of employees knowing only a token penalty will be imposed, an employer is invited to continue ignoring procedural rights of employees. Peck, supra, at 342.

Dismissal

We turn now to determining whether just cause exists for Grievant's dismissal. Grievant alleges his dismissal violated Article 17 of the Contract in that: 1) no just cause existed for dismissal, 2) progressive discipline was inappropriately bypassed; and 3) dismissal constituted an abuse of discretion in that it is too severe for the alleged offense and it is inconsistent with punishment imposed on other employees for the same or similar 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 own 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.

We begin by indicating some of the bases for Grievant's dismissal were incorrectly relied on by Superintendent Morrey, who dismissed Grievant. First, part of the expressed justification for Grievant's dismissal was his extended warning period. As indicated above, that extended warning period was invalid. Second, Morrey testified Grievant had "roughly handled" Elizabeth, a form of physical abuse, when he decided to dismiss. The dismissal letter only charges Grievant with verbal abuse. Article 17, Section 2, of the Contract provides "the appointing authority shall state the reason(s) for dismissal". Morrey did not do so accurately and we are concerned that the action taken was for an unsupportable reason. The evidence does not indicate Grievant did roughly handle Elizabeth.

The fact each basis for Grievant's dismissal has not been sustained does not mean the dismissal must be reversed. See Grievance of Bishop, 5 VLRB 347 (1982). If the facts of the underlying incident are different

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[1]In 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

than those relied on by management when it imposed the penalty, we will determine whether the proven facts justify the penalty. Grievance of Colleran and Britt, 6 VLRB 235 (1983).

In making this determination, we look to the specific factors enunciated in Grievance of Colleran and Britt, supra, to determine the legitimacy of the dismissal. We do this both to govern exercise of our discretion and to review management's application of the relevant factors in deciding to dismiss Grievant. Sherman, supra, at 404. The pertinent factors here are the nature and seriousness of the offense, Grievant's fiduciary role, Grievant's past disciplinary record, Grievant's past work record, the effect of the offense upon supervisors' confidence in Grievant's ability to perform assigned duties, the clarity of the notice to Grievant such conduct would be ground for discharge, the potential for Grievant's rehabilitation and mitigating circumstances surrounding the offense.

Superintendent Morrey considered Grievant's abuse of the resident Elizabeth on July 7, 1984, to be extremely serious and that, taken together with his suspension in 1982 for resident abuse, it alone constituted just cause for dismissal. Morrey stated he would have dismissed Grievant even if he had not been in a warning period for attendance problems at the time of his dismissal.

We find Grievant's offense to be a serious one. Grievant's position was one of custodial responsibility and trust; this imposed on him a special duty of care. Grievance of Bishop, supra, at 375. He acted contrary to that duty here. He verbally abused a resident in the presence of other residents and staff by angrily calling her a "fucking hog"

several times and an "animal". Brandon's job is to take dependent persons and treat them with respect and care. Grievant acted in the opposite direction here by degrading the resident in front of other residents and staff.

We reject Grievant's claim there was no verbal abuse since the resident did not understand Grievant's words. Whether the resident understood what was said to her or not, other residents may have and other staff members present certainly did. As we noted in Grievance of Harrison, 2 VLRB 304, 320-323 (1979), racial epithets in the workplace foster discrimination. Analogously, a workplace filled with degrading obscenities directed toward mentally and physically disabled residents tends to foster an environment where residents are degraded and treated as obscene.

We believe verbal abuse and physical abuse, though different in kind, are the same in quality. As pointed out in Harrison, supra, the vocabulary of the workplace is a significant aspect of employment. Verbal abuse, or degrading language, encourage habits of action which flow from habits of mind. The consequences may be as detrimental as physical abuse.

Grievant was also on clear notice verbal abuse of residents would not be tolerated. He was aware of Policy 2030 which provided verbal abuse would not be tolerated and that "ordinarily, such resident abuse is a removal offense". Moreover, he had been suspended in 1982 for physical abuse of a resident, and was told by Assistant Superintendent Aines that he had "gone out on a limb" for him but that if a similar incident occurred in the future, he would not be able to help him.

However, we reject the State's apparent contention that Policy 2030 and Aines' notice to Grievant mandated Grievant's dismissal when he abused the resident Elizabeth. In essence, the State is saying the dismissal is per se just. As we stated in Sherman, supra, at 405:

> 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.

In looking at all the circumstances of the case here, we believe the dismissal of Grievant was excessive. One verbal lapse by Grievant, under circumstances where most people would feel a sense of disgust for having to clean human feces for the third time on a hot day, deserves severe condemnation but not the total loss of a job.

The Employer cites our decision in Grievance of Sherman, supra, for the proposition that, as an experienced and trained employee, Grievant should have been able to deal with the stress resulting from the circumstances of having to clean the resident's feces for the third time on a hot day. In Sherman, we found the employee should have been able to deal with the stress resulting from transporting a recalcitrant patient to seclusion and ultimately upheld the dismissal of the employee for deliberately and thrice striking the patient.

We also think Grievant should have been able to deal with the stress resulting from the circumstances, which is why we believe he deserves severe punishment. We concur with Dr. Morrey that cleaning up feces on a hot day was part of the job. However, Grievant's offense was

reactive and unpremeditated, under circumstances where ordinary human reactions of revulsion briefly overrode self control. The offense is not as serious as the employee in Sherman who repeatedly and deliberately struck a patient and then lied about it.

The Employer contends there is nothing in Grievant's employment record to suggest he responds well to corrective action or should be given a third opportunity to mistreat Brandon residents; that his work history is tarnished with repeated disciplinary measures by Brandon management in efforts to correct his unacceptable behavior relating both to attendance problems and resident abuse.

With regard to attendance problems, Grievant was placed in a warning period for those problems and should have been removed from a warning period prior to his dismissal. Thus, Superintendent Morrey should not have had before him the "fact" Grievant was in a warning period when he was considering dismissal. We cannot conclude this error was entirely harmless.

At the hearing, Superintendent Morrey stated Grievant's declining performance since the 1982 suspension for abuse contributed to his dismissal. We do not believe the evidence supports this position. Outside of Grievant's attendance problems, which resulted in a reprimand, suspension and placement in a warning period, there is no other evidence of Grievant's performance being unsatisfactory. There is evidence that for the period March 1980 to March 1982, Grievant received overall "4" ratings ("frequently exceeds job requirements/standards") on his performance evaluations, and thereafter, with the exception of his attendance problems, dropped to "3" ratings ("consistently meets job requirements/standards").

In essence, the Employer's position is if you are frequently exceeding your job requirements and then only meet those requirements, you have somehow fallen from grace. We cannot accept that argument. If an employee meets performance standards, that is what is required. Dropping from a exemplary employee to a satisfactory one cannot form a basis for dismissal.

Given the circumstances of this case, where there has been a prior incident of abuse two years earlier under quite different circumstances, we believe the Contract's highest disciplinary penalty outside of dismissal - a 30-day suspension - is reasonable. It is evident Grievant is a satisfactory employee who can be rehabilitated if he receives a sufficiently severe penalty to enforce the seriousness of the offense. Grievant admitted at the hearing he violated Brandon's abuse policy by his actions, and we believe if a severe penalty is imposed, his superviors can trust him to perform his assigned duties without again engaging in abuse.

The loss of 30 day's pay is a serious penalty. Grievant will lose six weeks wages and could be disqualified from receiving unemployment benefits for that period. We note Grievant's representative made no specific objection to such a penalty during the hearing and his brief maintained a "heavy" suspension would be appropriate.

We do not mean to say in this case an employee is entitled to three strikes before he's out. Under the circumstances, however, a 30-day suspension is adequate to enforce the seriousness of the offense.

ORDER

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

1. The performance evaluation Grievant received on June 25, 1984, giving him an overall rating of "2" ("inconsistently meets job requirements/standards") and a "2" rating in the area of "absenteeism and tardiness" and containing adverse comments on his attendance problems, and accompanying letter informing Grievant his warning period was being extended, shall be destroyed; and shall be replaced with an evaluation giving Grievant an overall "3" rating and a "3" rating in the area of "absenteeism and tardiness" with no adverse comments and removing Grievant from his warning period; and

2. Grievant shall be reinstated to his position as Mental Retardation Program Specialist B at the Brandon Training School; and

3. Grievant shall be awarded back pay and benefits from the date commencing 30 working days from the date of his discharge until his reinstatement for all hours of his regularly-assigned shift, minus any income (including unemployment compensation received and not paid back) received by Grievant in the interim; and

4. the parties shall submit to the Board by May 13, 1985, a proposed order indicating the specific amount of back pay and other benefits due Grievant; and if they are unable to agree on such proposed order, shall notify the Board in writing that date of specific facts agreed to by the parties, specific areas of factual disagreement and a statement of issues which need to be decided by the Board.

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

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

James S. Gilson