

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:

JOHN GORRUSO

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DOCKET NO. 85-10

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On February 22, 1985, Attorney Therese Corsones filed a grievance on behalf of John Gorruso ("Grievant"). The grievance alleged the dismissal of Grievant from his position as Correctional Officer B at the Rutland Community Correctional Center ("RCCC") was in violation of the collective bargaining agreement between the state of Vermont and the Vermont State Employees' Association effective for the period July 1, 1984 - June 30, 1986 ("Contract"), in that there was no just cause for dismissal. The grievance also alleged Grievant's due process rights were violated because the appointing authority, RCCC Superintendent Michael O'Malley, failed to conduct a fair or impartial investigation.

Hearings were held before the Board on September 19, 1985, September 26, 1985, October 3, 1985, and October 24, 1985. The full Board was present at all the hearings with the exception of the October 24 hearing, when Member James Gilson was absent. Member Gilson has reviewed that portion of the record he missed and has participated in the decision. Attorney Corsones represented Grievant. Assistant Attorney General Michael Seibert represented the State.

Requested Findings of Fact and a Memorandum of Law were filed by Grievant on November 7, 1985. The State filed Requested Findings of Fact on November 7, 1985, and a Memorandum of Law on November 12, 1985. Reply briefs were filed by both parties on November 20, 1985.

The Board held the evidence open in this matter until December 18, 1985, to allow the cross-examination of Lisa Casey by deposition. The deposition was filed on December 19, 1985. Grievant filed Supplements to his Requests for Findings and Memorandum of Law on December 18 as a result of the deposition. The State filed no additional materials due to the deposition.

FINDINGS OF FACT

1. Grievant was first employed by the State of Vermont as a temporary Correctional Officer at RCCC for the period February 1980 through September 1980, when he was hired into a permanent position as a Correctional Officer. He completed his original probationary period in March 1981 and was reallocated upward to the position of Correctional Officer B in October 1981, in which position he worked until his dismissal in January 1985. At all times relevant herein, Grievant worked the third shift at RCCC, which began at 11:30 p.m. and ended at 7:30 a.m.

2. At the time Grievant reached the end of his original probationary period in March, 1981, Grievant's supervisor considered extending his probationary period because of an altercation Grievant was involved in while at a local bar. While Grievant's probationary period was not extended and he became a permanent status employee, Grievant's supervisor informed him this off-duty conduct was inappropriate. This course of events put Grievant on notice that off-duty activity on his part relevant to his employment was considered by his employer to be relevant in assessing his work performance. (State Exhibit 14).

3. During Grievant's tenure as a permanent Correctional Officer, he received one letter of reprimand and one letter of counseling. These letters were unrelated to sexual harassment. He received several letters of commendation. The performance evaluations he received all rated his overall work performance as "3" ("consistently meets job requirements/standards") (Grievant Exhibits 2-11, State Exhibit 15).

4. On January 29, 1985, RCCC Superintendent Michael O'Malley dismissed Grievant. The dismissal letter given to Grievant provided in pertinent part as follows:

"This letter is to inform you of your termination from State employment for three (3) separate incidents of sexual harassment against three (3) different female officers at this facility.

To wit:

On November 14, 1984 at approximately 2330 hours you entered the facility's administrative/front office area and informed Correctional Officer Terri Forte that you had scraped the windshield of her car for her. You then asked CO/Forte what you had done the prior night at a local night club called "Cousins", of which her husband is a part owner. CO/Forte informed you that you had been a "jerk", and that you were not welcome back to that establishment at any time in the future. At this time you attempted to apologize to CO/Forte, and while she was seated at the receptionist's desk with her back to you, you placed your left arm around her shoulders and drew her close to you. CO/Forte immediately demanded that you stop doing this, informed you to leave her alone, and that she had a lot of work to do.

You continued to badger CO/Forte about the prior evening for a period of two or three minutes while she 'repeatedly' told you that she had a lot of work to be done and wanted to be left alone to do it. After several minutes, you left CO/Forte alone and returned to the security area of the building.

Approximately ten (10) minutes later, you returned to the administrative/front office area and began to interrogate CO/Forte again as to your actions the previous evening at "Cousins". You asked her questions like, "What did I do last night?", "What was so bad about it?" and, "Why are you so mad at me?". With her back still towards you, she repeatedly told you that she, "did not want to talk about it", had work to do and for you to leave her alone.

You did not listen to CO/Forte's continued pleas to leave her alone and refused to leave the office. You went on to inform CO/Forte that you, "liked her very much", and wanted the two of you to be able to, "talk to each other". Again, with her back to you, CO/Forte told you that it would be a long time before this would happen, and she 'again' demanded that you leave her alone.

At this time you again drew her tightly to you by placing your left arm around her head and neck. CO/Forte struggled unsuccessfully to get out of your grasp and started to scream for you to leave her alone. It was only then that you released your grasp on her.

CO/Forte was now in an extremely distraught condition by this time, and again demanded that you leave her alone. You replied, "I didn't mean anything by it" and hugged her once more from behind.

CO/Forte then emphatically informed you, "don't ever touch me again"! She then informed you that she was going to call her husband and that you should leave.

You refused to leave unless CO/Forte promised she would talk to you before she left the facility. In an attempt to get you to leave her alone, Mrs. Forte stated, "maybe, we'll see".

You then said to CO/Forte, "you promise? You had better talk to me", and then you left the area.

CO/Forte finished her work and attempted to leave the facility quickly in an attempt to avoid another confrontation with you. You were waiting for her, however, outside the facility between the employees exit and the parking lot in front of the facility.

As CO/Forte attempted to go to her car, you confronted her and said, "can we talk now"? CO/Forte repeatedly informed you that it, "was late", and her husband was waiting for her and she wanted to get in her car and leave. You continued to follow her into the parking lot and attempt to apologize for your behavior the night prior at the night club.

Sometime after Mrs. Forte started her car, and while you scraped her windshield unsolicited, you received a radio message to return to the facility to give assistance. Both you and Officer Forte responded. Just prior to entering the building, a second radio message was received informing you that everything was O.K. At this time you informed Mrs. Forte that you had something to say, and that you needed to say it now before you lost your nerve. You then informed Mrs. Forte, "Terri, I like you a lot, a lot more than I should. I love you". Mrs. Forte then very promptly told you that she was very happily married, that she never wanted to talk to you again or see you in or around her husband's place of business again. As Mrs. Forte started across the parking lot, you began to yell, "I love Terri", over and over again.

To wit:

On December 10, 1984, at the Admission Control Desk of the Rutland Community Correcitonal Center, at approximately 2330 hours, in front of several male and female officers, you made a remark that denigrated Officer Casey, and all women in general, when you stated, "Sexual harassment, my ass, you're just like all the other sluts", or words to that effect, when she voiced concern over possible sexual harassment.

To wit:

In the course of my investigation into the aforementioned incidents, I learned of other examples of inappropriate behavior in the past which leads me to conclude that your continued employment would have a substantial detrimental impact on the work environment of this facility.

On December 31, 1981 in the Rutland Correcitonal Center, at approximately midnight, you requested that officer Ellen Marcelle (McWard) go into the laundry room with you, so that you could show her something. When Officer Marcelle (McWard) entered the laundry room, you shut off the lights and grabbed her, attempting to kiss her. Officer Marcelle (McWard) fought you off, and when she did you told her that everyone was asleep, and that no one could see you.

Officer Marcelle (McWard) very sternly informed you that this was neither the time nor the place. After this incident, Officer Marcelle (McWard) informed Supervisor Robert Manning that she never wanted to work with you ever again.

During the period between March and December of 1982, you engaged in a course of abusive conduct toward Officer Allison Chew, including an incident in March where you offered to drive her home from work, and proceeded to drive around instead for half an hour, physically assaulted her, and caused her a great deal of fear and concern. Abusive conduct including; harassing phone calls, conversations, continued until December 1982 when Officer Chew resigned, in part because of your conduct.

On October 17, 1983 all staff was given a memo concerning "Staff Interaction" (Memo #83-154), in which you were informed that "Sexual slanders and come-ons smack of harassment and will not be tolerated."

This termination is effective upon receipt of this letter.

This termination falls into the category of gross misconduct. You will not receive two weeks notice or two weeks pay in lieu of notice.

...In accordance with the agreement between the V.S.E.A. and the State of Vermont, Article 16, section #3:

"...upon request, meet informally with the employee and VSEA representative, if requested, to discuss the circumstances surrounding his dismissal." (State Exhibit 1)

5. Ellen McWard, a Correctional Officer, and Grievant were working in the same area on the night of December 31, 1981. At around midnight, Grievant asked McWard to come to the laundry room with him. After they entered the laundry room, Grievant closed the door, shut off the light and tried to kiss her. He told her everyone was asleep and nobody could see with the light out. She resisted and told him it was neither the time nor the place for such activities. He said he did not mean anything by it and just wanted to wish her a Happy New Year. She reported the incident to supervisor David Champine and asked Supervisor Robert Manning that she not be assigned to work with Grievant alone.

6. This incident was not discussed with Grievant by his supervisors at the time it occurred. It was not mentioned to him until it was referred to by Superintendent O'Malley during the investigation which led to Grievant's dismissal.

7. In Spring 1983, at Whirlaways bar in Rutland, Grievant twisted McWard's arm behind her back and attempted to kiss her. These attempted kisses were unwanted by McWard. McWard complained to Assistant Superintendent Richard Wright and Steven Cocci, RCCC Chief of Security, about Grievant's actions. Cocci then counseled Grievant not to continue such behavior toward McWard.

8. During 1982, Allison Chew was a Correctional Officer at RCCC. During that period, Grievant did not engage in abusive conduct toward Chew. He did not physically assault her, did not harass her with phone calls and by conversation, and did not refuse to let her out of his car. Chew invited Grievant into her apartment on several occasions and met with him at bars several times. She never indicated to Grievant she did not want to have anything to do with him. We do not conclude Chew left the facility partly because of Grievant.

9. During 1982, Chew did not complain to any superiors about Grievant's actions. Grievant knew nothing of the allegations against him concerning Chew until the time he was dismissed.

10. Grievant met Terri Forte in the Spring of 1984, when she began working at the Correctional Center as a temporary correctional officer. While she was employed as a temporary correctional officer, Forte worked all three shifts and worked the same shift as Grievant approximately five times. Forte was hired into a permanent position as a correctional officer in May 1984, and was regularly assigned to work the second shift, which ended at the time Grievant's third shift began. Prior to October, 1984, Forte and Grievant exchanged greetings and engaged in brief conversations on a friendly basis while at work. Forte served in a probationary period until November 1984.

11. Forte's husband, Greg Forte, is co-owner and manager of a nightclub in Rutland named "Cousins". Forte typically finished work at 11:30 p.m. and went to Cousins to visit with her husband until closing time. During the period May through September, 1984, Grievant and Forte sat together and engaged in friendly conversation on several occasions while they both were in Cousins.

12. On October 11, 1984, Grievant's birthday, Forte was alone in the video room at Cousins playing a video game. Grievant came up behind Forte and put his arms around her waist. Forte turned around and Grievant asked Forte for a birthday kiss. Forte indicated she did not want to give him a kiss but he immediately kissed her. The kiss was of short duration and was not wanted or encouraged by Forte. Both Forte and Grievant had been drinking at this time. Forte did not complain to her work supervisors about the incident at the time.

13. On October 18, 1984, Forte parked in a lot on the other side of Route 7 from Cousins. As she was crossing Route 7, Grievant drove quickly out of a nearby parking lot in his pickup truck. Grievant stopped in the passing lane just as Forte reached the middle line in the roadway so that Forte's movement was impeded. She would have had to go around the truck to get off the roadway. Grievant asked Forte if she wanted to have a drink at another bar. Forte told Grievant she was going to Cousins instead. Grievant repeated his request and Forte refused. Grievant then drove off. Grievant did not try to pull Forte into the truck.

14. Forte had reason to be afraid for her personal safety when Grievant stopped in front of her since her movement was impeded in the middle of the roadway. She also had reason to fear that Grievant would make an unwelcome sexual advance towards her. Grievant knew or should have known that his actions could have caused such fear. Grievant's motive in stopping was to further an intimate relationship with Forte. This incident placed Forte in fear of her personal safety and in fear of unwelcome sexual attention. Forte did not complain to her work superiors concerning the incident when it happened.

15. Grievant was aware Forte had gone target shooting with another correctional officer on occasion. Grievant was a gun enthusiast and had experience in target shooting. On October 25, 1984, at work, Grievant came into the office where Forte was working overtime and asked her several times to go target shooting with him. She refused. The next morning, Grievant telephoned Forte and again asked her to go target shooting. Forte indicated she had not changed her mind. Forte indicated to Grievant she preferred to go target shooting with the officer with whom she had previously gone shooting. Grievant did not ask her to go

target shooting again. Grievant's motive in asking Forte to go target shooting was to further a friendly relationship. Forte did not complain to her work superiors concerning the incident when it happened.

16. On November 13, 1984, Forte was in Cousins with her friend, Ruth Manning. Grievant, who was intoxicated, was behaving in an obnoxious manner. At one point, he pulled a woman off a bar stool onto the floor. Grievant attempted to make conversation with Manning and Forte. They ignored Grievant. Eventually, Forte asked Grievant to stop bothering them and to leave them alone. Grievant eventually left the area and went back to talk to a friend. Later that evening, Darla Piggrem, a RCCC correctional officer, told Forte she had overheard Grievant say his ultimate goal was to come into Cousins in his Marine dress blues and open up on the crowd with an M-16 machine gun. There is insufficient, direct reliable evidence for us to conclude Grievant made that statement. Piggrem told Forte she was going to contact the FBI concerning what Grievant had allegedly told her. At closing time that night, Grievant ignored several requests by Cousins' employees to leave. Forte, in an angry voice, asked him to leave. Grievant, who by this point was extremely intoxicated, eventually left after being persuaded to by a friend, Michael Erickson.

17. On the following day, November 14, Forte worked second shift as usual. After finishing work, Forte went to the front office area to RCCC to review inmates' files. Grievant, who was working third shift, came into the front office, at which point Forte was reviewing the file of an inmate who had allegedly killed several people in a car accident after leaving her husband's bar, resulting in the bar being sued. Grievant told Forte

he had scraped ice from her windshield on the way into work that night. Grievant tried to talk with Forte about his actions of the preceding night, indicating he was too drunk to remember what he did and wanted to apologize. Forte told Grievant he had acted like a jerk, and had infuriated both herself and her husband. Grievant apologized. Forte, appearing uninterested in Grievant's apology, continued to review the inmate's file and discussed its contents with Grievant. Grievant leaned over Forte as she was reading the file and put his left arm around her left shoulder for a short time. Forte asked Grievant to take his arm off her shoulder. Grievant said he did not mean anything by it. It would be reasonable for Forte to interpret Grievant's action as a sexual or affectionate gesture. Grievant did not attempt to hug Forte at any time. Forte was upset by Grievant's action. Grievant again attempted to apologize to Forte for his actions at Cousins the night before. Forte did not appear interested in Grievant's apology and he left the area. Before leaving, Grievant indicated he wanted to talk to her before she left about the previous night. Grievant did not return to the office that night.

18. Shortly thereafter, Forte tried to leave the facility without Grievant seeing her. However, Grievant was completing his exterior check of the building at the time and approached Forte in the facility parking lot. Grievant's duties required him to be where he was at the time. Grievant walked Forte to her car and attempted again to talk about his actions the previous night. When they got to her car, Grievant received a radio message to report to a certain area of the facility. Grievant appropriately responded to the radio call, acknowledging the call with a "10-4" and immediately heading towards the facility. However,

before Grievant reached the building, he received a second radio call to disregard the first call. Grievant then returned with Forte to her car and told Forte he liked her a lot, more than he should. He told her that he loved her. Forte told Grievant she was happily married and asked him to stay away from her and Cousins. Forte then walked to her car. Grievant yelled "Terri, I love you" several times as Forte walked to her car and drove off.

19. Grievant's activity at the center on the night of November 14, when coupled with his off duty behavior towards Forte, had the effect of creating an offensive working environment for her.

20. On December 10, 1984, Lisa Casey, a Correctional Officer at RCCC, found a bible in her mailbox when she came to work. The bible had certain passages generally related to morality marked in the text. Casey remarked, "This looks like sexual harassment to me." Grievant, who was present, responded "Sexual harassment, my ass." He did not also say "You're just like all the other sluts."

21. About 1 1/2 months prior to this, while in a Rutland bar, Grievant asked Casey to go to another bar with him. Casey agreed to go. After one drink, she asked Grievant to return her to her car. However, Grievant did not return her to her car but drove to another bar instead, where they had a few more drinks. As they left that bar, Grievant attempted to kiss Casey but she successfully resisted his advances. Finally, Grievant returned Casey to her car.

22. Casey did not report this incident to her supervisors at RCCC until she reported the December 10, 1984, incident.

23. On November 20, 1984, Superintendent O'Malley called Forte into his office to discuss the M-16 allegation Darla Piggrem had made

against Grievant. During that meeting, Forte relayed to O'Malley her version of the alleged sexual harassment of her by Grievant. Following this meeting, O'Malley conducted an investigation. He invited all female officers to his office and inquired if any of them had been "sexually harassed". The interview produced the McWard, Chew and Casey allegations. During the course of his investigation, and prior to dismissing Grievant, O'Malley allowed Grievant, during a meeting with Grievant and his attorney, to respond to the Forte, Casey and McWard allegations. Grievant was not given the opportunity to respond to the Chew allegations prior to being dismissed. Grievant sought to have O'Malley listen to certain witnesses supportive of Grievant's version of the allegations against him. O'Malley declined to listen to such witnesses.

24. O'Malley's administration of the RCCC polarized the staff into pro-O'Malley people and those who opposed him. Staff were inclined to take sides on the issues and to perceive events at the RCCC consistent with their attitudes towards O'Malley.

25. In deciding to dismiss Grievant, O'Malley considered that Grievant could not be rehabilitated given the seriousness of his actions and the fact Grievant's sexual harassment of women had spanned a four-year period. O'Malley made no attempt to rehabilitate Grievant.

26. Female correctional officers began working at RCCC in 1980. No policies, guidelines or training were implemented with respect to the appropriate interaction between male and female officers at the facility.

27. On October 17, 1983, Superintendent O'Malley issued a

memorandum on "Staff Interaction" which he placed on the "Read and Sign" board at the facility. All correctional officers are required to be aware of memoranda placed on the "Read and Sign" board. At the time this memorandum was issued, there were 153 other memoranda on the board. This memorandum provided in pertinent part as follows:

"Due respect should be shown to staff members of the opposite sex, without being patronizing. All staff of this facility have a job to do, a job which can sometimes be very tough, proper staff interactions will make this job easier for each of us. Regardless of your gender, you should always strive to look at staff members of the opposite sex as a Correctional Professional. The happenstance of gender does not affect the often strenuous requirements of the occupation. The most important thing about the staff member of the opposite sex is the quality of the work they perform. Sexual slanders or 'come-ons' smack of harassment, and will not be tolerated." (State Exhibit 9).

28. Other than this memorandum, no other written notice was provided, prior to Grievant's dismissal, to correctional officers in the facility concerning appropriate interaction between male and female officers. No prompt reporting system for sexual harassment complaints was established or encouraged.

29. At all times relevant, Grievant was aware that it was a prohibited act to hug or kiss a female correctional officer at work, or to call a female officer a "slut." He understood he could be disciplined for such behavior. He also recognized that his off-duty conduct could affect his work and that this was an appropriate concern of management.

30. Prior to Grievant's dismissal, the Commissioner of Corrections had instructed all Superintendents to give high priority to ensuring that sexual harassment did not occur in a correctional facility. RCCC management and supervisors attended training and educational sessions on sexual harassment. However, no sexual harassment training or education was provided to non-supervisory employees.

31. Prior to Grievant's dismissal, no other employee had been dismissed at RCCC for sexual harassment, nor is there evidence of lesser discipline being imposed.

32. In January, 1985, subsequent to making her statement against Grievant, Forte was reassigned to work in the front office area directly under Superintendent O'Malley on a project writing policies and procedures and gathering information for the American Correctional Association accreditation process. Instead of working the second shift, Forte works the first shift, from 8:00 a.m. to 5:00 p.m. and works no weekends. This is a desirable position and we conclude O'Malley had a special interest in Forte's Career.

33. The Rules of the Equal Opportunity Commission, Sec. 1604.11, "Sexual Harassment," provide in pertinent part:

"(a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when

(1) . . . ,

(2) . . . ,

(3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

(b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

.....(d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

.....(f) Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

34. The Contract provides in pertinent part as follows:

ARTICLE 5

NO DISCRIMINATION OR

HARASSMENT AND AFFIRMATIVE ACTION

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 VSEA, 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, and of their obligation to adhere to any affirmative action plan or program that may be developed under applicable law 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.

ARTICLE 16

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 warrant the State:

- i. bypassing progressive discipline...;
- ii. applying discipline... in different degrees... as long as it imposing discipline for just cause.

..... 2. The appointing authority... may dismiss an employee for just cause with two weeks' notice or two weeks' pay in lieu of notice... In the dismissal notice, the appointing authority shall state the reason(s) for dismissal...

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

- b. gross misconduct;

10. In any case involving a... 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.

MAJORITY OPINION

Before discussing the specific charges made against Grievant, we first discuss two preliminary matters raised by the parties.

Admissibility of O'Malley Transcript

The State contends the Board erred when it admitted a portion of the transcript of an October 1, 1985, phone conversation between Superintendent O'Malley and Michael McNulty into evidence. The State requests the Board to reconsider its decision and now decline to admit such evidence.

We believe we were correct in admitting it as it is relevant to assessing the credibility of Superintendent O'Malley. In any event, we have given the transcript little weight because other factors are so much more decisive.

Grievant's Due Process Rights

Grievant contends he was deprived of his right to due process because Superintendent O'Malley failed to conduct a fair and impartial pre-termination hearing and investigation of the complaints against him. Grievant relies on the recent U S Supreme Court decision, Cleveland Board of Education v. Loudermill, ___ US ___, 53 L.W. 4306 (March 19, 1985), to support this contention. Therein, the Court held that employees with a protected property interest in continued employment are entitled to a pre-termination hearing.

We conclude Loudermill is not pertinent here because Grievant was dismissed prior to issuance of the Loudermill decision and we do not believe Loudermill should be applied retroactively. Solomon v. Atlantis Development, 145 Vt. 70 (1984). Grievance of Regan, 8 VLRB 340, 365 (1985).

Even assuming Loudermill is pertinent, it does not go as far as Grievant says, and obligate Superintendent O'Malley to conduct a fair and

impartial investigation and pre-termination hearing. All Loudermill says is that an employee must have specific notice of the charges against them and an opportunity to present their side of the story. Here, Superintendent O'Malley questioned Grievant as to the Forte, McWard and Casey charges. It is true Grievant was not given a pre-termination opportunity to respond to the Chew charges but the dismissal letter informed him of his contractual right to meet with the employer to discuss the circumstances surrounding his dismissal. We do not now need to decide whether this complied with Grievant's constitutional due process rights under Loudermill, but we do point out Grievant had an opportunity to present his side of the case.

Specific Charges Against Grievant

Grievant contends his dismissal violated Article 16 of the Contract in that no just cause existed for dismissal; that the penalty was clearly inappropriate and excessive. Our scope of review in this case is guided by Section 10, Article 16 of the Contract, and our decision in Grievance of Sherman, 7 VLRB 380 (1984).

The charges against Grievant are that he sexually harassed four female correctional officers primarily while he was on duty. Our review does not go beyond the reasons given by the employer for its action in the dismissal letter. Grievance of Regan, 8 VLRB 340, 366 (1985).

In determining whether alleged conduct constituted sexual harassment, we will, like the Equal Opportunity Commission, "look at the record as a whole and the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred." [Rules of the Equal Opportunity Commission, Section 1604.11(b)].

We note that we are not bound by the Rules of the Equal Opportunity Commission concerning sexual harassment since they have not been explicitly made part of the Contract. The Contract does not contain any detailed definition or guidelines concerning sexual harassment. Absent this, we presume the Contract intended to adopt some common understanding concerning what is appropriate behavior between the sexes in the workplace. The Rules of the Equal Opportunity Commission are relevant as an aid in understanding what a reasonable person at RCCC would be expected to know was embraced in the contractual meaning of sexual harassment.

The Rules have existed many years. Neither party objects to our use of the EOC guidelines, and as applied to this case they seem well within what is reasonable to expect of a definition of sexual harassment. Accordingly, we think the standard against which Grievant's behavior should be measured is that portion of the EOC Guidelines which provides:

"Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when.....

(3) Such conduct has the purpose or effect of unreasonably ... creating an intimidating, hostile or offensive working environment."

Further, we think the federal standard that requires an objective review is appropriate. Thus, "the focus of the question of sexual harassment should be on the defendant's conduct, not the plaintiff's perception or reaction to" ...it. Scott v. Sears, Roebuck & Co., 605 F Supp. 1047 (N.D. ILL 1985). We must determine, under the totality of the circumstances, whether Grievant's conduct, when viewed as objectively as we are able to do, was of such a nature that a reasonable person in the complainant's position would be subjected to an offensive working environment.

In order to make this judgment we must consider the severity of the conduct. Severity bears on whether a violation of work rules occurred. Federal courts in evaluating claims of sexual harassment under Title VII of the Civil Rights Act of 1964 (42 U.S.C. Section 2000e) require "severe and persistent" misconduct, Henson v. Dundee, 652 F2d 897 (11 Cir. 1982); or conduct egregious in nature consistently repeated. Robson v. Eva's Super Market, Inc., 538 F Supp. 857 (N.D. Ohio 1982). We do not think these standards, established to determine whether employers are financially liable, are the correct ones to apply in order to determine whether an employee should be disciplined. Nevertheless, we must examine the conduct at issue to make certain it is not trivial and would objectively have a prohibited effect of creating a hostile work environment. Of course, severity of conduct also bears heavily on appropriate discipline.

Grievant's off-duty conduct concerning the women he is alleged to have harassed is relevant to understand the totality of the circumstances in which the alleged on duty incidents occurred. Indeed, off-duty conduct itself can be cause for dismissal where there is a nexus between the conduct and employment. Grievance of Ibey and Earley, 6 VLRB 72 (1983) (nexus existed where two correctional officers smoked marijuana on facility property immediately prior to reporting to duty; suspension appropriate). IRS and National Treasury Employees Union, Chapter No. 27 (Samuel Edes, Arb., Government Employee Relations Report, Sept. 7, 1981, No. 28, p. 34) (off-duty act of "mooning" by two slightly intoxicated Internal Revenue Service agents did not adversely affect the agents' ability to perform their jobs). That is not this case. All we consider is that there is a nexus here because Grievant is alleged to have

engaged in unwanted sexual attention of co-workers off-duty which continued on-duty and affected the work environment.

We now address the specific charges made against Grievant. Grievant is alleged to have sexually harassed four female correctional officers during a period spanning approximately three years. Grievant contends the charges involving officers Chew and McWard violate the contractual provision that discipline should be imposed within a reasonable time of offense.

We agree. There is no need to discuss the charge involving Officer Chew in this regard in any detail because we find the charge was unproven in any event. We have found the charge concerning Officer McWard was established by a preponderance of the evidence. However, the events on which the charge is based are too old to be considered as cause for discipline now.

The Contract requires the State to "act promptly to impose discipline ... within a reasonable time of the offense." The events involving McWard occurred more than three years prior to the dismissal, and the dismissal letter was the first time management cited Grievant for the incident even though McWard had informed her supervisor of the incident at the time it occurred. Since management knew of the offense, and took no action at the time, it has waived the right to punish for it now. c.f. Grievance of Swett and VSCFF, 4 VLRB 98 (1981). Grievance of McDonald, 4 VLRB 42 (1981). (Employees who did not grieve in a timely manner waived the right to complain of the action later.) Clearly, discipline was not imposed within a reasonable time of the offense.

The charge against Grievant involving a third female correctional officer, Lisa Casey, was not established by the State by a preponderance

of the evidence. Grievant was charged with calling Officer Casey a "slut" when she voiced concern over possible sexual harassment. We found Grievant did not in fact call her a slut. While Grievant did respond "sexual harassment, my ass" to Casey's expressed concern, the evidence does not indicate this voiced opinion establishes sexual harassment violative of generally understood rules of conduct for appropriate interaction between the sexes. We recognize Grievant's statement was made 1 1/2 months after Grievant had made unwelcome sexual advances to Casey while they both were off-duty. Nonetheless, we conclude a sufficient showing was not made that Grievant's statement did or would upset a female person of ordinary sensibility or that it in fact negatively affected Casey.

The remaining charge against Grievant is that he sexually harassed Officer Terri Forte. Grievant alleges he did not have fair notice the conduct at issue could be grounds for discharge. If the testimony of Officer Forte concerning this charge is accepted, it is clear Grievant had fair notice the action was prohibited and could lead to disciplinary action. Grievant admitted in his own testimony that, if Forte's testimony is correct, what she says he did was prohibited. Moreover, based on the facts we have found, it appears that by any standard, sexually motivated approaches which place another in fear is prohibited conduct, and Grievant knew it.

Finally, we note the State has a contractual obligation to strive to create a work environment where such conduct is prohibited and is clearly justified, and perhaps required, to impose disciplinary action to redress such inappropriate conduct. c.f. Grievance of Carosella, 8 VLRB 137 (1985). Grievance of Harrison, 2 VLRB 304 (1979). Contract

Article 5(3)(a).

The real issue here is not a notice issue but a fact issue, namely the degree of severity of the alleged conduct which actually occurred.

In this case, we were presented with extraordinarily conflicting evidence. Moreover, loyalties of the non-supervisory staff were fiercely divided between those who supported Superintendent O'Malley and those who did not. Almost any event at the center, it seems, would fan this conflict and color witnesses' reports of it. Added to this is the difficulty inherent in the subject matter itself. Men and women frequently view events between themselves differently in the best of circumstances and, where the loyalty or disloyalty to a boss is added to the mixture, the facts become exceedingly opaque. We are faced with a difficult fact-finding task.

If management had established a prompt and efficient reporting system where sexual harassment complaints could be immediately evaluated and addressed, some clarity might emerge. This is particularly so where female correctional officers had only began working in the facility in 1980, yet no training as to appropriate interaction between male and female officers was instituted. Management's failure to educate and train non-supervisory employees as to sexual harassment made it difficult to have an effective reporting system to stop and prevent sexual harassment. c.f. Bundy v. Jackson, 641 F2d 934, 947 (D.C. Cir., 1981) (employer ordered as preventive remedy to establish prompt and effective procedures for hearing, adjudicating and remedying sexual harassment complaints). Management instructed employees at a supervisory level and above on sexual harassment but instruction to non-supervisory employees was limited to a single memorandum buried on a board with over 150 other

memoranda. Forte herself felt apprehensive about making a complaint early on, when Grievant's conduct might have been corrected, because no system or history of doing so existed. In addition, we get the impression O'Malley's response to Grievant's actions was a belated attempt to demonstrate to his superiors his commitment to eliminating sexual harassment. Management's failure to implement an effective system within the non-supervisory staff to detect and prevent sexual harassment contributes to the problems inherent in fact finding of this kind where acts and effects may be hard to establish. We recite these concerns, not to excuse Grievant's behavior, but to illustrate the difficulty we have in establishing the facts.

We have carefully evaluated and weighed this conflicting evidence to determine the operative facts concerning the Forte charge, and have set them out in our findings. In sum, Grievant made unwelcome sexual advances when he put his arms around Forte's shoulder in the front office on November 14, impeded her freedom of movement, and then expressed his love for her in the facility parking lot later that night. We think, judged by objective standards, that given past events such as the video room kiss, the pickup truck incident, the target shooting incident, and the events of the night before in Cousins, Grievant created an offensive work environment for Forte. Thus, we conclude he engaged in sexual harassment of Forte.

However, we do not believe the credible evidence establishes he repeatedly hugged Forte against her express wishes on November 14. Nor can we find his previous actions, on-duty and off-duty, were as reprehensible as charged.

We turn to determining whether the proven charges against Grievant constitute just cause for dismissal. In cases such as this where the Employer has not established all the charges against Grievant, we must determine whether the remaining proven charges justify the penalty. Grievance of Collieran and Britt, 6 VLRB 235 (1983). A discharge may be upheld only if it meets two criteria of reasonableness: one, that the conduct constitutes a substantial shortcoming detrimental to the State's interests, and the other, that the employee had fair notice, express or fairly implied, that such conduct would be grounds for dismissal. In re Grievance of Brooks, 135 Vt. 563, 568 (1977).

We look to the factors enumerated in Collieran and Britt, *supra*, at 268-269, for guidance. The pertinent factors here are 1) the nature and seriousness of the offense, 2) the employee's type of employment, 3) the employee's past work record, 4) the effect of his offense upon supervisors' confidence in his ability to perform assigned duties, 5) whether Grievant was on fair notice his conduct could be grounds for discharge, 6) the potential for the employee's rehabilitation, and 7) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

Grievant's offense is much less serious than charged. On the evidence we consider, it consisted of off-duty conduct culminating in an unwanted placing of an arm on the female's shoulder, impeding her freedom of motion to protest his "love", and placing her in fear of unwanted attention. This conduct is more serious than verbal acts alone, but is far down the scale of possible acts of sexual harassment. There is a wide range of activity which could be sexual harassment. Without being exhaustive, it could range from a single lewd remark

or instance of unwanted physical touching (e.g., a "fanny pat") up to coerced sexual favors in order to retain employment. We regard Grievant's conduct as moderately severe.

The type of employment requires strict compliance with the rules. Grievant's duties as a correctional officer require him to depend on and have the trust of female correctional officers, and vice versa. His supervisors must have confidence in his ability to perform his assigned duties in this environment. We regard this factor as important.

The other factors we treat together. Superintendent O'Malley indicated the potential for Grievant's rehabilitation was slight given his offenses. O'Malley concluded Grievant's behavior towards women was so deviant that no supervisory action could be taken to restore him to being a good employee. However, rehabilitation encompasses the notion of strong supervisory control to correct faults.

As demonstrated, there is no experience to demonstrate whether Grievant could have been rehabilitated and no evidence as to what might have happened if RCCC management had established an effective preventive and remedial program concerning sexual harassment. Forte herself testified these incidents could have been avoided if Grievant's behavior had been dealt with at an early stage. We cannot find Forte's belief is without merit. We find it as likely as not that preventive and remedial actions by management and the counseling of Grievant would have taken care of the problem between Grievant and Forte, and if implemented the system would prevent recurrence.

Grievant's good work record versus the facts proven leads us to believe he is a good candidate for rehabilitation. Grievant's prior work record is substantially unblemished. One prior similar incident which is relevant to establishing notice to Grievant exists (i.e., the Spring 1983 Whirlaways bar incident), but by all accounts he was a conscientious, hard-working employee. Accordingly, we believe with proper counsel and supervision he can be a useful employee at the facility.

In determining the adequacy and effectiveness of alternative sanctions to deter sexual harassment, we not only look to deterring Grievant's conduct but that of other employees. As indicated, we believe Grievant's conduct could be deterred. We also believe draconian punishment in this case in an area such as sexual harassment, where a broad gradation of offenses exists, may actually make the workplace less secure of sexual harassment since any trivial or normal behavior between the sexes may be viewed as grounds for punishment.

The Contract calls for progressive discipline. Upon consideration of all factors, we think it should have been used here, and that this case is not a proper one to bypass it. It is true our Supreme Court has held dismissal of employees appropriate without recourse to progressive discipline in past cases. However, these cases have involved very egregious conduct. See In re Grievance of Brooks, supra (several severe arguments with co-workers, one of which involved the use of physical force against a female co-worker); In re Grievance of Carlson, 140 Vt. 555 (1982) (employee defrauded State of substantial amounts); In re Grievance of Goddard, 142 Vt. 437 (1983) (employee repeatedly struck inmate). Such egregious conduct did not occur here.

As already discussed, Grievant was on fair notice sexual harassment was prohibited. However, we question whether Grievant had fair notice the conduct he actually engaged in could be grounds for discharge.

We believe the dismissal of Grievant was an excessive and inappropriate action given the contract which makes progressive discipline the normal policy. Nevertheless, Grievant violated reasonable work rules and he should be punished. We judge a 30-day suspension without pay a reasonable penalty to enforce the seriousness of Grievant's offenses given the fact that his past work record is satisfactory. Also, for purposes of Grievant's rehabilitation, we believe it necessary for management to provide Grievant and the other employees at the facility clear written guidelines, training and supervision on appropriate workforce behavior with female employees and to clearly inform him recurrence of sexual harassment could lead to dismissal.¹



Kimberly B. Cheney, Chairman



William G. Kensley, Sr.

¹ The Vermont Advisory Committee to the US Commission on Civil Rights and the Governor's Commission on the Status of Women in their publication, Sexual Harassment on the Job - A Guide for Employers (September 1982), lists actions an employer can take to address sexual harassment. As a guide to RCCC management, we list the suggested actions: 1) establishing a procedure for handling complaints of harassment, or adopting the existing complaint procedure for this purpose, 2) determining whether there may be a sexual harassment problem through a survey using a questionnaire, 3) seek legal counsel about what the organization should do, 4) preparing and distributing a policy statement on harassment, 5) train the personnel staff about harassment, 6) include a discussion of sexual harassment in managerial and supervisory sessions, and 7) assign responsibility for coordinating the overall effort to prevent harassment.

DISSENTING OPINION

I vigorously dissent from my colleagues' view that Grievant should be reinstated. The facts of this case, as I see them, provide ample just cause for Grievant's dismissal.

Grievant is charged with sexually harassing four female correctional officers primarily while he was on duty. In determining whether alleged conduct constitutes sexual harassment, I concur with the majority view that the EOC Guidelines on sexual harassment are a useful aid in determining whether sexual harassment occurred.

I also accept the majority view of the facts of the McWard and Chew allegations and concur in their conclusion that these charges are unwarranted because they violate the contractual provision that discipline should be imposed within a reasonable time of the offense. I note, though, that the Whirlaway's bar incident in Spring, 1983, involving McWard served to place Grievant on clear notice that such inappropriate off-duty conduct towards female correctional officers was a concern of his supervisors since RCCC Chief of Security, Steven Cocci, counseled Grievant not to continue such behavior toward McWard.

It is here that I part company with the majority's version of the facts. Unlike them, I believe the charges concerning Officer Casey and Forte have been substantially established. I was not persuaded by the testimony of Grievant or of the witnesses he provided that he did not sexually harass female correctional officers. In fact, even the two female officers, Susan Cook and Diane LaMoria, called by Grievant testified to the effect that he had "hit on" them (slang appearing to mean "asked for sexual involvement").

I believe Grievant in fact called Officer Casey a "slut" when she voiced concern over possible sexual harassment. This statement, when considered in the context of the earlier off-duty incident where Grievant made unwanted sexual advances toward Casey, created an

offensive work environment for Casey. She took offense at such a demeaning statement and rightly so. These kinds of sexual slurs have no place in the workplace.

The charge concerning Officer Forte has likewise been substantially established. I disagree with the majority's view which essentially is that Forte may have led Grievant to believe a romantic relationship with her was possible but that, at some point when Forte made it clear she was not interested, Grievant failed to take the hint and harassed Forte, although to a limited extent. In my view, Forte did not "lead on" Grievant. Instead, it is evident Forte wanted nothing to do with Grievant but Grievant harassed her both off and on duty to the point where he created an intimidating and extremely offensive work environment for Forte.

The charges involving Forte concern Grievant's actions towards her on November 14 at work. In order to fully understand these incidents, it is necessary, as the EOC Guidelines provide, to "look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred." In this case, that means it is necessary to consider Grievant's previous off-duty conduct towards Forte, as well as on-duty conduct, to understand the context in which the November 14 events occurred. This is particularly necessary here where Grievant engaged in unwanted sexual attention of Forte off-duty which continued on-duty and affected her work environment.

This sad state of events began on October 11, 1984, at which point Forte's contacts with Grievant had been limited to greetings and

brief conversation. Forte was alone in the video room at her husband's bar, Cousins, when Grievant came up behind her and put his arms around her. Although Forte told Grievant to "take your hands off me," Grievant forcibly attempted to give her an unwanted kiss on the lips. After this incident, Forte was understandably fearful of Grievant.

Grievant's offensive off-duty actions continued on October 18, when he recklessly blocked Forte from crossing Route 7 and acted in an intimidating manner. He stopped his pickup truck in the passing lane just as Forte reached the middle of the roadway. Grievant opened the door and asked her to go to another bar with him and grabbed for her arm. She refused. Grievant persisted and Forte continued to refuse. Grievant eventually got angry and sped off. This action demonstrated Grievant's lack of appreciation of how to appropriately interact with women. Grievant should have known these actions would have the effect on Forte it did, to upset her tremendously and make her increasingly fearful of Grievant.

Grievant's intimidating, offensive manner continued on October 25, at work. Grievant asked Forte to go target shooting with him. Despite her refusal, he continued to badger her about going, to the point where he asked Forte if she was afraid of him and whether she would go if her husband was not around. Despite Forte's obvious refusal, he called her the following morning with the same request.

On November 13, the night before the charged incidents, Grievant acted in a particularly obnoxious behavior in Cousins, not only towards Forte, but evidently to any of the nightclub's patrons with whom he came into contact. I concur with the majority's version of the events here, with the exception that I believe Grievant told Piggrem his

ultimate goal was to come into Cousins in his Marine dress blues and open up on the crowd with an M-16.

It is under these circumstances that the events of November 14 occurred. At this point, Grievant reasonably should have recognized that Forte not only was not interested in a romantic relationship with Grievant, but was threatened and intimidated by his very presence. His actions of November 14, which I believe are substantially as depicted in the dismissal letter, escalated an already bad situation.

Grievant hugged Forte twice in the front office against her will although she made it clear to him she did not want him to touch her. He also badgered her in the office although she told him to leave her alone. Then, in the parking lot, Grievant continued to badger Forte as she was leaving work. He expressed his love for her although it was obvious at that point love for Grievant was the furthest thing from Forte's mind.

In determining whether these proven charges constitute a substantial shortcoming detrimental to the State's interests which justify dismissal, In re Grievance of Brooks, 135 Vt. 563, 568 (1977), I look to the factors enumerated in Grievance of Colleran and Britt, 6 VLBB 235, at 268-269, relevant for determining the legitimacy of disciplinary action. The pertinent factors here are the same as delineated by the majority.

Grievant's offense was extremely serious. Although the charges concerning officers McWard and Chew were unwarranted, the proven charges concerning officers Forte and Casey indicate Grievant engaged in sexual harassment of an extremely egregious nature. Grievant made

unwelcome sexual advances and engaged in verbal and physical conduct which had the effect of creating an extremely intimidating and offensive work environment for Casey and Forte, particularly Forte.

Grievant's duties as a correctional officer require him to depend on and have the trust of female correctional officers, and them to depend on and trust him. His conduct makes the potential for mutual trust and dependence between him and female correctional officers virtually nil. Superintendent O'Malley indicated the potential for Grievant's rehabilitation was slight given his offenses. I concur that his actions demonstrate he is an extremely poor candidate for rehabilitation. Grievant apparently does not recognize to this day what effects his actions have on women.

Grievant contends he was not on fair notice his conduct could be grounds for discharge. It is clear to me that a male in our present-day society is on fair notice that unwelcome sexual advances and verbal and physical conduct of a sexual nature towards women co-workers which intimidate women and make them fearful are prohibited conduct which may and should lead to severe disciplinary action. Grievant admitted he was aware it was prohibited to call a female correctional officer a "slut" or hug or kiss a female correctional officer at work. He also recognized his off-duty conduct could affect his work and that such conduct was an appropriate concern of management. Moreover, a memorandum issued by Superintendent O'Malley in 1983 provided Grievant with express notice that sexual slanders and "come-ons" smack of harassment and would not be tolerated.

I concur with the majority view that RCCC management should have done a better job of establishing a program to detect and prevent sexual harassment. However, in my mind this failure of management does not excuse Grievant's behavior which was intolerable and which he knew

to be prohibited.

In sum, I conclude that this was an appropriate case to bypass progressive discipline; Grievant's dismissal was neither inappropriate nor excessive. His conduct was every bit as egregious as that engaged in by the employees in Brooks, Supra; In re Grievance of Carlson, 140 Vt. 555 (1982); and In re Grievance of Goddard, 142 Vt. 437 (1983); where bypass of progressive discipline was approved by our Supreme Court.


James S. Gilson

ORDER

Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED the grievance of John Corruso is SUSTAINED; and

1. Grievant shall forthwith be reinstated to his position as Correctional Officer B at the Rutland Community Correctional Center;

2. Grievant shall be awarded back pay and benefits from the date commencing 30 working days from the date of his discharge until 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;

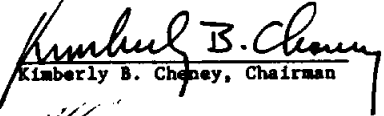
3. The interest due Grievant on back pay shall be at the rate of 12 percent per annum and shall run from the date each paycheck was due during the period commencing 30 regularly-scheduled workdays after Grievant's dismissal, and ending on the date of his reinstatement; such interest for each paycheck date shall be computed from the amount of each paycheck minus unemployment compensation received by Grievant during the payroll period; and

4. The parties shall submit to the Board by February 4, 1986, 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 22nd day of January, 1986, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Kimberly B. Cheney, Chairman


William G. Kemsley, Sr.