VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 85-20
MARJORIE JOHNSON	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On April 26, 1985, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Marjorie Johnson ("Grievant"). The grievance alleged the dismissal of Grievant from her position of Correctional Officer B at the Northwest State Correctional Facility in St. Albans violated Articles 16 and 17 of the collective bargaining agreement between the State of Vermont and VSEA, effective for the period July 1, 1984, to June 30, 1986 ("Contract") and the Due Process clause of the United States Constitution.

A hearing was held before the full Board on January 23, 1986. VSEA Staff Attorney Michael Zimmerman represented Grievant. Assistant Attorney General Michael Seibert represented the State of Vermont, Department of Corrections ("Employer"). At the hearing, the parties submitted a limited stipulation as to various facts and for admission of evidence and agreed on the issues for the Board to decide.

Requested Findings of Fact and Memoranda of Law were filed by Grievant and the Employer on February 6, 1986. Grievant filed a reply brief on February 13, the established deadline for submission of briefs. The Employer filed a reply brief on February 21, after the deadline.

FINDINGS OF FACT

1. From April 1981 to her dismissal on March 27, 1985, Grievant was employed first as a Correctional Officer A, then as a Correctional Officer B (Pay Scale 9), at the Northwest State Correctional Facility, St. Albans, Vermont.

2. During the period October 11, 1981, to April 16, 1984, Grievant received three performance evaluations. On all those evaluations, Grievant received overall ratings of "3" ("consistently meets job requirements/standards"), with "3" ratings in all individual factors except that, on two of the evaluations, Grievant received ratings of "4" ("frequently exceeds job requirements/standards") in some individual factors (Exhibit X).

3. On October 4, 1984, Grievant was suspended for three days for a violation of contraband rules (i.e., for having magazines and a radio in her possession on post).

4. On February 11, 1985, Grievant received a special evaluation for the period April 16, 1984, to January 17, 1985. Grievant received an overall rating of "2" ("inconsistently meets job requirements/standards") with substandard ratings in seven of 10 subcategories (Exhibit X, Pages 8 through 10).

5. During the period December, 1984 through January, 1985, Grievant understood that operating a portable television while working her duty station on the perimeter post at the Facility would constitute a security breach and could form the basis for discipline.

6. On January 10, 1985, Grievant was relieved from duty with pay pending investigation of two charges, including the charge that

"(w)hile on duty on Post 2, you had with you a portable television set." (Exhibit A).

7. Paul Silva, Security and Operations Supervisor, conducted an investigation into the allegations between January 2, 1985 and January 9, 1985, when he filed a report (Exhibit K). In the course of his investigation, Silva received the following seven incident reports, which he made part of his report:

a. a December 29, 1984, report of Myron Messeck, Correctional Officer B, indicating, 1) that Grievant had shown him the television and demonstrated its capabilities on Post 2 at the Facility when she relieved him on December 27, 1984, and 2) that Grievant had said the TV was so small she could just hide it in her pocket if anyone came to her post (Exhibit N);

b. a December 30, 1984, report of Messeck indicating he had found a TV Guide on Post 2 with programs marked which corresponded to the shift worked by Grievant the preceding day (Exhibit O);

c. a January 4, 1985, report of Messeck indicating that on January 3, 1985, he found a handwritten TV schedule on Post 2 corresponding to the shifts Grievant had worked between December 29, 1984, and January 4, 1985. Grievant admitted to Hearing Officer John Petersen at the Step II grievance hearing on her resulting suspension that the handwritten TV schedule belonged to her (Exhibits P, R);

d. a January 1, 1985, report of Correctional Officer B Bedard, indicating Grievant had shown him and Correctional Officer Cross the small television in the mini-bubble on that date. His report described the television in detail, and indicated Grievant said she would never be caught

with the TV because it was small enough to hide down the front of her shirt (Exhibit S);

e. a January 2, 1985, report of Correctional Officer Cross, indicating Grievant had shown the TV to him and Bedard on the day before. He indicated, in addition, that Grievant said the TV cost $199 at Radio Shack, picked up Channels 3, 5, 10, 12 and 6, and that she would put it in her bra if anyone tried to catch her with it (Exhibit T);

f. a January 5, 1985, report of Correctional Officer Paterek indicating that, during the course of a telephone conversation between his control room and Grievant's post, she had told him about the TV and he had overheard the TV in operation in that and subsequent "post checks", and that Grievant told him the TV did not emit the blue haze typical of TV's because it used available light as its source, and that the TV looked like a woman's compact, and thus might not be found in a search (Exhibit U);

g. a January 8, 1985, report of Messeck, indicating he had overheard Grievant's half of a telephone conversation between Silva and Grievant, and that after the conversation, Grievant told Messeck she had not lied when she denied telling people about the TV because she had shown everyone the TV, instead of telling them about it (Exhibit V).

8. Grievant was on duty at Post 2 from December 29, 1984, until January 4, 1985, between the hours of 3:00 p.m. and 11:00 p.m.

9. Silva interviewed Grievant on January 7, 1985. Silva informed Grievant he had received several reports concerning her carrying a small television set and watching it on post. Grievant told Silva that at no time did she ever have a television on post. On January 8, 1985,

Silva asked Grievant if she had ever carried a miniature television in the facility. Grievant indicated she had never done so.

10. Based on the Silva investigation, Grievant was suspended without pay for 10 work days by letter dated January 16, 1985, from Assistant Superintendent Paul Choiniere for having a portable television on Post 2 while on duty and for not following proper inspection procedures in inspecting a truck leaving the compound (Exhibit B).

11. Grievant filed a Step II grievance over this suspension on January 31, 1985 (Exhibit C).

12. John Petersen, Agency of Human Services Chief of Personnel, the individual designated by Commissioner of Corrections James Walton as the Step II grievance hearing officer, held hearings on February 15 and 19, 1985, and March 6, 1985, concerning the grievance over the 10-day suspension.

13. During the Step II hearings, Petersen asked Grievant if she ever purchased a TV as described by the other officers. Grievant denied that she had made any such purchase. Petersen also asked Grievant if she had ever owned such a television. Grievant said no. Petersen then asked Grievant if she had ever possessed such a television. Grievant again denied any such allegation. In addition, Petersen asked Grievant if she had ever operated a TV in the facility. Grievant again said no. Because of the contradictions between Grievant's story and the allegations of the other correctional officers, Petersen scheduled further hearings so he could hear oral statements from the other officers.

14. Having thereafter heard what he found to be convincing statements from Correctional Officers Messeck, Paterek, Cross and

Bedard which supported the allegation that Grievant had and operated a television while on duty at the perimeter post , Petersen once again informed Grievant of the gravity of the situation and his interest in getting at the truth. Once again, in response to Petersen's direct questions, Grievant denied ever purchasing, owning, operating or having a "pocketvision"-sized portable TV in her possession at the Correctional Facility (Exhibit F).

15. Between the second and third days of the hearings on Grievant's Step II grievance, Petersen spoke to an Agency of Human Services employee, Todd Park, who had previously worked for Radio Shack, about miniature televisions. As a result, Park telephoned the St. Albans branch of Radio Shack. Park reported to Petersen that Robert Godin, manager of the St. Albans Radio Shack, had told him he had sold a miniature TV to an employee of the Corrections Department, and that the description he gave matched Grievant's. Park also told Petersen Godin told him the purchaser had reported the reception at the facility was good (State's Exhibit F).

16. Immediately after the third day of hearings (i.e., March 6), Petersen went to the St. Albans Radio Shack store. He spoke to Godin who confirmed to Petersen that what he had told Park was correct. Godin showed Petersen a receipt, dated December 20, 1984, bearing Grievant's name as the customer, which indicated that a pocketvision television, batteries, an adapter, and a hood had been purchased on that date.

17. Petersen denied Grievant's Step II grievance (at least insofar as it related to the charge concerning the television)(Exhibit D).

In addition, because there remained a conflict between the statements of Grievant and her co-workers, Petersen wrote a memo to Commissioner Walton (Exhibit F), which resulted in Walton's assigning Stephen Maranville, Department of Corrections Assistant Director of Security and Operations, to conduct a further investigation.

18. At Walton's request, on March 11, 1985, Grievant was given a letter by Assistant Superintendent Choiniere, wherein she was advised of her temporary relief from duty, with pay, effective that date. The reason given for the temporary relief was "to allow time for an investigation of allegations that you made false statements during the course of a disciplinary hearing." (Exhibit I).

19. During the course of the Maranville investigation, St. Albans Radio Shack employees identified Grievant, from a photo line-up, as having purchased a hand-held "pocketvision" television in December, 1984. Maranville also secured a copy of a Radio Shack receipt made out to Grievant for the December 20, 1985, purchase of a pocketvision television. Store Manager Godin reported, in addition, that Grievant returned to the store and told them she got excellent reception on a number of channels on her post at the Correctional Facility. Godin also reported Grievant told him her television had been stolen from her home (See Exhibits F, G and J).

20. Maranville was also able to confirm, with the Vermont State Police, that Grievant, on or before January 8, 1985, reported the theft of a pocketvision television from her home. She represented the value of the television to be $195 and Grievant told the State Police its number was 16-151, which corresponds to the stock number on the Radio Shack sales receipt (Exhibit G, Page 3 and Exhibit H, Page 1).

21. Grievant had told Petersen, in the Step II hearings, that a compact had been stolen from her home, and that Officers Bedard and Cross had actually seen the same compact and not a television, in the mini-bubble on January 1, 1985 (Exhibits F, S and T).

22. On March 18, 1985, Maranville submitted a written report on his investigation to Commissioner Walton (Exhibit G).

23. On March 27, 1985, prior to her dismissal, Grievant met with Commissioner Walton, Department Director of Security and Operations Phil Scripture, John Petersen and VSEA representative Steve Janson, to discuss the charges against her. The meeting lasted two hours. Commissioner Walton had drafted a dismissal letter prior to the meeting but was willing to reconsider whether dismissal was warranted if information provided at the meeting gave him reason to do so.

24. During the March 27 meeting, Commissioner Walton indicated the purpose of the meeting was to examine whether Grievant had made false statements during the Step II grievance hearings. Commissioner Walton told Grievant Radio Shack employees had identified her, from a photo line-up, as the individual who had purchased the pocketvision television on December 20, 1984. In response, Grievant said she was a regular customer of Radio Shack, and it was understandable the employees would recognize her. Commissioner Walton asked Grievant if she had ever owned a pocketvision television. She said no. He then told her the Department had a sales receipt which indicated she was the purchaser of a pocketvision television on December 20, 1984. Grievant said her daughter had bought the TV as a present for a friend, unbeknownst to her. Commissioner Walton told Grievant the State Police had indicated she had reported the

theft of a pocketvision TV from her home in January 1985. Grievant responded she had made such a report, but that it was not Grievant's TV which was stolen. She said it was the TV her daughter had bought as a present for her friend, which had been under the Christmas tree in a box without Grievant's knowledge.

25. Commissioner Walton did not believe Grievant was being truthful and, at the conclusion of the meeting on March 27, presented her with a dismissal letter. The letter provided in pertinent part as follows:

> On January 31, 1985, a Step II grievance was initiated on your behalf alleging in part that disciplinary action taken against you with regard to having a portable TV while on duty on Post 2 was not based on fact.
>
> I designated John Petersen, Chief of Agency Personnel to hear the grievance. In response to Mr. Petersen's direct questions you denied purchasing, owning, operating or ever having a portable TV in your possession in the Correctional facility. Our investigation revealed these responses were not true. You knowingly and deliberately made false statements to a hearing officer who was assigned the responsibility to review your allegations, ascertain facts and to determine the appropriateness of the discipline imposed. This attempt to subvert the grievance process constitutes a substantial detriment to the employers' interests and justifies your immediate dismissal.
>
> In the past there have been issues and incidents surrounding your conduct and work performance which resulted in your discipline. The latest was the incident which precipitated your grievance of January 31st. In this case, suspension was imposed rather than dismissal because it was our perception that this discipline would be sufficient to deter future similar incidents and that there would be a commitment on your part to meet acceptable performance and conduct standards.
>
> You appealed to me for a fair and non-prejudicial determination of the facts but your statements to the hearing officer indicate a complete disregard for the purpose and integrity of the grievance process. My confidence and trust in your ability to perform as a Correctional Officer is so diminished by your actions that allowing you to continue as an employee would be irresponsible on my part.
>
> (Exhibit E)

26. Before making his decision, Commissioner Walton did not consult with Facility Superintendent Richard Bashaw, did not review Grievant's personnel file and did not consider Grievant's performance as a correctional officer. Walton concluded Grievant had lied throughout the grievance process and that this was unacceptable behavior warranting her dismissal. Walton accepted that an employee could enter a "not guilty" plea on a disciplinary action but, if the employee made statements at a grievance hearing, the employee has an obligation to tell the truth. Walton viewed the misconduct resulting in Grievant's suspension and the misconduct resulting in her dismissal as two separate issues; that the dismissal decision was really an issue of credibility and was not a reconsidered increase in discipline for having the television on post. In Walton's view, he had to be able to depend on a Correctional Officer's credibility since the nature of their duties caused them to be witnesses to actions involving inmates which the officer had to accurately report and which may result in lawsuits being brought against the Department of Corrections. Walton concluded Grievant's dishonesty during the grievance process meant he could have no reliability in Grievant's statements.

27. Grievant concedes there was nothing unreasonable in the Employer having concluded, from all of the evidence before it, that the version of the facts put forth by Messeck, Paterek, Cross, Bedard and the Radio Shack employees was true. By conceding that, however, Grievant does not concede she lied.

OPINION

Grievant and the Employer have agreed the issues for the Board to decide are limited to the following:

1) Whether the Board has jurisdiction over Grievant's claim her dismissal violates the Due Process clause of the United States Constitution in that she was not afforded the right to a pre-termination hearing and, if so, whether the State substantially complied with Loudermill requirements by allowing Grievant to defend against the charges prior to her dismissal;

2) Whether the State's actions had a chilling effect on the utilization of the grievance procedure, and if so, thereby violated Article 17 of the contract;

3) Whether the State's actions were an abuse of the grievance procedure by using it as a discovery device, rather than a process for the airing of employee complaints, and, if so, thereby violated Article 17 of the Contract;

4) Whether the dismissal, under all the facts and circumstances, was tantamount to an improper increase in punishment already imposed (i.e., a nine-day suspension) for the offense of having a TV on post; and

5) Assuming for the sake of argument that Grievant lied during the Step II hearing, whether just cause existed for her dismissal.

We will discuss each issue in turn.

Pre-Termination Hearing

Grievant alleges her due process rights were violated in that she was not afforded a pre-termination hearing prior to her dismissal. Grievant relies on the US Supreme Court decision, Cleveland Board of Education v. Loudermill, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (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.

The first issue in this regard is whether Loudermill requirements were applicable at the time Grievant was dismissed. The Employer contends the Loudermill decision, issued on March 19, 1985, was not a final and binding decision at the time Grievant was dismissed on March 27, 1985, since the time to request reargument of the decision had not yet expired. The Employer cites no authority to support this argument and we thereby reject it.

Nonetheless, the Employer contends the Board lacks jurisdiction over Grievant's due process claim to a pre-termination hearing, since it concerns a Constitutional right, the source of which is the Due Process clause of the US Constitution. The Employer contends the Contract does not import Constitutional due process rights and the Board's jurisdiction in grievances is governed and limited by the Contract.

The Board has such adjudiciatory jurisdiction as is conferred on it by statute. In re Grievance of Brooks, 135 Vt. 563, 570 (1977). The Board's jurisdiction in grievance proceedings is governed by 3 VSA §902 (14), which defines a grievance in pertinent part as "an employee's... expressed dissatisfaction with aspects of employment or working conditions under (a) collective bargaining agreement".

Article 16 of the Contract provides an employee may only be dismissed for cause and has a right to grieve his or her dismissal to the Board. The question the Board must decide is whether the Board has jurisdiction to rule on Grievant's claim, made in the context of her dismissal grievance, that Constitutional due process rights were violated by the State's failure to give her a pre-termination hearing.

We have had occasion in the past to determine whether we have jurisdiction to decide and provide remedies for cases involving Constitutional questions where the employee is covered by a collective bargaining agreement. We have determined it is appropriate for us to look to Constitutional law where language in a collective bargaining agreement imports a Constitutional standard and we must interpret that portion of the agreement. Grievance of Sypher and the Vermont State Colleges Faculty Federation, Local 3180, AFL-CIO, 5 VLRB 102, 125 (1982). Grievance of Cronin, 6 VLRB 37 (1983). Grievance of Roy, 6 VLRB 163 (1983). However, absent that circumstance, the term "grievance" is not so infinitely expandable as to include every Constitutional right. Grievance of Russell, 7 VLRB 60, 80-81 (1984).

Under the circumstances here, where a due process right is at issue, our review of applicable Vermont Supreme Court decisions convinces us we do have jurisdiction over such a claim. The Contract gives State employees a vested property interest in continued employment, absent just cause for dismissal. In re Grievance of Muzzy, 141 Vt. 463, 472 (1982). In Muzzy, the Court recognized the 14th Amendment to the US Constitution affords procedural due process protections to a property interest, and was critical of the Board not adhering to the essential

due process right of having the burden of persuasion cast upon those who would terminate the right under consideration. Id, at 472-473.

Here, analogously, a due process right of a pre-termination hearing is at stake. The Vermont Supreme Court guidance is clear. We have jurisdiction of and must protect such a right. While the Court's rulings in Brooks, supra, and Muzzy, supra, concerned actions of the Board affecting due process rights, rather than the employer's actions, we believe a logical extension of those rulings is that the Board has jurisdiction to decide Constitutional due process issues affecting State employees. Our conclusion is bolstered by Nzomo v. Vermont State Colleges, 136 Vt. 97, 100, holding that defined dismissal procedures are binding and must be scrupulously observed.

In addition, the Contract confers jurisdiction since due process rights are incorporated in the "just cause" requirement for dismissal.

Moreover, it is most efficient and economical for Grievant's due process claim to be considered in this forum, since judicial review of our decisions lies with our Supreme Court. Such review may also curtail further litigation. c.f. Alexander v. Gardner-Denver Co., 415 US 36 (1974). Migra v. Warren City School District, 465 US 75 (1984). Zanghi v. Village of Old Brookfield, 752 F2d 42 (2 cir. 1985). The Court, of course, has jurisdiction to consider Constitutional claims. In fact, in its decision in In re Maher, 132 Vt. 560 (1974), the Supreme Court has already decided, contrary to Loudermill, that the State did not violate an employee's Constitutional rights to due process by omitting a pre-termination hearing. Whether or not that decision is now viable, the Court recognized the issue presented a due process problem of

Constitutional dimensions which required an answer in an appeal from this Board. Id, at 562. Consequently, we should address it first. So, we turn to determining whether the State substantially complied with the Loudermill requirements.

Loudermill provides that it is an essential principle of due process that there be "some kind of hearing" prior to the discharge of an employee who has a Constitutionally-protected property interest in employment. 105 S. Ct., at 1493. In general, "something less" than a full evidentiary hearing is sufficient. Id., at 495. There is no requirement of an impartial review. c.f. Grievance of Gorruso, 9 VLRB 14, 30-31 (1986). The pre-termination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions - essentially a determination whether there are reasonable grounds to believe the charges against the employee are true and support the proposed action. The employee is entitled to oral or written notice of the charges against him or her, an explanation of the employer's evidence, and an opportunity to present his or her side of the story. Loudermill, supra, at 495.

The Employer substantially complied with these requirements in the March 27 meeting, at which Commissioner Walton gave Grievant oral notice of the charge against her that she had made false statements during the grievance process concerning having a television in the facility. Walton informed Grievant of evidence he had against her indicating she had purchased a pocket-vision television from Radio Shack, although she had denied ever purchasing such a television there, and gave her an opportunity to present her side of the story. The Loudermill purpose to provide an initial check against mistaken decisions was met by this meeting. Grievant simply failed to convince Walton of the

reliability of her statements; she certainly had a pre-termination opportunity to respond. Walton had reasonable grounds to conclude the charges against Grievant were true and to then follow through on his inclination to dismiss Grievant. Loudermill was, therefore, satisfied.

Chilling Effect on Use of Grievance Procedure

We must then consider the merits of Grievant's claim. She says her dismissal violated the grievance procedure provisions of the Contract because it had a chilling effect on the utilization of the grievance procedure. Exactly what is alleged by this claim is unclear, but Grievant contends in her brief "that is a clumsy way of saying (her) dismissal was in retaliation for her invocation of the grievance procedure".

This issue concerns one of the fundamental rights granted under the Contract; the right granted under Article 17, Section 7, to employees to "freely institute... grievances without threats, reprisal or harassment". The intent of the parties is clear; employees have a clear right to file grievances without being discriminated against. Grievance of Friel, 4 VLRB 80, 90 (1981).

When an employee claims management took adverse action for engaging in protected activity, the employee first must demonstrate the conduct was protected and then show the conduct was a motivating factor in the action taken. Then the burden shifts to the employer to show by a preponderance of the evidence it would have reached the same decision even in the absence of the protected conduct. Grievance of Morrissey, 7 VLRB 129 (1984). Grievance of Roy, supra. Grievance of Cronin, supra. Grievance of Sypher, supra.

It is clear Grievant was engaging in protected activity by grieving her suspension. However, the evidence does not support Grievant's claim that the act of instituting a grievance by itself was a motivating factor in the decision to dismiss her. It was Grievant's untruths during the grievance process which caused her dismissal, not the fact that she grieved. Thus, we dismiss Grievant's claim she was dismissed in retaliation for her invocation of the grievance procedure.

We emphasize this part of our analysis is a different issue than whether Grievant justly could be dismissed for false statements she made during the grievance process. We have simply concluded no retaliatory motive was present in the Employer's decision. We do not equate dismissal for making false statements during the grievance process, without evidence of retaliatory motive, as per se constituting "threats, reprisal, or harassment" of employees. Whether false statements made during the grievance procedure constitutes just cause for dismissal will be discussed later.

Abuse of the Grievance Procedure

Grievant contends the Employer abused the grievance procedure by using it as a discovery device, rather than a process for airing employee complaints. Grievant claims she was retaliated against because John Petersen, Step II grievance hearing officer, who had a contractual duty to "act fairly and without prejudice", stepped out of his proper role as a hearing officer, and became instead, a sleuth, even an advocate, in pressing leads. By doing so, Grievant contends Petersen turned the grievance procedure into machinery to justify dismissal, rather than a process for resolving issues between management and employee.

The parties have contracted we have no jurisdiction to resolve this claim. Article 17, Section 4(d), referring to the conduct of hearing officers, provides:

> The management representative at Step II or II shall act fairly and without prejudice in determining facts which affect the granting or denial of a grievance... Complaints concerning the conduct of the management representative shall be grievable directly to, but not beyond, Step III.

Through this language, the parties clearly expressed their intent that the Board not review the conduct of hearing officers. That does not, however, preclude review of subsequent acts of management based on that conduct.

Improper Increase in Punishment

Grievant contends her dismissal, under all the facts and circumstances, was tantamount to an improper increase in punishment already imposed (i.e., a suspension) for the offense of having a TV on post.

In essence, Grievant claims she was subject to "double jeopardy"; that is, she received a double penalty for the same offense. If we were to conclude Grievant was suspended and then subsequently dismissed, after grieving the suspension, for the same offense of having a television on post in the facility, we would concur with Grievant that she received an improper increase in punishment. See generally Elkouri and Elkouri, How Arbitration Works (4th Ed., BNA 1985), pages 677-679; Fairweather, Practice and Procedure in Labor Arbitration, (2nd Ed. BNA, 1983), pages 345-348.

However, Grievant's claim of a double penalty is not persuasive. It is believable that if Grievant had admitted to having the television on post after the suspension was imposed, her penalty would not have

been increased. However, when management reasonably concluded Grievant lied during the grievance process about having the television on post, she was dismissed. Two separate offenses existed here; one, having the television on post, and the other, being dishonest about having the television on post. Grievant's dismissal resulted from the latter offense and was not an increase in penalty for the first offense.

Just Cause for Dismissal

We turn to the final issue before us: assuming Grievant lied during the Step II hearing, did just cause exist for her dismissal?

Our scope of review in this case is guided by Article 16 of the Contract, which provides an employee may be dismissed for just cause, and our decision in Grievance of Sherman, 7 VLRB 380 (1984).

A discharge may be upheld only if it meets two criteria of reasonableness: one, that the conduct constituted a substantial shortcoming detrimental to the State's interests, and the other, that the employee had fair notice, express or implied, that such conduct would be grounds for dismissal. In re Grievance of Brooks, 135 Vt. 563, 568 (1977).

We first must determine whether Grievant's dishonesty during the grievance process was a punishable offense, or whether Grievant's dishonesty was protected because it occurred in the course of pursuing a grievance.

We conclude it was a punishable offense. Honesty is an implicit duty of every employee and, at a minimum, an employee should know that dishonest conduct is prohibited. In re Carlson, 140 Vt. 555, 560 (1982).

An employee is not insulated from telling the truth during the grievance process. There is nothing inherent in this process which excludes employees from the obligation they have in all aspects of their job to deal honestly. An employee obviously has a right to develop a genuine issue of fact through the grievance procedure but not to be dishonest in relating events. The parties have contracted for fair dealing during the grievance process, providing: "It is expected that employees and supervisors will make a sincere effort to reconcile their differences as quickly as possible...", Article 17 (Grievance Procedure), Section 1.

The very nature of Grievant's job duties as a correctional officer required her to report actions accurately. Any dishonesty she engaged in reflected on her credibility in reporting events and, consequently, constituted punishable conduct.

We turn now to determining whether it was appropriate for the Employer to bypass progressive discipline and dismiss Grievant. We look to factors enumerated in Grievance of Colleran and Britt, 6 VLRB 235, at 268-269 (1983), for guidance in determining the legitimacy of the disciplinary action. The factors most pertinent here are the nature and seriousness of the offense and its relation to the employee's duties, position and responsibilities, and the effect of the offense upon supervisors' confidence in the employee's ability to perform assigned duties.

Given the nature of Grievant's duties as a correctional officer, we conclude her dishonesty during the grievance process was a serious offense. The nature of Grievant's duties required her to be a witness to actions involving inmates which she had to report accurately. Her acts could result in lawsuits being brought against the Department of

Corrections. In essence, her job could require her to be a witness in many types of disputes. For instance, if firearms are used, an inquiry results where officers must testify to events leading to their use. Also, officers are required to testify during prisoners' disciplinary hearings. We take notice of our own cases, which contain many instances of correctional officers being required to report incidents involving inmates or other officers. Given these duties, it is inherent in her job that Grievant's superiors have confidence in her credibility. Grievant cast substantial doubt on her credibility by lying to the Step II hearing officer. Commissioner Walton reasonably concluded he could not rely on her to truthfully report incidents. Further, the incident could lead to Grievant's impeachment in other aspects of her duties, and diminish her effectiveness.

We recognize the reporting during the grievance process of many objective events can be quite subjective; dependent on the perception of those viewing them. e.g., Grievance of Corruso, 8 VLRB 14, at 36-37. It may be necessary that to constitute an offense, lying during the grievance process has to be proven by the higher standard of clear and convincing evidence; a standard of proof greater than by a preponderance of the evidence but less than beyond a reasonable doubt. Alexander v. Warren, Arkansas School Board, 464 F2d 471, 474 (8th Cir., 1972). Fred Walker Agency,Inc. v. Lucas 211 SE 2d 88, 92(Va. Supreme Ct., 1975). Perhaps other factors are pertinent in different fact situations. However, all we need now to decide is whether lying by an employee whose job duties include being a witness in the ordinary course of employment

should be punished. Even the clear and convincing standard has been met here, because Grievance concedes that in this case a factfinder would reasonably conclude she had lied.

Dishonesty itself is a justifiable reason for bypassing progressive discipline. In re Grievance of Carlson, supra, at 559. Grievant's offense was as serious as that of Carlson. She violated her implicit duty of honesty and, given her job duties, undermined superiors' confidence in her ability to perform her duties.

In sum, we conclude under all the circumstances present herein that Grievant's dishonesty during the grievance process, concerning having a television on post at the facility, constituted a "substantial shortcoming detrimental to the State's interests", Brooks, supra, at 568, and that her dismissal was not "inappropriate or excessive" within the meaning of Article 16, Section 10, of the Contract.

ORDER

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

The Grievance of Marjorie Johnson is DISMISSED.

Dated this 17th day of April, 1986, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.

James S. Gilson