

Disciplinary Actions Less Than Dismissal

The procedural and substantive protections existing in dismissal cases, discussed above, also apply to suspension cases with respect to the following areas: right to union representation at a meeting which may lead to discipline, specific notice of disciplinary action, just cause standard, factors relevant in determining whether just cause exists, progressive discipline (where it is provided for in the contract), burden and quantum of proof, Board authority generally to remedy improper disciplinary actions and authority to modify penalties.¹

In determining whether just cause exists for suspension, the VLRB recognizes that the misconduct required to be demonstrated for a suspension to be upheld is less serious than that required to uphold a dismissal.² The conduct must be sufficiently egregious to justify discipline, and the employee must be on fair notice that his or her conduct could be grounds for the discipline imposed.³ The ultimate criterion of just cause is whether the employer acted reasonably in disciplining the employee because of the misconduct.⁴

Many of the Board cases involving suspensions of employees have involved state correctional officers. In one grievance contesting a suspension, a state correctional officer received a suspension for negligence and disobedience of a direct order of a superior officer. The Board determined that sustaining the disobedience charge required proof of intentional defiance or proof that the employee deliberately substituted his judgment for that of the superior in

¹ Grievance of King, 13 VLRB 253 (1990). Grievance of Griswold and VSCSF, 12 VLRB 252 (1989). Grievance of Colleran and Britt, 6 VLRB 235 (1983). Grievance of Earley and Ibey, 6 VLRB 72 (1983).

² Earley and Ibey, 6 VLRB at 82. Grievance of Allen and VSCFF, 3 VLRB 143, 152 (1980).

³ Griswold and VSCSF, (Vermont Supreme Court, Unpublished Decision, Docket No. 89-602, 1991).

⁴ Id.

circumstances where it was unreasonable to do so.⁵ In order to prove the negligence charge, the employer was required to establish that the officer failed to do what a reasonably prudent person in his circumstances would do to accomplish his job mission.⁶ The Board determined that the employer had proven neither charge and rescinded the suspension.⁷

In a subsequent grievance filed by a correctional officer contesting a 15-day suspension, the Board refined the definition of “negligence” to mean a failure to do what a reasonably prudent person in the officer’s circumstances would do to accomplish the job mission and means both a failure to act as well as an affirmative act taken which adversely affects the functions of the employer.⁸ The Board concluded that the officer acted negligently as well as maliciously by belittling and degrading an employee with profane and abusive language, but reduced the penalty to a 7 ½ day suspension where the other employee also maliciously used profane language against the grievant and was not disciplined.⁹

In another grievance filed by a correctional officer contesting a written reprimand and 2-day suspension, the Board concluded that the officer acted negligently by failing to carry out job duties on important matters in a timely manner and upheld the disciplinary actions.¹⁰ In another case contesting a three-day suspension imposed on a correctional supervisor, the Board determined that just cause existed for the suspension due to an inmate’s escape being partly caused by the supervisor being negligent by failing to ensure that outside recreation for inmates was organized and conducted according to procedures.¹¹ The Board upheld a three-

⁵ Grievance of Swainbank, 3 VLRB 34, 46 (1980).

⁶ Id. at 47.

⁷ Id. at 45-49.

⁸ Grievance of Munsell, 11 VLRB 135, 146 (1988).

⁹ Id. at 147-148.

¹⁰ Grievance of Lawrence, 17 VLRB 360 (1994).

¹¹ Grievance of Patterson, 5 VLRB 376 (1982).

day suspension of a correctional officer in another case where the officer compromised the security of the facility and failed to accept responsibility for his actions.¹²

The Board upheld a disciplinary demotion, one-day suspension and three-day suspension of a correctional officer in 2011 decisions. The Board determined just cause existed for the demotion from his shift supervisor position to a correctional officer position for failing to ensure that a correctional officer working under him was conducting special observation checks on an offender whom had a serious medical condition, allowing the officer to engage in excessive personal use of a work computer, and engaging in excessive personal use of the computer himself.¹³ The Board also concluded that just cause existed for the subsequent one-day suspension of the officer for disobeying an order of his supervisor to work overtime, and for a subsequent three-day suspension for declining lawful orders of his supervisor to meet with him and engaging in threatening and disrespectful behavior towards the supervisor when the meeting occurred.¹⁴

The nexus between off-duty conduct and work has been involved in other correctional officer suspension cases decided by the Board. The Board upheld a 30-day suspension imposed on an officer for off-duty conduct which resulted in his arrest for burglary, simple assault and violating an abuse prevention order. The Board concluded that the requisite nexus existed between such misconduct and the officer's work duties. The Board held that the officer demonstrated a disregard for the law and violent behavior sufficient for the employer to reasonably draw a connection between the off duty conduct and the officer's ability to supervise

¹² Grievance of Porwitzky, 20 VLRB 83 (1997).

¹³ Grievance of Glover, 31 VLRB 282 (2011); *Affirmed*, Sup.Ct.Doc.No. 2011-338 (2012).

¹⁴ Grievances of Glover, 31 VLRB 307 (2011); *Affirmed*, Sup.Ct.Doc.No. 2011-338 (2012).

individuals imprisoned because they have violated the law.¹⁵ The Board also upheld the three-day suspension imposed on a correctional supervisor in another case for driving to work while his license was suspended. The Board similarly concluded that the officer's conduct demonstrated a disregard for the law sufficient for the employer to reasonably draw a connection between his conduct and his ability to supervise individuals incarcerated because they had violated the law.¹⁶

In a further correctional officer grievance, the Board upheld suspensions and demotions imposed on two correctional officers for smoking marijuana on state property immediately prior to reporting to work.¹⁷ The Board upheld a two-day suspension imposed on a correctional officer in another case for committing a security breach by taking a visitor into the secure perimeter of a correctional facility, without the approval of his shift supervisor, to administer an alco-sensor test.¹⁸ The Board upheld a four-day suspension in another correctional officer grievance where the officer had the odor of alcohol on his breath when he reported to work and he had recently received a lesser suspension for an alcohol-related offense.¹⁹ The Board sustained a one-day suspension of a correctional teacher for knowingly violating an established procedure in attempting to improperly gain access to an inmate in close custody.²⁰

In ruling on a grievance filed by a state social services district director contesting a 10-day suspension, the Board concluded that the employer had proven one of two charges that the director had demonstrated a lack of professional

¹⁵ Grievance of Petty, 20 VLRB 44 (1997).

¹⁶ Grievance of Glover, 18 VLRB 352 (1995).

¹⁷ Grievances of Earley and Ibey, 6 VLRB 72 (1983).

¹⁸ Grievance of Gadreault, 8 VLRB 87, 127-130 (1985).

¹⁹ Grievance of Snaith, 11 VLRB 38 (1988).

²⁰ Grievance of Scott, 17 VLRB 46 (1994).

judgment and failure to follow statutory requirements to initiate investigations of possible child abuse. The Board reduced the discipline to a 5-day suspension.²¹

The Board upheld the 20-day suspension imposed on a state Department of Environmental Conservation employee due to an argument and physical altercation the employee had with a co-worker. The Board determined that the suspension of the employee was a reasonable penalty given the nature of the offenses, and met the contractual requirement to apply discipline with a view toward uniformity and consistency where the co-worker received an equal penalty.²²

The Board dismissed a grievance filed by a state transportation maintenance worker contesting his three-day suspension. The Board determined that it was appropriate for the employer to bypass progressive discipline and suspend the employee when he failed to obey an order to report to work in an emergency situation.²³ The Board upheld a two-day suspension issued to a Motor Vehicle Examiner for engaging in rude and unprofessional interaction with a customer, where the employee previously had received two oral reprimands for similar behavior.²⁴

In a grievance contesting a 30 day suspension imposed on a state college faculty member, the Board determined that just cause existed for the action due to the faculty member abusing sick leave when she had foreknowledge of her need for leave due to health reasons, did not request leave or cover for her absences, and was deceptive in covering up her misconduct.²⁵

The Board upheld a 5-day suspension imposed on a state colleges security officer for discourteous and argumentative conduct towards a campus visitor. The

²¹ Grievance of Russell, 7 VLRB 60 (1984).

²² Grievance of Brabant, 18 VLRB 410 (1995).

²³ Grievance of Bagley, 19 VLRB 280 (1996).

²⁴ Grievance of MacDonald, 28 VLRB 128 (2006).

²⁵ Grievance of Allen and VSCSF, 3 VLRB 143 (1980).

offense followed closely on the heels of a similar incident for which the officer had justly received a written reprimand, and the officer had received several disciplinary actions during his employment for inappropriate conduct towards coworkers and other members of the college community.²⁶

The Board has concluded that the fact that allegations are made against an employee does not warrant suspending an employee without pay absent a determination by management that the allegations are substantiated.²⁷ An employer must determine misconduct has been committed, not just alleged, before disciplining an employee.²⁸ Management may impose a disciplinary penalty based only on the facts of the underlying incident as determined by management, and may not impose discipline based on allegations which management has yet to conclude are substantiated.²⁹ An essential element of due process under applicable precedents is that management makes a determination that misconduct has actually been committed by the employee before disciplinary action is imposed.³⁰

Case law on disciplinary actions less than suspension is noticeably sparse. The VLRB has decided that, although the contract did not explicitly require that "reasons" be given for a written reprimand, due process considerations require that a notice of reprimand be sufficiently specific to allow adequate preparation for an employee's defense.³¹ Contemporaneous oral notification may combine with the disciplinary letter to provide adequate specificity.³² Also, in determining whether

²⁶ Grievance of Griswold and VSCSF, 16 VLRB 359 (1993).

²⁷ Grievances of Ackerson, 17 VLRB 105, 126 (1994).

²⁸ Id.

²⁹ Id.

³⁰ Id. at 127-28.

³¹ Grievance of King, 13 VLRB 253, 280 (1990).

³² Id.

just cause exists for a written reprimand, the VLRB will determine whether the progressive discipline step of oral reprimand was appropriately bypassed.³³

³³ Id. at 281. Grievance of Jamison, 10 VLRB 239 (1987). Grievance of Porwitzky, 18 VLRB 530 (1995).