

## **Progressive Discipline and Illustrative Dismissal Cases**

There have been several dismissal cases decided by the Board where the Board has concluded that any charges made against the employee have not been proven by the employer by a preponderance of the evidence. In those cases, the Board has reinstated the employee with back pay and benefits.<sup>1</sup> However, there have been many more cases where some or all of the charges against the dismissed employee have been established, and the Board needs to decide whether progressive discipline has been properly followed or appropriately bypassed.

In cases where the collective bargaining contract has provided for progressive discipline, and the employer has employed progressive discipline, the Board generally has upheld the dismissal provided that the employer has been able to establish serious charges of misconduct against the employee. The Board upheld a dismissal of a state employee in one case for tardiness and unauthorized absences where the employee previously had received a warning letter and three suspensions for unauthorized absences and tardiness.<sup>2</sup>

The Board upheld the dismissal of a state employee in another case based on his off-duty assault of a subordinate employee, attempts to destroy evidence of his misconduct and dishonesty during the employer's investigation. The Board concluded that the employee's lengthy service and positive performance record were offset by receiving two lengthy suspensions and a written reprimand during his employment.<sup>3</sup> The Board sustained the discharge of a state college security officer for sexual harassment of a co-worker and unprofessional conduct towards a campus

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<sup>1</sup> Grievance of Marden, 1 VLRB 37 (1977). Grievance of Ouellet, 1 VLRB 164 (1978). Grievance of Benoir, 7 VLRB 308 (1984). Grievance of Sullivan, 9 VLRB 277 (1986). Grievance of Gibbs and VSEA, 10 VLRB 24 (1987). Appeal of Penka, 21 VLRB 182 (1998). Appeal of Davidson, 27 VLRB 105 (2004). Grievance of Jacobs, 31 VLRB 204 (2011).

<sup>2</sup> Grievances of Cronin, 6 VLRB 37 (1983).

<sup>3</sup> Grievance of Hurlburt, 24 VLRB 14 (2001).

visitor where the officer had received numerous previous disciplinary actions, including four suspensions.<sup>4</sup>

The Board has issued many decisions on whether just cause existed for the dismissal of state correctional employees where progressive discipline has been applied. The Board upheld the dismissal of a state correctional officer for violating facility procedures in connection with the escape of two inmates where the employee had received a lengthy suspension for another serious offense five months earlier.<sup>5</sup> The Board sustained the discharge of a correctional officer in another case where he failed on repeated occasions to comply with directives to timely and sufficiently justify his absences for medical reasons, and he had been suspended less than a year prior to his dismissal for misconduct similar to that leading to his dismissal.<sup>6</sup>

Similarly, the Board sustained the dismissal of a correctional officer in another case for failing on repeated occasions to comply with directives to either report to work or produce a physician's certificate to justify his continuing absences, and he recently had received a three-day suspension.<sup>7</sup> The Board also upheld the dismissal of a correctional officer in a case for serious neglect of duties that jeopardized the life and health of inmates and for engaging in dishonesty. The Board concluded that the officer's past disciplinary record did not work in his favor where he had received two suspensions and a disciplinary demotion in the preceding three years.<sup>8</sup>

The Board sustained the dismissal of a correctional officer in another case where he engaged in inappropriate horseplay with an inmate, unauthorized and unjustified physical touching of an inmate, and use of profane and inappropriate

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<sup>4</sup> Grievance of Griswold, 18 VLRB 593 (1995).

<sup>5</sup> Grievance of Petty, 20 VLRB 61 (1997).

<sup>6</sup> Grievance of Patterson, 18 VLRB 538 (1997).

<sup>7</sup> Grievance of Porwitzky, 20 VLRB 83 (1997).

<sup>8</sup> Grievance of Ducas, 28 VLRB 238 (2006).

language with offenders on repeated instances. The Board determined that the officers's satisfactory performance record was more than offset by a disturbing propensity to repeatedly engage in inappropriate interactions with inmates for which he had received counseling many times and a 15 day disciplinary suspension.<sup>9</sup>

Further, the Board upheld the dismissal of a correctional officer for the offenses of entering into an agreement with an offender to replace the window in his personal vehicle, and dishonesty during the investigation of the charges against him, where the officer had an extensive disciplinary record in the five years preceding his dismissal. This included a 30 day suspension the previous year for an improper relationship with an offender accompanied by an agreement by the officer that failure in the future to maintain appropriate boundaries with offenders could result in his dismissal.<sup>10</sup>

The Board also sustained the dismissal of a 22-year Department of Corrections employee for the offenses of engaging in an argument with a co-worker at a worksite where they were supervising offenders, which erupted into a physical fight initiated by him, and dishonesty during the investigation of the charges against him. The Board concluded that the employee's past work record and disciplinary record did not support his retention of employment where he had received three disciplinary suspensions, three disciplinary letters of reprimand, and an unsatisfactory performance evaluation and placement in a prescriptive period of remediation during the four years preceding his dismissal.<sup>11</sup>

The Board sustained the discharge of a University of Vermont police officer for unreasonably detaining a student and using inappropriate force during the incident. He detained the student contrary to the direction of his superior, and then

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<sup>9</sup> Grievance of Abel, 31 VLRB 256 (2011).

<sup>10</sup> Grievance of Richardson, 31 VLRB 359 (2011).

<sup>11</sup> Grievance of Alexander, 31 VLRB 411 (2011).

exacerbated his misconduct by pointing his firearm at the student and ordering her to the ground. The Board concluded that these constituted very serious offenses, and determined that his “flawed disciplinary record” of a written reprimand and a one-day suspension did not aid his contention that dismissal was too severe a sanction.<sup>12</sup>

The role of progressive discipline and when it may be bypassed are issues often facing the VLRB in a just cause case. The Vermont Supreme Court has held that progressive discipline is not inherent in the concept of just cause, and in the absence of a contract requiring it, is not binding on the employer.<sup>13</sup> Where there was no such contractual requirement and progressive discipline was not applied, the Court upheld dismissal under the following circumstances:

- repeated conflicts with co-workers, including heated arguments, use of abusive language and use of force.<sup>14</sup>
- excessive absenteeism and failure to return to work at end of leave of absence without supervisor's approval.<sup>15</sup>
- insubordination and lack of cooperation by magazine editor.<sup>16</sup>

Where a contract provides for progressive discipline, and it was not followed in a particular case, the issue becomes whether it was appropriate to bypass it. The difficulty arises in determining which cases are so appropriate. Preliminarily, it should be noted that the VLRB has rejected contentions made by employers that some dismissals are *per se* just.<sup>17</sup> The Board stated in one case:

We refuse to hold that some dismissals are *per se* just. The language of the provision at issue expressly provides that the Board’s authority of review

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<sup>12</sup> Grievance of Teamsters Local 597 Re: Sheehan, 26 VLRB 317, 350-352 (2003).

<sup>13</sup> In re Grievance of Brooks, 135 Vt. 563, 568 (1977).

<sup>14</sup> Id.

<sup>15</sup> In re Grievance of Gage, 137 Vt. 16 (1979).

<sup>16</sup> Grievance of Morrissey, 7 VLRB 129 (1984), *Affirmed*, 149 Vt. 1 (1987).

<sup>17</sup> Grievance of Sherman, 7 VLRB 380, 405 (1984). Grievance of Carosella, 8 VLRB 137, 161 (1985).

extends to “any case involving a . . . dismissal”, and the facts indicate there was no discussion during bargaining about excluding certain offenses from consideration under that provision. Moreover, each case involves a question of degree and we must look to all the circumstances of a case to determine whether a dismissal is just.<sup>18</sup>

In another case, the Board expressed the view that an employer must select an appropriate disciplinary sanction based on the specific facts of the particular case before it; it may not automatically impose a fixed penalty for a specific category of misconduct regardless of individual factors.<sup>19</sup> Thus, each dismissal case in which progressive discipline has been bypassed involves the VLRB examining all the circumstances to determine whether bypass of progressive discipline was appropriate. The following cases are illustrative of cases which have been found appropriate for bypass, under contracts providing for progressive discipline, by either the VLRB or the Vermont Supreme Court:

- excessive force against inmate.<sup>20</sup>
- deliberate striking of mentally or physically disabled resident.<sup>21</sup>
- misappropriation of funds, falsification of expense claims or other acts of dishonesty.<sup>22</sup>
- correctional employee’s actions creating the appearance of improper relationship with inmate, improperly providing services to the inmate, and being dishonest about the relationship.<sup>23</sup>

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<sup>18</sup> Grievance of Sherman, 7 VLRB at 405.

<sup>19</sup> Grievance of Hurlburt, 9 VLRB 174, 188-89 (1986).

<sup>20</sup> In re Grievance of Goddard, 142 Vt. 437 (1983).

<sup>21</sup> Grievance of Sherman, 7 VLRB 380 (1984); Grievance of Bishop, 5 VLRB 347 (1982); *Affirmed*, 147 Vt. 280 (1986).

<sup>22</sup> In re Grievance of Carlson, 140 Vt. 555 (1982); Grievance of Newton, 1 VLRB 378 (1978); Grievance of Deforge, 3 VLRB 196 (1980); Grievance of Barre, 5 VLRB 10 (1982); Grievance of Cruz, 6 VLRB 295 (1983); Grievance of Graves, 7 VLRB 193 (1984); *Affirmed*, 147 Vt. 519 (1986). Grievance of Newton, 23 VLRB 172 (2000). Grievance of Cray, 25 VLRB 194 (2002). Grievance of Turcotte, 30 VLRB 24 (2008). Grievance of Rosenberger, 31 VLRB 162 (2010).

<sup>23</sup> Grievance of Corrow, 23 VLRB 101 (2000).

- establishment of one of four charges that corrections officer had sexually harassed four female correctional officers.<sup>24</sup>
- refusal to obey lawful and reasonable order of supervisor.<sup>25</sup>
- divulging of confidential information.<sup>26</sup>
- security worker not following fire plan when fire alarm went off, not reporting to the fire scene, silencing the alarm before determining its cause and failing to direct fire department to the fire scene.<sup>27</sup>
- probation and parole officer engaging in sexual act of fellatio with coworker during a shift on five separate occasions, while either in a state vehicle or in a state office.<sup>28</sup>
- Department of Motor Vehicles employee issuing a false identification card to a person under age 21 allowing the person to illegally consume alcohol.<sup>29</sup>
- correctional officer engaging in off-duty conduct of placing a handgun to a person's head, assaulting and pointing a gun at another person during the same incident, damaging property, attempting to cause a person to falsify evidence, and hiding the gun used at another officer's home.<sup>30</sup>
- cook in correctional facility making sexual advances towards an inmate and being uncooperative and dishonest during the employer's investigation of the charges against him.<sup>31</sup>

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<sup>24</sup> Grievance of Gorruso, 150 Vt. 139 (1988).

<sup>25</sup> Grievance of Mickewich, 1 VLRB 190 (1978). Grievance of Levesque, 3 VLRB 95 (1980); Grievance of Regan, 8 VLRB 340 (1985); *Affirmed*, 153 Vt. 333 (1989). Grievance of Sileski, 28 VLRB 165 (2006).

<sup>26</sup> Grievance of Boucher, 9 VLRB 50 (1986).

<sup>27</sup> Grievance of Thurber, 11 VLRB 312 (1988), 12 VLRB 208 (1989); *Affirmed*, (Unpublished decision, 1991).

<sup>28</sup> Grievance of Towle, 17 VLRB 21 (1994); *Affirmed*, 164 Vt. 145 (1995).

<sup>29</sup> Grievance of Coffin, 20 VLRB 143 (1997).

<sup>30</sup> Grievance of Soucier, 21 VLRB 202 (1998).

<sup>31</sup> Grievance of Pretty, 22 VLRB 260 (1999).

- correctional officer attempting to induce an employee to write a false statement, having a handgun on correctional facility property, making sexual comments to an employee, making derogatory and disparaging comments about employees, falsely denying allegations made against him, and making false claims during an investigation.<sup>32</sup>
- correctional officers assaulting an inmate and being dishonest about their actions.<sup>33</sup>

The VLRB has found summary discharge and bypass of progressive discipline inappropriate in the following instances:

- five proven charges of park supervisor's misconduct; the most serious of which was one-day absence from work without supervisory approval.<sup>34</sup>
- dispatcher sleeping on the job.<sup>35</sup>
- several instances of verbal abuse of mentally and physically disabled patient.<sup>36</sup>
- unavailability to drive for 98 days due to two license suspensions, where employee was required to drive an average of once a week as part of job duties.<sup>37</sup>
- off-duty offenses of correctional officer of careless and negligent motorcycle driving, attempting to elude police officers and giving false statements to police.<sup>38</sup>
- verbal abuse of supervisors and insubordinate action of striking brim of supervisor's hat so it came off his head, following an earlier less egregious

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<sup>32</sup> Grievance of Newton, 23 VLRB 172 (2000).

<sup>33</sup> Grievances of Charnley and Leclair, 24 VLRB 119 (2001). Grievance of Kerr, 28 VLRB 264 (2006).

<sup>34</sup> Grievance of Cook, 3 VLRB 105 (1980).

<sup>35</sup> Grievance of Kindestin, 3 VLRB 288 (1980).

<sup>36</sup> Grievance of Carosella, 8 VLRB 137 (1985).

<sup>37</sup> Grievance of Hurlburt, 9 VLRB 174 (1986).

<sup>38</sup> Grievance of Boyde, 13 VLRB 228 (1990).

act of insubordination for which the employee received a written reprimand.<sup>39</sup>

- physical abuse of twisting arms of patients by state hospital employee, under circumstances where management had not vigorously and consistently enforced its policy prohibiting physical abuse.<sup>40</sup>
- cheating by highway use inspector during a training exam, and then denying the cheating during an investigation by the employer, under circumstances where other employees engaged in dishonesty and had received disproportionately lighter penalties.<sup>41</sup>
- dishonesty by correctional officer during an investigatory meeting under circumstances where the employer had not brought this charge against the officer until pursuing other charges against the officer of inappropriate sexual conduct with female inmates, and the charges of inappropriate sexual conduct were not proven.<sup>42</sup>
- employer did not prove charge that correctional officer interfered with an employer investigation, and employer proved some of its charges against the officer stemming from an attempted suicide by an inmate.<sup>43</sup>
- transportation maintenance supervisor engaging in various actions demonstrating disregard of supervisory authority, where the employee worked for the employer for 32 years without any previous discipline and the employee had a consistently good performance record, and the employee was provoked to some extent by his supervisor.<sup>44</sup>
- 28 year transportation maintenance supervisor borrowing state property and disregarding instructions given him by his superiors to not take or borrow state property without asking permission.<sup>45</sup>

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<sup>39</sup> Grievance of King, 13 VLRB 253 (1990).

<sup>40</sup> Grievance of Buckbee, 15 VLRB 34 (1992).

<sup>41</sup> Grievance of Terrel, 15 VLRB 342 (1992).

<sup>42</sup> Grievance of Greenia, 22 VLRB 18 (1999).

<sup>43</sup> Grievance of Lilly, 23 VLRB 25 (2000).

<sup>44</sup> Grievance of Downing, 24 VLRB 85 (2001).

<sup>45</sup> Grievance of Brown, 24 VLRB 159 (2001). *Affirmed*, 177 Vt. 365 (2004).

Many of these cases have been decided by the Board under collective bargaining contracts between the State and the VSEA providing that “(i)n any misconduct case involving a suspension or a dismissal, should the Vermont Labor Relations Board find just cause for discipline, but determine that the penalty was unreasonable, the Vermont Labor Relations Board shall have the authority to impose a lesser form of discipline.” In most of these cases, the Board reduced the penalty of dismissal to a suspension. The Vermont Supreme Court has held under this contract language that if the Board finds just cause for discipline, but not on grounds as serious as those alleged by the employer, the Board is authorized to fashion its own disciplinary sanction within those allowed by the contract.<sup>46</sup>

A recent trend in Board grievance decisions has been an increase in the number of state employee dismissal cases in which one of the major charges, or the only charge, against the employee involves dishonesty. The Board has issued decisions in thirteen such cases during the past ten years. The Board has found the dishonesty charge established in eight cases and affirmed the dismissal of the employee in each case based on the dishonesty charge and other established charges.<sup>47</sup> In the other five cases, the Board has concluded that the employer has not established the dishonesty charge and has ordered the employee reinstated.<sup>48</sup>

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<sup>46</sup> In re Brown, 177 Vt. 365, 371-372 (2004).

<sup>47</sup> Appeal of Danforth, 27 VLRB 153 (2004). Grievance of Sileski, 28 VLRB 165 (2006). Grievance of Ducas, 28 VLRB 238 (2006). Grievance of Kerr, 28 VLRB 264 (2006). Grievance of Turcotte, 30 VLRB 24 (2008). Grievance of Rosenberger, 31 VLRB 162 (2010). Grievance of Richardson, 31 VLRB 359 (2011). Grievance of Alexander, 31 VLRB 411 (2011).

<sup>48</sup> Appeal of Revene, 27 VLRB 282 (2004). Appeal of Davidson, 29 VLRB 166 (2007). Grievance of Jewett, 29 VLRB 206 (2007); *Reversed on Other Grounds*, 186 Vt. 160 (2009). Grievance of Dwire, 30 VLRB 240 (2009). Grievance of Jacobs, 31 VLRB 204 (2011).