

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 22-47
CODY BROWNELL)	

FINDINGS OF FACT, OPINION, AND ORDER

Cody Brownell, (“Mr. Brownell” “Grievant”), a Correctional Officer I, at the Northeast Correctional Center, employed by the Department of Corrections, grieves the decision of his employer, State of Vermont Department of Corrections (“State” “DOC” “Employer”) to terminate him for misconduct involving sexual harassment. Grievant alleges the Employer violated Article 14 of the collective bargaining agreement between the State and VSEA by terminating him without just cause, 2) improperly bypassing progressive discipline and progressive corrective action in demoting him, and 3) failing to apply discipline with a view toward uniformity and consistency in terminating him from the Department of Corrections.

The Vermont Labor Relations Board held hearings on the grievance on August 17, 2023, before, Board members, Robert Greemore, Chairperson, Alan Willard, and Roger Donegan. Grievant appeared pro se. The State was represented by Assistant Attorney General Duffy Jamieson. The hearing was held on the Microsoft Teams Platform. The parties filed post-hearing briefs on October 18, 2023.

FINDINGS OF FACT

Background

1. Grievant Cody Brownell was employed by the State of Vermont Department of Corrections from July 1, 2019, until his termination on September 9, 2022.

2. Grievant attended the Vermont State Correctional Academy in September 2019. During his training he was instructed on the State's Sexual Harassment policy. Grievant received and signed off on receiving a copy of the DOC Work Rules.
3. Grievant was assigned to the Northeast Regional Correctional Complex ("NRCC") in St. Johnsbury, Vermont where he served as a Correctional Officer I ("COI").
4. In February 2021, Grievant received a performance evaluation with a rating of Satisfactory.
5. On January 30, 2022, Grievant was promoted to a Community Correctional Officer position. He never served in that position, because staffing shortages necessitated that he continue to work at NRCC as a COI.
6. On February 8, 2022, Grievant worked the NRCC overnight shift and was assigned to the Post One position for Building One. The responsibilities of the Post One position include floating or providing breaks to the other officers in Building One, patrolling the perimeter of Building One, and assisting the Leader One in Building One. At the time, Building One housed minimum-custody incarcerated individuals.
7. Olivia Vardaro, then a COI at NRCC was assigned to the Leader One position for Building One, on February 8, 2022. As the Leader One officer, Officer Vardaro was responsible for Building One. During her shift, she was stationed in a small area commonly referred to as the booking cage or "cage."
8. The cage is a small area enclosed by a door and mesh or braided bars. The room is in the center of several hallways all sealed off by doors. Inside the cage is a small desk or bench area with a chair. Ninety degrees from that desk is a table or bench that contains a logbook which Grievant as the Patrol One would access during his shift.

9. During the overnight shift, Grievant came into the cage where Officer Vardaro was stationed. Grievant approached Officer Vardaro and leaned against the table or bench containing the logbook, close to where Officer Vardaro was sitting. He proceeded to make unsolicited and sexually explicit comments, including that he was “horny” and “hard.” Officer Vardaro responded that he was gross and turned her attention away from Grievant and focused on her computer. She tried to distract him by saying that he would be leaving soon, that his shift ended soon.
10. Grievant did not stop making sexually explicit comments. He said he wanted to have sex right now, to go in the bathroom with Officer Vardaro and have sex. Officer Vardaro told him that was morally wrong, he had a wife, and she had a boyfriend, that it was ethically wrong because they were both officers in charge of the inmates, that they had a job to do, and that there were cameras all around. She also said she was not interested.
11. Grievant then suggested that they go into a back room to avoid cameras. Grievant said they could engage in oral intercourse. Grievant stopped talking when another correctional officer came by. According to Officer Vardaro, she told him no, absolutely not.
12. Grievant went to the bathroom and after returning Officer Vardaro told him to go on break. She did not want to be near him. Grievant indicated he did not want to go on a break. Officer Vardaro repeated her request, and after Grievant denied needing a break, Officer Vardaro said she would take one if he did not.
13. Grievant admits he made sexually explicit comments to Officer Vardaro. He admits that he said he was “horny” and detailed his sexual desires to Officer Vardaro. Grievant admits that the comments were said to Officer Vardaro, but that he was describing his

sexual desires for his wife and detailed anticipated sexual plans with his wife. He told Officer Vardaro that if his wife were there, he would take his wife into the bathroom and “fuck” his wife.

14. Grievant claims that Officer Vardaro never told him to stop these comments or that they made her feel uncomfortable. He said the comments were consistent with the way the two would talk about each other’s partners.
15. Officer Vardaro did not report the behavior that night to her shift supervisor, because it was close to the end of her shift. After she left work, she talked with family and friends about the events and after speaking with an aunt and discussing the need to prevent this conduct from happening to someone else, Officer Vardaro decided to report Grievant’s behavior during her next shift.
16. When she returned to NRCC for her next shift on February 9, 2022, Officer Vardaro tried to avoid Grievant but noticed that he was again assigned to Post One. She delayed moving to her post so she could report the incident to the Shift Supervisor.
17. At around 7:30 p.m., Officer Vardaro asked if she could speak to the Shift Supervisor Matthew Pecor. She was not comfortable talking in the facility and asked to talk outside. She was feeling awkward and uncomfortable about the topic and initiated the conversation by posing a hypothetical. Supervisor Pecor asked that she drop the hypothetical and tell him what was going on. Officer Vardaro reported to Supervisor Pecor what had taken place during the prior shift with Grievant. She indicated that she was going to report the incident to the Superintendent. Supervisor Pecor recommended she file a report, which she did.

18. Officer Vardaro's report detailed the encounter with Grievant in the morning hours of February 9, 2022. She reported that Grievant told her he "felt horny," wanted to "get off," and that he wanted to go into the bathroom to have sex. Officer Vardaro reported that she rebuffed these advances saying, "that is gross" and reminding him of the impropriety of such conduct at work and telling him "No."
19. Supervisor Pecor moved Grievant to another end of the building and had another officer relieve Grievant from his post. Later, after receiving direction from Superintendent Quinn, Supervisor Pecor sent Grievant home.

Investigation

20. On February 10, 2022, Superintendent Quinn placed Grievant on Temporary Relief From Duty, "in order to permit the State to conduct and complete an investigation into allegations of misconduct, including, but not limited to, violations of DOC PREA. PREA is the Prison Rape Elimination Act. PREA policies address allegations of sexual abuse or conduct between staff and incarcerated individuals. The inclusion of PREA in the Relief from Duty letter was a mistake or mistype and PREA is not a factor or related to the allegations of misconduct against Grievant.
21. Assistant Superintendent Chris Cadorette gathered information regarding the allegations against Grievant. He took pictures of the cage area and viewed the video from the security cameras for the night of the alleged misconduct. The video contained no audio. The video showed Grievant in the cage with Officer Vardaro, going to the bathroom, and other movements that corroborated that he was hanging around Officer Vardaro during the night.

22. During the investigation, Officer Vardaro reported that prior to these events, Grievant had engaged in behavior that made her uncomfortable. On one occasion, Grievant entered the bathroom she was in without knocking. On several occasions, Grievant touched Officer Vardaro on the waist to move her so he could access his locker.
23. On March 22, 2022, and April 8, 2022, Charles Kirk, an investigator for DHR, interviewed Grievant, who was represented by David Martinson from the VSEA. Grievant reported that he had a good relationship with Officer Vardaro, they had attended the Vermont Corrections Academy together, and had socialized outside of work a few times.
24. Grievant did not initially recall the details of his interactions with Officer Vardaro on February 9, 2022. After being told about Officer Vardaro's allegations, he admitted that he said he "was horny" but meant it as it relates to his wife. He also may have made some sexual reference but related to his wife and what he would do with his wife. He denied propositioning Officer Vardaro for sex or inviting her to have sex in the bathroom. He also denied masturbating in the bathroom at work.
25. On May 31, 2022, Commissioner Deml sent Grievant a Loudermill letter advising Grievant that the Department was contemplating disciplinary action against him up to and including termination. Grievant was alleged to have engaged in misconduct "by sexually harassing a coworker while you were both on duty and after your coworker declined to engage in a conversation of a sexualized nature with you. Your conduct created for your coworker a situation that unreasonably interfered with her work environment and performance."

26. The Loudermill letter advised Grievant he had violated Personnel Policy 3.1, prohibiting sexual harassment, and 5.6, which requires employees to conduct themselves in a manner that will not bring discredit or embarrassment to the State. Grievant was also alleged to have violated DOC Work Rules 1, 6, 9, and 13.
27. On September 9, 2022, DOC Commissioner Deml terminated Grievant from his position because of the misconduct outlined in the May 31, 2022, Loudermill letter. “Specifically, you engaged in insensitive, offensive, and harassing comments and conduct of a sexual nature towards a coworker in the workplace.”
28. In deciding to terminate Grievant, the State conducted an analysis to determine whether there was just cause to terminate him. As part of its analysis for terminating Grievant, the employer identified that it has lost trust and confidence in his judgment, integrity, and ability to properly discharge his duties.
29. Grievant was terminated on September 9, 2022, and thereafter initiated the Grievance process.

OPINION

Grievant alleges the Employer dismissed him without just cause, improperly bypassed progressive discipline and failed to discipline him with a view towards consistency and uniformity. Just cause for dismissal is some substantial shortcoming detrimental to the employer’s interests which the law and sound public opinion recognize as a good cause for dismissal. In re Grievance of Brooks, 135 Vt. 563, 568 (1977). The ultimate criterion of just cause is whether an employer acted reasonably in discharging an employee for misconduct. Id. There are two requisite elements which establish just cause for dismissal: 1) it is reasonable to

discharge an employee because of certain conduct, and 2) the employee had fair notice, express or fairly implied, that such conduct would be grounds for discharge. Id.

In carrying out our function to hear and make a final determination on whether just cause exists, the Labor Relations Board determines *de novo* and finally the facts of a particular dispute, and whether the penalty imposed on the basis of those facts is within the law and the contract. Grievance of Colleran and Britt, 6 VLRB 235, 265 (1983). The burden of proof on all issues of fact required to establish just cause is on the employer, and that burden must be met by a preponderance of the evidence. Id. Once the underlying facts have been proven, we must determine whether the discipline imposed by the employer is reasonable given the proven facts. Id. at 266.

The Employer has alleged Grievant engaged in misconduct involving sexual harassment and violated Personnel Policies 3.1, and 5.6, and DOC Work Rules, 1, 6, 9, and 13. Grievant admits that he told his female coworker that he was horny and discussed with her his sexual desires and intentions. That he claims he made these comments about his wife, does not eliminate their offense, render them appropriate, nor disqualify them from being considered sexual harassment. The definition of “sexual harassment” under State Personnel Policy 3.1, applicable at the time of Grievant’s termination, is sufficiently broad to include comments of a sexual nature directed at an employee but referring to someone else. Policy 3.1, provides in pertinent part:

Sexual harassment means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, when:

- a) submission to such conduct is made either explicitly or implicitly a term or condition of employment; or

- b) submission to or rejection of such conduct by an individual is used as a component of the basis for employment decisions affecting that individual; or
- c) the conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.

Sexual harassment can be verbal, physical, auditory, and/or visual. It can be either subtle or overt. Sexual harassment refers to behavior that is not only unwelcome, but which can also be personally offensive, fails to respect the rights of others, lowers morale and interferes with work effectiveness, or violates a person's sense of well-being.

Personnel policy 3.1, State's Exhibit 4.

Officer Vardaro testified that Grievant's statements made her feel uncomfortable and interfered with her ability to perform her work. She kept her gaze fixed on her laptop and tried to encourage Grievant to leave the cage and work area. When he did not, she removed herself from the area to get away from him. The Board finds this testimony of Officer Vardaro to be credible. Her body language, telling him no, and removing herself from the area demonstrates that she did not welcome Grievant's lewd and vulgar statements. The State has proven by a preponderance of the evidence that Grievant engaged in misconduct involving sexual harassment. He violated the Sexual Harassment policy by his offensive and explicit sexual language which had the purpose or effect of unreasonably interfering with Officer Vardaro's work and creating an intimidating, hostile, unwelcome, or offensive work environment.

Personnel Policy 3.1.

By sexually harassing his co-worker, Grievant also engaged in conduct expressly prohibited in State Personnel Policy 5.6, ¶7. "Employees shall not discriminate against, intimidate, nor harass any employee because of . . . sex . . . or any other factor prohibited by

law.” Sexual harassment is a form of sex discrimination, 21 V.S.A. 495d (13)(A), and is expressly prohibited by law in the workplace. 21 V.S.A. §495h.

The State has proven by a preponderance of the evidence that Grievant engaged in unprofessional conduct that could bring discredit or embarrassment to the State in conflict with the Required Conduct in State Personnel Policy 5.6, ¶ 3, and Work Rule 9. Work Rule 9 also prohibits employees from behaving in a manner “that reflects discredit upon the Department.”

The State has also proved by a preponderance of the evidence that Grievant violated DOC Work Rules 1, and 6, which provide as follows:

1.No employee shall violate any provisions of the collective bargaining agreement or a State or Department work rule, policy, procedure, directive, local work rule or post order.

. . . .

6.No employee shall, while on duty or engaged in an activity associated with the Department of Corrections, engage in verbal or physical behavior towards employees, volunteers or members of the public, which is malicious, demeaning, harassing or insulting. Such behaviors include, but are not limited to: profane, indecent or vulgar language or gestures, actions or inactions which are rude (such as ignoring a visitor who attempts to gain entrance into the building) or treating inmates in a demeaning manner with no legitimate rehabilitative justification. No employee shall exhibit behaviors which are physically or mentally abusive towards offenders.

DOC Work Rules, State’s Exhibit 8.

Grievant engaged in conduct toward Officer Vardaro that was demeaning, harassing, and insulting, in violation of Work Rule 6. By sexually harassing a coworker and making explicit sexual statements to her, he failed to engage in a professional manner in his interactions with a coworker. Because he violated DOC Work Rules 9 and 6, and Personnel Policies 5.6 and 3.1,

Grievant also violated DOC Work Rule 1, which requires compliance with all State or Department Policies or Work Rules.

DOC Work Rule 13 prohibits romantic or sexual relationships between employees and offenders. The State has not proven by a preponderance of the evidence that Grievant engaged in such behavior, and therefore, Grievant did not violated DOC Work Rule 13.

The Board turns its analysis to whether the termination of Grievant based on the proven charges was reasonable.

Reasonableness of termination decision

In determining whether the proven charges justify the termination decision, the Board applies the factors announced in Grievance of Colleran and Britt, 6 VLRB 268, 269 (1983). The factors include: 1) the nature and seriousness of the proven offenses, 2) the Grievant's job level, 3) the Grievant's past work record including length of service, performance on the job, and past disciplinary record, 4) the effect of the offenses upon Grievant's ability to perform at a satisfactory level and their effect on supervisors' confidence in Grievant's ability to perform assigned duties, 5) the consistency of the penalty, 6) the clarity of notice, 7) the notoriety of the offense or its impact upon the Employer's reputation, 8) the potential for Grievant's rehabilitation, 9) mitigating factors, and 10) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future and mitigating factors. See Id. at 268-69 (1983).

The Colleran factors provide a means of assessing the reasonableness of the employer's decision. The Employer is not required to prove each factor to support the reasonableness of its decision, "only that 'on balance the relevant factors support management's judgment.'" In re Jewett, 2009 VT 67, ¶ 23, 186 Vt. 160, 170 (quoting In re Colleran, 6 VLRB at 269).

We first consider the nature and seriousness of Grievant's offenses and their relation to Grievant's duties and position. The just cause analysis centers upon the nature of the employee's misconduct. Grievance of Merrill, 151 Vt. 270, 273 (1989); In re Morrissey, 149 Vt. 1, 13 (1987). In deciding whether there is just cause for dismissal, the Board determines the substantiality of the detriment to the employer's interests. Merrill, 151 Vt. at 273-74.

Nature of proven offense and type of employment

Grievant sexually harassed his coworker by engaging in a sexually explicit monologue about his sexual desires. Whether his aspirations were directed at his co-worker, or his wife does not undermine the inappropriateness and offensiveness of the comments in the workplace, nor their violation of the Sexual Harassment policy. Grievant's conduct runs afoul of the required conduct outlined in Personnel Policy 5.6., paragraph 3. "Employees shall conduct themselves in a manner that will not bring discredit or embarrassment to the State of Vermont, whether on or off duty." Grievant violated DOC Work Rules, 1, 6, and 9.

Corrections Officers hold a position of authority and power over the incarcerated individuals they monitor. Corrections Officers must rely on each other, and their security and safety depends on the ability to trust their coworkers. Grievant betrayed this bond and trust by announcing to his co-worker his sexual desires. Grievant failed to heed her attempts to dissuade and stop Grievant from this topic. Grievant's misconduct was serious.

Employee's past discipline and work record and effect of offense on employee's ability to perform at a satisfactory level.

Grievant has never received any discipline during his tenure with DOC. He did receive a promotion but had yet to fill that position at the time of his discharge.

The State has reasonably lost trust in Grievant's ability to perform his duties as a correctional officer. Grievant engaged in sexual harassment of his co-worker while the two were alone in a small, confined space despite his co-worker's efforts to stop his sexually offensive comments. The State has reasonably concluded that "he is unable to meet the expectations or carry out the basic duties of his profession." State's Exhibit 9, § 5. Where Grievant's supervisor does not believe he can perform his duties, the Board has found the loss of confidence reasonable and supporting just cause. See Grievance of Abel, 31 VLRB 256, 279 (2011). See also Grievance of Alexander, 34 VLRB 33, 53 (2017).

Consistency

The State has cited two cases of employees engaging in sexualized conversations with co-workers for which the discipline ranged from a fifteen-day suspension to termination. The Board has upheld termination decisions where the Grievant has engaged in sexual harassment involving sexual banter and exchanges with female officers. See Grievance of Nappi, 36 VLRB 86 (2021). The termination decision is consistent with the penalty imposed upon other employees for the same or similar offenses.

Clarity of Notice

Grievant had both express and implied notice that his conduct could lead to termination. The standard for implied notice is whether the employee should have known the conduct was prohibited. Grievance of Towle, 164 Vt. 145, 150 (1995); Grievance of Brooks, 135 Vt. 563, 568 (1977). This is an objective standard. Towle, 164 Vt. at 150. "Knowledge that certain behavior is prohibited and subject to discipline is notice of the possibility of dismissal." Grievance of Hurlburt, 2003 VT 2, ¶25, 175 Vt. 40, 50.

Grievant received training at the Academy on the Sexual Harassment policy and its prohibitions. He also signed off on having received a copy of the DOC Work Rules. He was on notice that vulgar, profane, and indecent verbal behavior was not permitted by DOC employees “while on duty or engaged in an activity associated with the Department of Corrections.”

Notoriety of the offense and its impact on the employer’s reputation

There has been no evidence that Grievant or the conduct he engaged in has become “widely but unfavorably known or talked about.” Webster’s New World Dictionary 928 (Third College Edition, 1988). Although there is a potential for notoriety or harm to the Employer’s reputation resulting from Grievant’s offense, the State has not proven that there has been notoriety of the offense or its impact upon the reputation of the agency.

Rehabilitation and alternatives to termination

Despite his training and experience, Grievant has failed to acknowledge or understand the impropriety of announcing to his co-worker in the workplace his explicit sexual desires and plans for sexual fulfillment. Grievant refuses to recognize that his conduct was vulgar, offensive, and violative of the Sexual Harassment and Employee Conduct policies and DOC Work Rules. Grievant has demonstrated his disregard for how his behavior impacts his female co-workers. There has been no evidence that Grievant is willing or able to learn from his past mistakes and improve his conduct in the workplace. Grievant displayed poor judgment and the State was reasonable in its determination that Grievant’s potential for rehabilitation is limited.

Given the severity of the offense and the erosion of trust in Grievant’s ability to perform his job duties, the State was reasonable in finding that no alternative sanction would be adequate or effective.

The balance of these factors weighs in favor of the Employer and the Board concludes that the decision to terminate Grievant was reasonable.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the Grievance of Grievance of Cody Brownell is DISMISSED.

Dated this 6th day of February 2024, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Robert Greemore

Robert Greemore, Chairperson

/s/ Roger Donegan

Roger Donegan

/s/ Alan Willard

Alan Willard