VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 21-46
MICHAEL MILLER	)	

FINDINGS OF FACT, OPINION, AND ORDER

Introduction

Michael Miller, ("Grievant" "Mr. Miller"), a twenty-three-year employee of the Department of Corrections ("Employer" "State" "DOC") was terminated from his position as a Chief Security Officer at the Chittenden Regional Correctional Facility ("CRCF") for repeatedly asking an African American Correctional Officer II, whom he supervised, whether his food was fried chicken and not being truthful during the investigation into the incident.

On December 17, 2021, the Vermont State Employees' Association ("VSEA") filed a grievance with the Vermont Labor Relations Board ("Board") on behalf of Michael Miller alleging that DOC violated Article 14 of the collective bargaining agreement between the State and VSEA for the supervisory bargaining unit, by 1) terminating Grievant without just cause, 2) improperly bypassing progressive discipline and progressive corrective action in terminating him, 3) failing to apply discipline with a view toward uniformity and consistency, and 4) unreasonably delaying the imposition of discipline.

On May 5, 2022, the Board held a hearing through Microsoft Teams, before Board members Richard Park, Chairperson, David Boulanger, and Karen Saudek. VSEA General Counsel Timothy Belcher represented Grievant. Allison Powers, Assistant Attorney General, represented the State. The parties filed post-hearing briefs on June 10, 2022.

FINDINGS OF FACT

Background

1. Grievant was hired by the State in May 1998, to serve at the Chittenden Regional Correctional Facility ("CRCF"), as a Corrections Officer I. He ascended through the ranks, promoted to a Corrections Officer II, then in 2007, he was promoted to the Correctional Security Operations Supervisor ("SOS") at the facility. At one time during his tenure, he acted as Assistant Superintendent for approximately six months.
2. Grievant was involved in recruiting new Correctional Officers. During his tenure he recruited people of color and new Americans. He advocated for hiring people with some English language challenges who were otherwise qualified and able to perform the duties of Correctional Officer.
3. Larry Thomas was employed by the State as a Correctional Officer for about two years, serving at the CRCF. He started as a Correctional Officer I ("COI") and was promoted to a Correctional Officer II ("COII") in 2020. At the time of the incident that prompted Grievant's termination, Mr. Thomas was a Correctional Officer II. Mr. Thomas resigned from the DOC in June 2021 and moved to Delaware where he works for the Delaware Department of Corrections.
4. Larry Thomas is a person of color who identifies as Black. He grew up in New York City and recalls facing adversity and racial discrimination by New York Police Department officers through the "stop and frisk" program in effect at the time. He testified that he was stopped and searched at times and believes he was stopped because he was Black. He observed that only people of color were being stopped and frisked.
5. Grievant recruited Mr. Thomas when the latter was a college student in Plattsburgh, New York. Grievant staffed a recruitment booth at the Plattsburgh Mall and talked with Mr.

Thomas about working for the Department of Corrections. The following year, Grievant returned and talked with Mr. Thomas and his friend about coming to work for DOC.

6. Grievant supervised Mr. Thomas. The officers at the CRCF, adhered to the following chain of command: Superintendent, Assistant Superintendent, SOS, Shift Supervisor, or S1, CO II, then finally COI.

7. After Mr. Thomas started working at CRCF, Grievant learned that Mr. Thomas was considering leaving and moving to Delaware. Grievant encouraged Mr. Thomas to stay in Vermont and continue his career at CRCF.

8. Mr. Thomas described his relationship with Grievant as cordial.

9. Correctional officers do not interact that often with the SOS, but they do require the approval of the SOS to obtain training.

10. Mr. Thomas made a request through Grievant to receive control room training. After not receiving a response, Mr. Thomas made his request to the Superintendent and received the needed approval.

11. Grievant testified that he did not delay or impede Grievant's request for training and followed the procedure for approving requests for special training. The State did not present any credible evidence that Grievant interfered with or held up the request.

12. In 2019, Mr. Thomas purchased a new car, a Camaro. At the time Grievant made a comment to Mr. Thomas about hoping the car did not get repossessed. When asked by counsel for the State why he thinks Grievant said this, Mr. Thomas responded, "I thought he was trying to be funny. You know, just saying I couldn't afford the car."

13. Mr. Thomas asked another Correctional Officer, who is white, who had purchased a truck at about the same time, whether he received the same warning. "I said, hey, did anybody

ask you -- well, did anybody tell you, you know, watch out your car might get repo' d. And they said no."

14. Grievant recalls having a conversation with Mr. Thomas, about being careful about relying on overtime pay as the basis for making spending decisions. Because overtime is not fixed or reliable, it can create a false sense of financial security. When overtime is no longer available, the base salary may not be sufficient to pay for large purchases.

15. Grievant has had similar conversations with other correctional officers during his tenure and has mentioned it during orientations. He has observed vehicles being repossessed and correctional officers receiving calls from debt collectors. He wanted to caution correctional officers about this risk.

16. Mr. Thomas did not describe Grievant's motivation as racist or that the statement was racist. Grievant testified that he made similar warnings or cautions to other correctional officers.

17. On December 31, 2020, Mr. Thomas was in the break room heating up his food in the microwave and he exited to get a fork. While Mr. Thomas was out of the room, Grievant entered the break room and asked, "who had chicken" he believed it was chicken and asked, "who is cooking the chicken up." When Mr. Thomas returned to the break room, Grievant asked him if it was his food and if it was fried chicken. Mr. Thomas responded that it was his food and that it was not fried chicken, it was stir fried seafood and vegetables. Grievant then said it really smells like fried chicken, and repeated that it smelled like fried chicken several times. Mr. Thomas proceeded to eat his food. Kalyn Langford, Director of Nursing, entered and remarked that the food smelled good. Grievant asked her or said to her "do you think it smells like fried chicken." Director Langford

replied, “no, it does not smell like fried chicken,” but that she already knew it was not fried chicken because Mr. Thomas had told her earlier it was shrimp and vegetables.

18. Mr. Thomas testified that Grievant had a smirk on his face. Grievant, however, due to adherence to the COVID-19 mitigation measures at the facility, was wearing a mask.

19. Another staff member, Steffen Flibotte, a Work Crew Team Leader, was also in the break room at the time of this exchange. Mr. Flibotte has worked at CRCF since the end of 2010. He started as a temporary Correctional Officer, then hired as a Correctional Officer I. After seven years he was promoted to a Correctional Officer II, then took the position of Team Leader in January 2020. The SOS position does not supervise the Work Crew Team Leader.

20. Mr. Flibotte was in the break room to retrieve a mop for work duty when he observed the interaction between Grievant and Mr. Thomas. He observed Mr. Thomas come into the break room and approach the microwave. Grievant asked Mr. Thomas if the food in the microwave was his. Thomas replied it was. Grievant asked Mr. Thomas if it was fried chicken. Thomas replied that it was not. Grievant repeated his question whether the food was fried chicken, Mr. Thomas said no, it was not fried chicken, it was shrimp. Grievant then said it smelled like fried chicken. Mr. Flibotte said it sounded like Grievant was saying fried chicken with a southern drawl.

21. No other witness, including Mr. Thomas testified that Grievant spoke with a southern drawl.

22. Nursing Director Langford did not pay attention to the interaction other than to respond to the query about the food.

23. Mr. Flibotte was a VSEA steward. He stated that Black and Hispanic employees had reported to him that they were not being promoted because of their race. He was not aware of any DOC employee being terminated because of a racially insensitive comment.
24. Mr. Flibotte had tried to get other supervisors fired because he was not satisfied with the toxic work culture/environment at the facility. Mr. Flibotte provided information to the newspaper Seven Days about a different supervisor and conditions at the facility. The other supervisor was investigated and neither criminal nor disciplinary charges were filed against the other supervisor.
25. Mr. Flibotte also complained about Grievant and said he wanted to see Grievant fired.
26. Because neither Mr. Thomas, Grievant, nor Nursing Director Langford represented that Grievant used a southern accent or drawl when asking about the fried chicken, the Board finds that the employer failed to prove that Grievant used a southern accent when asking if the food was fried chicken.
27. Mr. Flibotte thought that Grievant's question could be racist and was a little uncomfortable with Grievant's question about fried chicken. The whole encounter lasted about 30 seconds or less.
28. Mr. Thomas believed the repeated questioning of him by Grievant about fried chicken was racist, because Grievant continued to ask whether the food was fried chicken after being told it was not.
29. Four days later, on January 4, 2021, at 3:51 p.m., Mr. Thomas wrote to Superintendent Theresa Messier, with a copy to Glenn Boyde, on the subject of staff misconduct. Mr. Thomas wrote the email because he did not think it was right that a supervisor with authority over him and others "would think it was okay to say something like this, not

understanding the trauma that comes behind it." Mr. Thomas ended the email with "[t]his was very racist for SOS Miller to say and I believe it needs to be addressed. . .."

30. Mr. Thomas waited four days to report the incident because he was afraid of retaliation.

31. Mr. Glenn Boyde is a union representative who is a person of color. Mr. Thomas had previously met Mr. Boyde socially and included him on the email because he thought he could relate to his concern and because he feared retaliation for sending the email.

32. Mr. Thomas was not retaliated against nor suffered any adverse employment action as a result of the fried chicken statements nor reporting the fried chicken incident. Mr. Thomas left Vermont and DOC several months after reporting the incident.

33. There was no evidence presented that Mr. Thomas's decision to leave Vermont and DOC to move and work in Delaware was related to the fried chicken incident.

Personnel Policy and DOC Work Rules

34. State Personnel Policy 5.6, Employee Conduct, provides in pertinent part:

. . . .

REQUIRED CONDUCT

1. It shall be the duty of employees to fulfill to the best of their ability the duties and responsibilities of their position. Employees should pursue the common good in their official activities, and shall uphold the public interest, as opposed to personal or group interests.

. . . .

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.

. . . .

PROHIBITED CONDUCT

. . . .

2. Employees shall not intimidate or harass any employee because of race, color, . . . or any other factor for which discrimination is prohibited by law.

Joint Exhibit 9.

40. State Personnel Policy 3.3, Discrimination Complaints, provides in pertinent part:

> **PURPOSE & POLICY STATEMENT**
>
> The State of Vermont is opposed to discrimination, and contractually and legally bound to prohibit unlawful discrimination in the workplace on the basis of race, color....and any other factor that is prohibited by law. The purpose of this policy is to establish protocols for reporting and investigating allegations of prohibited discrimination. Sexual harassment is covered separately in Policy 3.1 Reasonable accommodation for qualified disability and the Americans with Disability Act (ADA)/ADA Amendments Act are covered by Policy 3.2.
>
> Many of the above-listed forms of discrimination are unlawful under state and federal law. All are prohibited by the collective bargaining agreements between the State of Vermont and its respective Unions ... Allegations of prohibited discrimination and retaliation as described above will be appropriately addressed by management, including investigation where necessary.
>
> <u>All employees</u>, including but not limited to non-supervisory staff, supervisors, managers, and appointing authorities, are expected to comply with this policy and take appropriate measures to ensure that discrimination does not occur. Disciplinary action, up to and including dismissal, maybe taken against any employee who engages in discrimination or who otherwise violates this policy, applicable state and federal laws, or the collective bargaining agreements.
>
> In addition, every manager and supervisor within the State of Vermont is responsible for providing a workplace free from discrimination. This duty includes disseminating this policy so that all employees are aware that they are not required to endure discrimination; discrimination will not be allowed; this policy, the collective bargaining agreement prohibitions, and state and federal discrimination laws will be enforced.

Joint Exhibit 9.

41. The Department of Corrections has promulgated its own Work Rules. On June 28, 1998,

Grievant received a copy of the DOC Work Rules which include the following:

> 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.
> . . . .

> 4.Employees shall be honest and complete in their descriptions, whether given orally or in writing, to the employer of events occurring in the work place and in all other circumstances related to their employment.
>
> 5.Employees shall cooperate fully with any inquiry or investigation, whether formal or informal, conducted by the Department. This shall include answering fully and truthfully any questions related to their employment.
>
> 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.
> . . . .
>
> 9. No employee, whether on or off duty, shall comport him/herself in a manner that reflects discredit upon the Department.
> . . . .
>
> 13. . . Employees, while on duty or engaged in activity associated with the Department of Corrections shall conduct themselves in a professional manner in their interactions with co-workers.

Joint Exhibit 1.

Investigation

42. On January 4, 2021, at 4:00 p.m., Grievant was placed on temporary relief from duty. He was notified through a phone call from Superintendent Messier. The Superintendent did not alert him or notify him of the details of the charge but said he was being suspended for serious allegations.

43. On January 29, 2021, Investigator Tyler Dunigan notified Grievant that he was being investigated because Grievant "engaged in misconduct, including but not limited to harassing a co-worker using a racial stereotype." The letter from Investigator Dunigan was the first time Grievant was alerted to the reason for his temporary relief from duty and

investigation. Investigator Dunigan informed Grievant of the following obligations under Personnel Policy 17.0:

> Cooperate with investigations, and provide truthful and complete information in accordance with State Personnel Policies and local Work Rules. Refusing to answer, answering incompletely, or answering untruthfully, questions relating to work is considered misconduct for which an employee may be disciplined up to and including dismissal from their employment with the State.
>
> Refrain from taking any action which may undermine the integrity of the investigation, including but not limited to threatening, coercing or harassing witnesses, or disclosing confidential information.

VSEA Exhibit 1.

44. Grievant was interviewed on February 5, 2021. During his interview, Grievant was asked what he recalled about an interaction with Mr. Thomas about food in the break room:

> Dunigan: Do you recall any conversation in the break room where you were inquiring about the type of food he was eating? It would've been right before you were got on TRD [Temporary Relief from Duty] a couple of days.
>
> Grievant: Yeah, he was using the microwave?
>
> . . . .
> Dunigan: -- if you can just walk me through your recollection of what that interaction was.
>
> Grievant: Yeah. I went to my locker which is if you go into the locker room, you go all the way to the back of the locker room, go to the left-hand side. This is where my like locker is, and the microwave is right there that staff used. I walked into the locker room, and I could smell the microwave going. I asked who had chicken, I believe it was chicken. I said who has -- who is cooking the chicken up. I went to my locker, open my locker. A few minutes later, Larry Thomas came over, and I said is that yours, and he said it was. I asked him about it, and come to find out it wasn't even chicken, it was seafood, stir fry, or something like that. And that was about it. It [sic] might've asked some other people about how it smelled. I want to say I went back to my office and started talking to Jon Turek about chicken because I was

craving chicken.

Dunigan: Okay.

Grievant: There we talked about -- Jon Turek and I talked about his deep fryer, his air fryer.

Dunigan: Okay.

Grievant: I don't -- there was nothing like a racial motive to it at all.

Dunigan: Okay. And it might sound like I'm splitting hairs here, but do you recall if you asked if fried chicken was being cooked or just chicken?

Grievant: I think I said fried chicken because I could smell fried chicken.

Dunigan: Okay. And after he had told you it was seafood, did you then ask again if it was fried chicken?

Grievant: That I don't know if I did or not.

Dunigan: Okay.

Grievant: I had -- I do recall having fried chicken on my mind that day.

Dunigan: Okay. How many times during that first interaction with Thomas at the microwave while he was cooking his food do you think you asked him if he was cooking fried chicken?

Grievant: I have no clue. I just remember talking about how good it smelled, and then he said it was seafood and I said man I don't even -- I would not have guessed that it was seafood.

Dunigan: It's been described to me that after you asked him the first time and he said it was seafood, you said something along the lines of are you sure that's not fried chicken, that sure smells like fried chicken to me, you're sure it's not fried chicken up to four or five times total you asking him if it was fried chicken.

Grievant: I -- the amount of times, I would say, I would have

no clue, but I probably did say something are you sure it wasn't because I remember it smelling to me just like fried chicken.

Dunigan: Okay.

Grievant: And that was in a good way.

Dunigan: Okay. After you initially asked him what it was and he told you it was seafood, did he reply to any more of your questions about whether or not he was cooking fried chicken or that it smelled like fried chicken?

Grievant: I want to say he did. I honestly don't recall. Going back to that conversation, but I want to say that we joked about it for a little bit.

Dunigan: So you recall him joking with you about the situation?

Grievant: Yeah, I mean, not making like huge, you know, upfront jokes, but we kind of like left about it, we discussed what was in his -- in the meal.
Dunigan: Okay. So did he not appear -- guess, how did he appear to you during that interaction?

Grievant: To me, he didn't appear any different than the day I met him a couple of years ago till the day that I left, I guess.

Dunigan: Okay. When you said that the words "fried chicken", did you have any accent or emphasis on those words while you were speaking to him?

Grievant: No. I was talking about food.

Dunigan: Okay. So --

Grievant: I love food.

Dunigan: So had you put any -- I'm going to do a poor reenactment of how it was described to me, but did you say the term fried chicken such as [frah'-ehd] chicken, with kind of a southern drawl on it?

Grievant: I don't believe I would do that. I probably just

said, "fried chicken."

Dunigan: Okay. Was anyone else around while you were talking to Thomas about this?

Grievant: There were. I know that -- gosh I can't even think of her name right now.

Dunigan: Kalvyn Langford?

Grievant: Kalvyn was there. I asked her if she could smell -- I said, doesn't that smell like fried chicken? Like, and she said, well, I'm biased because I already asked him what it was, or I already knew what it was, or something like that.

Dunigan: Okay. You know, a lot of these are going to seem pretty clear to you, but why did you ask him if his meal was fried chicken?

Grievant: Because it smelled like fried chicken to me. I guess I was just craving chicken that day. . ..

Dunigan: Okay. And Thomas is a person of color, correct?

Grievant: He is.

Dunigan: And you're aware of the racial stereotype that African-Americans have a preference for fried chicken?

Grievant: Yes. Right. In no means whatsoever was that intended towards that.

Dunigan: Okay. I'm going to pose a hypothetical question. As a supervisor in that facility as chief of security, if one of your officers was asking an inmate who was a person of color if their meal was fried chicken and they asked them three or four times when they had been told it was seafood, would you have any issue with that correctional officer asking the person of color if their meal was fried chicken repeatedly?

Grievant: I guess if you -- if they were able to see the meal and you know they really thought -- I mean, to me, it really smelled like fried chicken.

Dunigan: Okay.

Grievant: Yeah. I meant no harm by that whatsoever.

Dunigan: Okay. So to you, you had no -- when you were asking him if it was fried chicken, to you it was legitimately because you had smelled fried chicken and not because of your knowledge of the racial stereotype and Thomas being a person of color?

Grievant: It has absolutely nothing to do with that.

Joint Exhibit 3.

45. The investigator also conducted interviews with Mr. Flibotte, Mr. Thomas, and Director of Nursing, Kalvyn Langford. The investigation did not include interviews with other DOC employees about Grievant and his interactions with people of color at the facility.

46. On February 5, 2021, Mr. Dunigan issued his Investigative Report on the allegations that Grievant made racially harassing comments towards a subordinate who is a person of color.

47. On February 26, 2021, Interim Commissioner James Baker provided Grievant with a Loudermill letter identifying the following relevant provisions of the CBA, State Personnel Policies, and Department Work Rules, the State was alleging the Grievant had violated:

CBA Article 14: Disciplinary Action

Policy 3.3: Discrimination Complaints

Policy 5.6 Employee Conduct

Policy 8.0 Disciplinary Action

Policy 9.2 Immediate Dismissal

Policy 17.0 Employment Related Investigations issued

48. The Loudermill letter "alleged that [Grievant] committed misconduct and/or gross misconduct by repeatedly making racially harassing comments toward a subordinate and by

failing to provide complete and/or truthful information during [his] investigative interview." Joint Exhibit 5.

49. The misconduct allegation regarding harassment of a subordinate involved the December 31, 2020, repeated questioning of Mr. Thomas about his meal and whether it was fried chicken.

> During your investigative interview, you admitted to knowing that Thomas is a person of color and that there is a racial stereotype that African Americans prefer fried chicken. Given that you repeatedly asked or made comments about the food being fried chicken in at least 10 statements—even after being told that the contents were not fried chicken multiple times and even though shrimp and fish have a distinct smell—it appears that you were not genuinely questioning whether Thomas' meal was fried chicken. Rather, it appears that you were intentionally engaged in racially harassing misconduct by repeatedly referencing an offensive African American stereotype.

Joint Exhibit 5.

50. The allegation regarding failing to provide complete or truthful information asserted that after Grievant made the initial fried chicken comment "that was about it." The allegation continued with the following:

> You claimed to not have recalled whether you made comments about fried chicken repeatedly and denied that the comments were made based upon Thomas' race or racial stereotypes. Despite these denials the evidence collected during the State's investigation indicates that you were not complete and honest during your investigative interview. For instance, in addition to Thomas, two other Department personnel observed you make repeated comments about whether Thomas' meal was fried chicken. In addition, the circumstances of your comments – including the badgering way in which they were said, the tone in which they were conveyed, and the person to whom they were conveyed—indicate that the comments were made in a harassing way to play at a racially insensitive stereotype.

Joint Exhibit 5.

51. On May 13, 2021, a Loudermill hearing was held at which Grievant appeared with VSEA representative Tom Hango. Mr. Hango spoke first and highlighted Grievant's long years of service and excellent or better performance evaluations. He also stressed that Grievant had recruited many "minority members" and employees of DOC including Mr. Thomas. Mr. Hango also stressed that the repeated statements were an isolated incident, that Grievant had no intent to harm, and the incident would not happen again.
52. Grievant stated that when he first asked about the food cooking in the microwave and whether it was fried chicken, he did not know whose food it was. To him, he smelled fried chicken and wanted to know what was heating up in the microwave. Grievant stressed that he had been in the military and had worked with minorities throughout his life. He had also recruited staff from diverse backgrounds. He admits that he asked about whether the food was fried chicken a number of times after being told by Thomas that it was not fried chicken. "I will admit that, you know, when he said it wasn't chicken, I asked a couple of times about it I guess, and in hindsight being 20/20, I should just take the initiative and when he says it's not chicken, then just drop it rather than repeating it." Joint Exhibit 6.
53. Grievant stressed that during the initial interview he was not aware of the allegations and did not remember all the details about the conversation with Thomas about his food. He thought it was a casual conversation and nothing stood out for him. He remembered what he could at the time of the interview. He recognized in hindsight that he commented to Thomas too many times about fried chicken.
54. Interim Commissioner Baker asked Grievant whether the incident had any impact or effect on Mr. Thomas. Grievant responded that up until his investigation interview when he was told what prompted the investigation:

> I thought Thomas and I had a good relationship. I - - once I found out that Thomas felt that way, I immediately said I want to make it right, talk to Thomas. I understood that if he was upset, then he has a right to be upset, but I feel for him, but I also want him to know that I'm not –I wasn't targeting him in the way that he felt that I was targeting him. So I really wanted to make sure that regardless of how this ends out, I'd like the opportunity to talk to Thomas to make sure he's in a good spot.

Joint Exhibit 6.

55. In response to questioning from Interim Commissioner Baker about the fried chicken reference as applied to African Americans, Grievant stated:

> It's a stereotype that's been around for many, many years. And I can understand where Thomas would feel that I was coming at him as a reference to the fried chicken comment. I don't know how to express the fact that it was really about the food and not Thomas. Like I said it upsets me that Thomas is bothered by it when my intention was totally to reference of how his food smelled.

Joint Exhibit 6.

56. In November 2021, Nicholas Deml was appointed the new Commissioner of DOC. The ultimate decision regarding the DOC response to Grievant's conduct was made by Commissioner Deml.

57. On December 1, 2021, Commissioner Deml signed the Termination Decision Memo that included the twelve factors the State considered when deciding to terminate Grievant. The Commissioner determined that Grievant had lied during his investigative interview and Loudermill hearing and "[g]iven the totality of the circumstances, the Department finds that no alternative sanctions to termination are adequate or would be effective here." Joint Exhibit 8.

58. Commissioner Deml testified that Grievant's conduct was "so egregious" that the DOC could not tolerate the behavior. The Commissioner testified that Grievant's understating the number of times that he said fried chicken and that he was not aware that it was a

racially motivated phrase to be not credible. "I find it highly implausible, nearly impossible to understand that he did not think that that was racially related."

59. The Commissioner's characterization of Grievant's statements about the conversation, however, is incorrect. At the Loudermill hearing, Grievant admitted that he said fried chicken more than once and that he continued to ask if the food was fried chicken after he was told it was not. During the initial interview, for which he was provided with no notice about the specific conduct or actions that precipitated the investigation, Grievant acknowledged that he asked if the food was fried chicken and indicated he could not recall how many times he said fried chicken or repeated the statement. He also acknowledged that he knew fried chicken was a stereotype applied to African Americans. In this instance, however, he did not intend it as one; he intended its use to mean fried chicken, the food that he was craving.

60. On December 1, 2021, Commissioner Deml wrote to Grievant notifying him of his "dismissal from the position of Correctional Security and Operations Supervisor with the Department of Corrections (DOC), effective at the close of business December 1, 2021." The dismissal letter provided the following:

> I am terminating your employment because I find that you committed misconduct as described in the February 26, 2021 [Loudermill] letter, which is incorporated herein. Specifically, you engaged in discriminatory and unprofessional behavior towards a coworker. Additionally, you failed to provide complete and truthful information in your investigative interview by not being forthcoming in regard to your motive to ask multiple times about your coworker's food.

Joint Exhibit 8.

61. Mr. Thomas's testimony that he thought Grievant was trying to be racist played a significant part in Commissioner Deml's decision to terminate Grievant. The

Commissioner was unaware of other incidents where a DOC staff member was terminated for making racially insensitive remarks. The Commissioner also believed Grievant was on notice that his conduct could result in termination because "there's repeated conversations about nondiscrimination and the need to prevent discrimination and harassment."

62. The State did not include any evidence of trainings provided to Grievant on personnel management, supervising responsibilities generally, or race discrimination, implicit bias, workplace harassment, or diversity, equity, or inclusion specifically.

63. The Commissioner testified that it is important to maintain uniformity in disciplining and that similar acts should be treated similarly. When describing the two cases cited by the State in its twelve-factor analysis memo, the Commissioner stated that the two cases were disturbing. The Commissioner also noted that Grievant's favorable employment history and lack of a disciplinary record deserves a lot of weight.

64. There has been no notoriety resulting from the incident.

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.

Whether the State has proven the alleged charges

The Employer alleges Grievant engaged in misconduct or gross misconduct by 1) engaging in discriminatory and unprofessional behavior by repeatedly making racially harassing comments towards a subordinate; and 2) failing "to provide complete and truthful information during his investigative interview by not being forthcoming in regard to your motive to ask multiple times about your coworker's food." Joint Exhibit 8.

Regarding the first allegation, Grievant admits that he asked Correctional Officer II Thomas, an African American man of color several times whether the food he was eating or heating up was fried chicken. Grievant, admits he repeated the fried chicken question after being told that the food was Thomas's and that it was not fried chicken. Grievant admits that he is aware that fried chicken can be a racial stereotype, although he did not intend to use it as one when asking whether Mr. Thomas's food was fried chicken.

The State alleges that this incident, lasting approximately thirty seconds, qualifies as racial harassment or discrimination that violates Personnel Policy 3.3, Discrimination Complaints. The purpose of the Policy, "is to establish protocols for reporting and investigating

allegations of prohibited discrimination." Joint Exhibit 9, Policy Number 3.3. Discrimination under the Policy "is intended to include all forms of mistreatment or denial of privileges based upon impermissible factors as established by state or federal law, applicable regulations, or applicable collective bargaining agreements." Joint Exhibit 9. Unlike the policies for sexual harassment, Policy 3.1, and ADA, Policy 3.2, the Discrimination Complaints Policy does not further define or outline the types of behavior or conduct that is prohibited as harassment or discrimination. To determine whether one incident of repeatedly asking an African American employee whether he was eating fried chicken is race discrimination or racial harassment, therefore, requires reference to state and federal law.

Vermont's Fair Employment Practices Act ("FEPA") prohibits discrimination in employment on the basis of race. 21 V.S.A. § 495(a). FEPA is patterned on Title VII of the Civil Rights Act which protects against employment discrimination based on race, color, religion, sex, or national origin, and is often guided by federal court precedent interpreting Title VII. See Payne v. U.S. Airways, Inc., 2009 VT 90, ¶ 10, 186 Vt. 458, 463-64. The "standards and burdens of proof established under FEPA are identical to Title VII." Hodgdon v. Mt. Mansfield Co Inc.., 160 Vt. 150, 161 (1992). To establish a claim of race discrimination, an employee must show that he was (1) a member of a protected class, (2) qualified for the position; (3) there was an adverse employment action; and (4) that "the circumstances surrounding this adverse employment action permit an inference of discrimination." Robertson v. Mylan Labs., Inc., 2004 VT 15, ¶ 25, 176 Vt. 356, 367.

Mr. Thomas is a member of a protected class and ascended to the rank of Corrections Officer II. Although suffering the smack of the statement and being reminded of the racial trauma he suffered as a child, the Employer has presented no evidence that Mr. Thomas suffered

an adverse employment action as a result of the repeated fried chicken comments. Mr. Thomas continued his employment and there was no evidence presented that he was retaliated against or otherwise suffered any setback or adverse employment action. The State has not proven by a preponderance of the evidence that Grievant racially discriminated against Mr. Thomas by repeatedly asking whether his food was fried chicken.

The State has also failed to prove by a preponderance of the evidence that Grievant's question whether the food was fried chicken is racial harassment. In the sexual harassment context, the Board has held that a hostile work environment exists "when the workplace is permeated with discriminatory intimidation, or ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment." See In re Grievance of Ryan, 36 VLRB 24, 52 (2021), rev'd on other grounds, 2021 VT 82 (quoting Grievance of Butler, 17 VLRB 247, 315 (1994) (internal citations and other citations omitted), aff'd, 166 Vt. 423 (1997)) The standard employed by the Board is similar to that applied in Title VII race harassment cases.

Racial harassment can be discrimination where it is so severe or pervasive as to alter the conditions of the recipient's employment and create an abusive or hostile working environment. See generally Harris v. Forklift Sys., Inc., 510 U.S. 17, 21, 114 S. Ct. 367, 370 (1993); In re Boyde, 165 Vt. 624, 626 (1996) (outlining hostile work environment standard of acts so sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment). A hostile work environment exists where the "workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working

environment." Raspardo v. Carlone, 770 F.3d 97, 114 (2d Cir. 2014) (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21, 114 S. Ct. 367 (1993)).

The State has not met its burden of proving that Grievant engaged in racial harassment. The evidence does not support a finding that the one-time incident was so severe or pervasive to alter the conditions of Mr. Thomas's employment or working environment. There was no testimony that the fried chicken comments altered the conditions of Mr. Thomas's work environment. It is undisputed that the only time Grievant made a fried chicken reference was on December 31, 2020, over the span of thirty seconds in the break room.

The statements were made by Grievant who, although knowing that fried chicken can be used as a racial stereotype, insists that he questioned whether the food was fried chicken because he was thinking of and smelling fried chicken, not because of Mr. Thomas's race. Unlike certain racial epithets that are unambiguous, connoting only racially offensive meaning or intent, fried chicken also has a literal and non-racial meaning.

There was no evidence presented that Grievant made any racial epithets or slurs or used racial tropes at any other time during his twenty-three years generally, nor during the time he supervised Mr. Thomas specifically. The Board does not find persuasive the State's attempt to buttress its claim that Grievant engaged in race discrimination or harassment by referencing Grievant's caution to Mr. Thomas about the danger of having his new car repossessed. The State claims this encounter, combined with the fried chicken statements, is evidence of race discrimination. The Board disagrees. There is no evidence that the statement was based on or because of Mr. Thomas' race. Mr. Thomas himself testified that he thought Grievant made the comment to be funny because he thought Thomas did not have any money. The motive was economic, not racial. Grievant testified that he often cautioned subordinates about the risk of

relying on overtime pay as the basis for making large purchases. He was aware of junior employees being harassed by debt collectors and observed the repossession of their cars. Mr. Thomas's inquiry of one white co-worker, regarding whether Grievant or anyone else warned the co-worker about the risks of repossession, and the response that nobody had, does not refute the non-racial rationale of Grievant's statement.

The State maintains that Grievant violated the Discrimination Complaints Policy because he was a supervisor and supervisors are "responsible for providing a workplace free from discrimination." As noted above, however, the State has not proven by a preponderance of the evidence that Grievant engaged in discriminatory conduct or that discrimination occurred. The fried chicken comments did not result in Mr. Thomas or anyone else suffering an adverse employment action or hostile work environment.

The Board finds that the State did not prove that Grievant engaged in discrimination or racial harassment, and therefore, has not proven that Grievant engaged in the conduct prohibited in paragraph 7 of Personnel Policy 5.6.

The State next alleges that Grievant's repeated questioning about fried chicken was unprofessional, demeaning, and harassing, in violation of DOC Work Rules 6 and 13. The DOC Work Rules do not define the term "harassing" as it is used in Work Rule 6, repeated below:

> 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.

Joint Exhibit 1.

Because "harassment" is not connected to or modified by the term "racial" the Board construes it to have its general meaning "to trouble, worry, or torment, as with cares, debts, repeated questions, etc." or "to trouble by repeated raids or attacks, etc.; harry." Webster's New World Dictionary of American English, 613 (3rd college ed. 1988).

The State has proven by a preponderance of the evidence that Grievant engaged in demeaning or harassing behavior in violation of DOC Work Rule 6. Grievant repeatedly asked Mr. Thomas whether he was heating up or cooking fried chicken, after he was told that the food was not fried chicken. This repeated questioning constitutes harassment under the general definition of that term, not how that term is defined in Title VII or FEPA jurisprudence. This conduct was also unprofessional and displayed a disregard for Mr. Thomas, in violation of DOC Work Rule 13.

The State has also proven that in repeatedly asking an African American subordinate whether his food was fried chicken, Grievant failed to fulfill his duties as a supervisor and pursue the common good in violation of State Personnel Policy 5.6, Required Conduct 1. DOC could be embarrassed, and the institution discredited by the public exposure that a member of the leadership team repeated a racial trope to a subordinate. The context and rationale for use of the phrase might be lost when disseminated to the public and would discredit the Department and its employees. The State has proven, therefore, that Grievant violated Personal Policy Required Conduct 3, and DOC Work Rule 9.

Because any violation of a DOC Work Rule or State Policy is prohibited under DOC Work Rule 1, and the Board has found Grievant violated DOC Work Rules 6, 9, and 13, and Policy 5.6, Required Conduct 1, and 3, Grievant also violated DOC Work Rule 1.

Employer next alleges that Grievant was not truthful and did not cooperate fully during the investigation in violation of Personnel Policy 17.0, and DOC Work Rules 4 and 5. The Employer claims Grievant lied about the number of times he asked Mr. Thomas whether he was eating fried chicken and when he said his comments were not motivated by race. The Board finds the Employer did not prove by a preponderance of the evidence that Grievant was untruthful or uncooperative during the investigation process.

Grievant received no notice about the specific allegations against him before his investigative interview. Grievant was unaware that the focus of the interview would be the encounter with Mr. Thomas about the food he was reheating in the microwave. Grievant was candid in his interview. He admitted that he asked about fried chicken and that he repeated to make comments about fried chicken even after being told by Mr. Thomas that the food was seafood and vegetables. He could not recall the number of times he asked about fried chicken. "I have no clue. I just remember talking about how good it smelled, and then he said it was seafood and I said man I would not have guessed that it was seafood." He also admitted that "I probably did say something are you sure it wasn't [fried chicken] because I remember it smelling to me just like fried chicken. . .. And that was in a good way." Joint Exhibit 3.

Later in the interview, Grievant acknowledged that he likely repeated the fried chicken question more than once. He could not recall the precise number of times. His focus was on food, not on making a racist slur or taunt. Although he acknowledged he was aware that fried chicken can be a racial stereotype, Grievant stated that his questioning about fried chicken related to food and was not imbued with any racial overtones. Instead, he "was talking about food."

In addition to its claim of racial discrimination, the State chose to assert the additional charge or claim that Grievant lied or was not truthful about his intent or motivation when asking Mr. Thomas about fried chicken. With this additional charge, the State has the additional burden of proving Grievant's intent was racial and that his use of fried chicken was as a racial stereotype, and not its literal meaning as food. The State maintains it is not credible or plausible that Grievant's repeated questioning of Mr. Thomas, an African American employee, whether his food was fried chicken was not racially motivated or based on race. It is difficult to prove intent, and other than the statements themselves, the State did not present any credible evidence regarding Grievant's intent.

Grievant testified that his use of fried chicken was not intended as a racial slur or stereotype. Neither Commissioner Deml, nor Interim Commissioner Baker were present during the thirty second encounter. Mr. Thomas said that Grievant was smiling or smirking when he asked about fried chicken. Grievant, however, was wearing a mask as a COVID-19 mitigation measure. Mr. Flibotte's claim that Grievant used a southern drawl is not credible, because neither Mr. Thomas, nor Nursing Director Langford noticed or heard Grievant use a southern drawl and Mr. Flibotte had a bias against Grievant and wanted him fired.

The Board finds or recognizes that Mr. Thomas considered the statement or repeated reference to fried chicken to be "very racist for SOS Miller to say." That the statement was racist, however, does not prove that Grievant lied when he said he did not intend to invoke the racial stereotype when asking whether Mr. Thomas's food was fried chicken. Although the impact was racist, whether Grievant's intent or motive was racist or racial, which is what the State must prove in its charge that Grievant lied when he said his fried chicken question was not racially motivated, has not been proven. The State has not sustained its burden of proving by a

preponderance of the evidence that Grievant was not truthful or forthcoming when he stated during the investigation that his intent when asking about fried chicken was not racially motivated.

As outlined above, the State has not proven Grievant was dishonest or failed to provide truthful or complete information during the investigation. Accordingly, the State has not proven that Grievant violated DOC Work Rules 4 or 5 or Personnel Policy 17.0.

In sum, the State has not sustained its burden of proving that Grievant engaged in racial discrimination or harassment against Mr. Thomas. The Employer has not established that Grievant engaged in misconduct during the investigation.

The State has proven by a preponderance of the evidence that Grievant violated Personnel Policy 5.6, Required Conduct 1 and 3, and DOC Work Rules 1, 6, 9, and 13. The State has proven that Grievant engaged in demeaning or harassing behavior and failed to fulfill his responsibilities of supervisor in repeatedly asking an African American subordinate whether his food was fried chicken. DOC could be embarrassed, and the institution discredited by the public exposure that a member of the leadership team repeated a racial trope to a subordinate.

That not all of the charges have been proven, does not mean that the decision to discharge Grievant was without just cause. See Grievance of Regan, 8 VLRB 340, 366 (1985) (holding failure of employer to prove by a preponderance of the evidence all the particulars of the discipline letter do not require reversal of discipline). Where the proven charges are less serious than the State had alleged, the Board can impose a different disciplinary sanction within those allowed by the CBA. See Grievance of Brown, 177 Vt. 365, 371-72 (2004).

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 11) 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.

The State argues dismissal is justified because "a high ranking DOC official using overtly discriminatory language against a subordinate because of the color of his skin is extremely

serious misconduct that was closely related to Grievant's leadership position as SOS and in obvious violation of DOC Work Rules 1, 4, 5, 6, 9, and 13, and Personnel Polices 3.3, 5.6, and 17.0." State's Brief, at 13. The State, however, failed to prove the predicate facts or offenses that support its conclusion. The State has not proven that the Grievant engaged in racial discrimination or harassment, or that his comments were based on or because Mr. Thomas is Black. The State has also failed to prove that Grievant was untruthful or not cooperative or forthcoming during the investigation. The State has failed to prove the most egregious allegations against Grievant and the Board will conduct its reasonableness analysis based on the charges the State has proven.

Grievant did not uphold his duties as a supervisor and by repeatedly referencing fried chicken, failed to act in a professional manner, and demeaned and harassed Mr. Thomas in violation of DOC Work Rules 1, 6, 9, and 13, and Personnel Policy 5.6, Required Conduct 1 and 3. The conduct was inappropriate and wrong. While engaged in this conduct, Grievant failed to appreciate the impact of his comments and displayed poor judgment and insensitivity. He faltered in his role and responsibility as leader in the facility by ignoring the response of his subordinate and persisting in questioning that Mr. Thomas considered to be racist. The isolated incident, however, did not impact the terms and conditions of employment of Mr. Thomas, and there was no testimony that he felt unsafe in the work environment.

The State maintains that "Grievant is no longer able to perform at a satisfactory level because he demonstrated his unwillingness to treat a subordinate employee with respect and dignity and can no longer be trusted to treat 'those [incarcerated individuals] in [DOC's] custody with the dignity and respect they deserve." State's Brief, at 14 (quoting Commissioner Deml). There was no testimony, however, regarding Grievant's treatment of inmates or any other staff

member. There was no evidence presented that Grievant disparaged, demeaned, or discriminated against inmates of color. The State ignores Grievant's statements during his interview and at the Loudermill hearing displaying Grievant's concern for Mr. Thomas. Grievant wanted to check on Mr. Thomas. "[I]f Thomas was offended by something I said, I have no problem talking with Thomas. I know that's probably not the right thing to do, but I had zero intent to make any statement that would offend Thomas, or anybody." Joint Exhibit 3. At the Loudermill hearing, Grievant stressed that he wanted to make it right with Thomas. "[O]nce I found out that Thomas felt that way, I immediately said I want to make it right, talk to Thomas. I understood that if he was upset, then he has the right to be upset . . .." Grievant expressed a desire to redress or remedy the interaction and acknowledge his part in it and attempt to ensure that his employee/subordinate was not impacted by Grievant's mistake. Grievant repeated a phrase that has been used as a racial slur or trope and once alerted to how it was perceived by his employee demonstrated a willingness to remedy his error.

Given the charges actually proven, the State's claim that the Employer cannot trust the Grievant to perform his job at a satisfactory level is unreasonable.

At the time of the incident giving rise to his termination, Grievant had been employed with the Department of Corrections for over twenty-three years. He had ascended through the ranks and had achieved the position of SOS. Throughout his career he received excellent or better performance evaluations. He also received commendations for his outstanding work on special projects or emergency incidents that threatened the security of the correctional facility he served. Throughout his long career, Grievant had never received any discipline. His long tenure and unblemished career prior to this incident weighs against the reasonableness of a termination decision.

The State claims that consistency is not a factor in this case because it "is not aware of any misconduct similar in nature and egregiousness to Grievant's misconduct." State's Brief, at 15. In its termination memorandum signed by Commissioner Deml, however, the State listed two cases in which correctional officers made statements about fellow staff members that were racially motivated. In one incident a correctional officer made a statement to a Black coworker that the coworker "was being considered for opportunities due to the color of her skin." Joint Exhibit 7. The correctional officer who made the statement received an oral reprimand. In the second incident, another correctional officer told a Black coworker, "I'm only applying for this job so your black ass doesn't get it." The correctional officer who made this statement received "supervisory feedback." Although both statements were directed at Black coworkers and said to those co-workers because of their race, the offenses received the mildest of sanctions which are not even placed in an employee's personnel file. CBA Article 14.

The State argues that Grievant's fried chicken reference is more egregious than these two statements and warrants a harsher penalty because those cases involved co-workers and did not involve repeating a racial stereotype to a subordinate. We disagree. The race-based comments were explicit in the two cases and there was no need to divine whether they involved racial intent. They were said to Black employees because they were Black employees. One denigrated the qualifications of a co-worker because of her race "because of the color of her skin." While the other explicitly acknowledged the intent to deprive a Black co-worker of the opportunities of employment advancement "so your black ass doesn't get it." They displayed disparagement and a disregard for the qualifications and abilities of DOC employees. In contrast, Grievant's comments about fried chicken to his subordinate were not related to his job or job performance

or abilities. The comments did not impact, invade, or question Mr. Thomas's ability to perform his job.

The State argues that because Grievant repeatedly asked Mr. Thomas whether his food was fried chicken this constitutes a repeat offense or conduct, and is therefore, more egregious than the two offenses cited in its termination memorandum. The Board does not agree. Grievant repeating fried chicken in the break room represents the entirety of the allegation of racially insensitive behavior. The incident occurred once. There is no evidence the Grievant engaged in similar behavior prior to this incident.

The State also argues that the incident is more serious than the two race-based incidents because it occurred in front of others. The incident occurred in front of two other people, one did not recognize or register any racial or ill intent by the questioning. The other discussed the incident with Mr. Thomas and testified. There was no testimony that the repeated fried chicken reference caused "additional embarrassment and difficulty" to Mr. Thomas because it was said in front of these two other people.

The State relies heavily on Grievant's supervisory status as distinguishing his comments and elevating the offense to one that warrants termination. As a supervisor Grievant has additional responsibility and expectation to lead and treat his subordinates with respect and model good behavior. That he failed to fulfill this obligation, however, is not a significant enough distinction to warrant dismissal for Grievant's offense where the employees committing the two prior offenses received only supervisory feedback or an oral reprimand.

The Commissioner testified that some conduct is so egregious that it warrants termination. Explicit statements that Black co-workers are not worthy of their jobs because of the color of their skin and attempting to deprive Black co-workers of opportunities expressly

because they are Black, however, have not been considered so egregious to warrant termination. Such conduct barely registered any form of penalty. Imposing the most severe form of punishment for the fried chicken statement is not reasonable or consistent with the disciplinary action taken against other employees.

There has been no notoriety resulting from the incident. The State concedes that the likelihood of harm is unknown. No evidence was presented that anyone outside the institution or DOC was aware of the incident. Because the isolated incident does not constitute racial harassment or discrimination it would not subject the State to liability. The State did investigate the incident and a sanction less than termination provides a reasoned response to racially insensitive language.

The Board turns next to whether Grievant was provided with notice that his conduct could lead to termination. See In re Morrissey, 149 Vt. 1, 8–12 (1987) (requirement of fair notice for dismissal). Employer relies on the notice provided to employees of race discrimination and failing to cooperate with an investigation as providing clear notice to Grievant that he could be terminated for repeatedly asking whether an African American subordinate was eating or reheating fried chicken. As an initial matter, the State has failed to prove that Grievant violated the Personnel Policy 3.3, on Discrimination Complaints and has failed to prove that he lied during the investigation in violation of Personnel Policy 17.0. The Board's notice inquiry, therefore, is limited to whether Grievant was provided with notice that he could be terminated for violating Personnel Policy 5.6 and the DOC Work Rules.

Notice can be express or implied. In re 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. Grievant was on express notice that he was prohibited

from violating any State Personnel Policy or work rule. DOC Work Rule 1. Grievant was on notice that he could not "engage in verbal . . . behavior towards employees . . . which is malicious, demeaning, harassing or insulting" and he was required to "conduct [himself] in a professional manner in [his] interactions with co-workers." Joint Exhibit 1 (DOC Work Rules 6 and 13). Grievant was also on express notice that he was prohibited from engaging behavior that could bring discredit on DOC or discredit and embarrassment to the State. Personnel Policy 5.6; DOC Work Rule 9.

The State's position that Grievant cannot be rehabilitated because he did not take responsibility for his conduct, is not reasonable. Contrary to the State's assertion, Grievant has demonstrated a desire to remedy his behavior and the impact his actions had on Mr. Thomas. After discovering that Mr. Thomas was offended by the fried chicken comment, he "immediately said I want to make it right talk to Thomas." Grievant wanted to remedy his behavior and provide redress for Mr. Thomas. The State's claim that there is no potential for rehabilitation is based on the faulty assertion that Grievant failed to provide complete and accurate information when questioned about the incident. Grievant admitted that he asked or made comments about fried chicken and that he continued these comments after being told by Mr. Thomas that the food was not fried chicken. Grievant knew that fried chicken could be a racial trope but insists that his statements were made because he was focused on food and was craving and smelling fried chicken. Grievant's refusal to admit what the State failed to prove does not render Grievant untruthful nor incapable of reform or rehabilitation.

There are alternatives to termination. Grievant has been employed by DOC for over twenty-three years. Throughout his long tenure, Grievant has conformed his behavior to the expectations of DOC and has been rewarded for his excellent or better performance. Nothing in

the record suggests that Grievant will not be equally responsive to a penalty. Discipline short of termination will send a message to Grievant and other DOC staff members that use of racial stereotypes or tropes are never permitted.

After weighing the relevant Colleran factors, the Board concludes that it was not reasonable for the State to terminate Grievant, and the state lacked just cause to terminate Grievant from his position as an SOS with the Department of Corrections.

CONCURRING OPINION

I concur with my colleagues that the Employer lacked just cause to terminate Grievant and that a twenty-day suspension is a more reasonable disciplinary action. I submit this separate concurring opinion because I disagree with the majority on its conclusion that the Employer did not prove by a preponderance of the evidence that Grievant was untruthful or dishonest when he said he acted without racial intent or motivation when he continued to ask his African American subordinate about fried chicken. The evidence is undisputed that Grievant repeatedly asked Mr. Thomas whether he was eating or heating fried chicken, although he was aware that the food was not fried chicken. Grievant conceded that he was aware that fried chicken was a racial trope or stereotype, and he repeatedly directed it toward Mr. Thomas.

/s/ Richard W. Park

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Richard W. Park, Chairperson

ORDER

Based on the findings and reasoning stated above, it is ordered:

1. The Grievance of Michael Miller is sustained in part and his dismissal is reduced to a twenty (20) day suspension;

2. Grievant shall be reinstated to his position with the Department of Corrections as a Security Operations Supervisor at the Chittenden Regional Correctional Facility;

3. Grievant shall be awarded back pay and benefits from the date commencing twenty (20) working days from the effective date of his dismissal until his reinstatement, for all hours of his regularly assigned shift plus the amount of overtime Grievant would have worked, minus any income (including unemployment compensation received and not paid back) received by Grievant in the interim;

4. The interest due Grievant on back pay shall be computed on gross pay and shall be at the legal rate of 12 percent per annum and shall run from the date each paycheck was due during the period commencing 20 working days from Grievant's dismissal, and ending on the date of his reinstatement; such interest for each paycheck date shall be computed from the amount of each paycheck minus income (including unemployment compensation) received by Grievant during the payroll period;

5. The parties shall file with the Labor Relations Board by November 18, 2022, a proposed order indicating the specific amount of back pay and other benefits due Grievant; and if they are unable to agree on a proposed order, shall notify the Board in writing of specific facts agreed to by the parties, specific areas of factual disagreement and a statement of issues which need to be decided by the Board, and any proposed exhibits.

6. If the parties do not submit a proposed order, a hearing on disputed issues shall be held by December 20, 2022, on a date selected by the Board, via the Microsoft Teams platform; and

7. The Employer shall remove all references to Grievant's dismissal from his personnel file and other official records and replace it with a reference to a twenty (20) day suspension consistent with this decision.

Dated this 4th day of November 2022, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

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Richard W. Park, Chairperson

/s/ Karen F. Saudek

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Karen F. Saudek

/s/ David R. Boulanger

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David R. Boulanger