VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	DOCKET NO. 87-58
	)	
RICHARD MUNSELL II	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On November 20, 1987, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Richard Munsell II ("Grievant"). The grievance alleged that the State of Vermont, Department of Corrections ("Employer") violated Articles 6, 13 and 16 of the collective bargaining agreement between the State of Vermont and the VSEA for the Corrections Unit, effective for the period July 1, 1986 to June 30, 1988 ("Contract"), in suspending Grievant for 30 workdays and through various other actions relating to the suspension.

A hearing was held before Board Members Charles McHugh, Chairman, Catherine Frank and Louis Toepfer on March 3, 1988. Michael Seibert, Assistant Attorney General, represented the Employer. Michael Zimmerman, VSEA Staff Attorney, represented Grievant.

Grievant filed Requested Findings of Fact and a Memorandum of Law on March 17, 1988. The Employer filed a Memorandum of Law on March 17, 1988.

FINDINGS OF FACT

1. Grievant was, at all times relevant herein, a Correctional Officer C, pay grade 16, and his workplace was the Chittenden Community Correctional Center, South Burlington, Vermont ("CCCC").

2. The CCCC management has promulgated work rules to govern the conduct of staff. Among the work rules governing staff are the following:

> ... 8. No employee...shall engage in any type of behavior or lack of behavior which constitutes negligence and/or endangers the safety of staff.
>
> ... 18. No employee...shall maliciously use profane, abusive or unprofessional language towards others or about any...staff member.

Grievant was fully aware of these rules.

3. At CCCC, use of profanity is commonplace among inmates. It is not unusual for staff members to use some profanity in their conversations with each other.

4. On June 11, 1987, Correctional Officer B Richard Jones was working as a "floater" from 12:30 p.m. to 8:30 p.m. Jones was junior in rank to Grievant. As a "floater," Jones had no fixed duties, but was to fill in for other officers, as needed, in any unit of CCCC. At about 6:00 p.m., Jones filled in for Correctional Officer C Gunther Hetzel in the "M.A." (medium Unit A) while Hetzel accompanied a prisoner to the hospital. The other officer assigned to that unit was Correctional Officer B Michael Sweeney.

5. Hetzel returned to CCCC at about 6:55 p.m., but did not return to the "M.A." unit to relieve Jones. Instead, at about 7:25 p.m., he, Correctional Facility Shift Supervisor Thomas Poolet (who was in charge of the entire facility), and Correctional Officer B Ray Foy went outside to look at some windows Foy had in his truck. They remained outside until about 8:00 p.m., when Jones called Hetzel on the radio and asked him to return to the "M.A." unit.

6. When Hetzel returned to the "M.A." unit, Jones and Sweeney were there. At Hetzel entered the unit, he apologized to Jones for taking so long. Jones, very upset, said, "Keep your fucking bullshit lies to yourself." His loud, angry comment was heard by some inmates on the unit. As Jones was leaving, Grievant entered the unit. Grievant asked Jones if he would "do the trash run" (meaning empty the garbage on the unit). Jones, still upset, said, "Do the fucking trash run yourself, you lazy, fucking asshole." That comment also was heard by inmates.

7. Jones then left the unit, heading down a corridor. Grievant followed Jones, and asked to meet him in the booking area of CCCC. Grievant also radioed Poolet, and asked Poolet to meet him in the booking area.

8. As Jones and Grievant entered the booking area, Poolet had not yet arrived. Foy and a temporary officer, Ben Deliduka, were seated at a desk. Jones entered and sat on the edge of the desk. Grievant, who was quite upset at Jones' conduct in the "M.A." unit, entered, and stood in front of Jones. Grievant began by saying that Jones should not have "bad mouthed" him in front of inmates. Grievant and Jones also had words about Jones' refusal to empty the trash. At about that point, Poolet entered the area. Grievant then began to angrily berate Jones. Grievant said, "I know about your charges in Woodstock, you fucking snapper," ("snapper" is a slang term used to describe persons charged with sex offenses, particularly those against children). Grievant also told Jones "I know where you live." Jones replied that the charge had been dismissed, and that it was "none of

your business." Grievant then said to Jones: "If you have the guts, why don"t you just stand up like a man, you fucking asshole, and I'll knock your fucking head right off." Grievant continued by saying: "As a matter of fact, why don't you come outside right now and we can settle this right now." Grievant then kicked a trash can out of the way and said to Jones: "Get up now, you fucking spineless punk."

9. Poolet then interceded, telling Grievant that was enough. Poolet told Grievant to leave the booking office. Grievant continued to berate Jones. Poolet ordered Grievant to leave and placed his hand on his shoulder to gain his attention. Grievant then started to leave the booking area, only to turn back when Jones said something and again make angry comments. Grievant then left the booking area.

10. The procedure used at CCCC for the investigation of alleged misconduct involves serving "charges" on the staff member alleged to have committed an offense, then affording that member the right, with the assistance of a VSEA representative or private attorney, to present his or her version of the facts at a meeting before the appointing authority, and, finally, the imposition of any discipline. A form has been developed for that purpose. The form contains a space for the "charges", and a block entitled "Facts," which provides the following instructions:

> "Description of specific actions, statements made by employee; attach statements of witness, if any, and attach copies of other documents if appropriate. Also state reasons for recommendations."

The form also contains the following acknowledgment on the part of the employee charged:

> "In signing this Report, I acknowledge that it has been discussed with me and that I have received a copy. I understand that I may

respond orally or in writing and that such response will be made a part of this Report and taken into consideration prior to a final determination being made." (Employers' Exhibit 1, Page 2).

11. Following the incident, Poolet wrote a report, which he gave to CCCC's Chief of Security, who, after discussion with the Acting Superintendent, Heinz Arenz, instructed Poolet to have Deliduka and Foy write reports, as well. Poolet did not request a statement from Jones. Poolet did not request statements from Hetzel, or Sweeney, or Grievant. Jones was not questioned about the incident. (Employer's Exhibit 1, Pages 2-8).

12. On June 16, 1987, Grievant was served with a copy of the CCCC form, described above in Finding #10, wherein he was charged with having violated work rules #8 and #18. Grievant asked Hetzel and Sweeney to write statements concerning the June 11, 1987 incident in the "M.A." unit. They did write such reports. (Employer's Exhibit 1, Pages 10 and 11).

13. On June 22, 1987, in accordance with CCCC practice, a meeting was held at which Grievant was given the opportunity to present his version of the facts. Present at the meeting were the Chief of Security; Arenz; Richard Turner, CCCC's regular Superintendent whom at that time was serving as Acting Superintendent at another correctional facility; Poolet; Grievant; and Grievant's VSEA representative, Jerry Fishbein. Fishbein gave Hetzel's and Sweeney's statements concerning the events in the "M.A." unit on June 11 to Arenz. Fishbein also requested that Grievant be given copies of all statements in Arenz' possession so that he and Grievant could review them before responding to the charges. Arenz denied that request, but did allow Grievant and Fishbein time to read the statements before

proceeding with the meeting. Grievant then, for the first time, told his version of what had occurred on June 11th in the booking area.

14. Following the meeting, Arenz, in deciding what disciplinary measures to take against Grievant, consulted with CCCC's Chief of Security, and with Turner. Arenz and Turner considered Grievant's version of events and the statements of Poolet, Foy, Deliduka, Sweeney, and Hetzel. Arenz did not deem it necessary to speak to Jones about the incident.

15. By letter dated June 26, 1987, Arenz advised Grievant of his suspension, without pay, for a period of 30 workdays (i.e., from June 25, 1987 through August 4, 1987). That letter provided in pertinent part, as follows:

> Such action is being taken as a result of a verbal confrontation between another Correctional Officer and yourself on June 11, 1987 in the Booking area of this Facility.
>
> You presented mitigating circumstances which were given weight. We considered the specific behavior displayed and the persons who were affected.
>
> In accordance to the incident reports, which were shared with you, you were attributed with having made the following statements to CO Jones:
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> 1. "I know about your charges in Woodstock, you fucking snapper," and "I know where you live."
>
> 2. You approached CO Jones in a very threatening manner and stated:
>
> 3. "If you have the guts, why don't you just stand up like a man, you fucking asshole, and I'll knock your fucking head right off."
>
> 4. "As a matter of fact, why don't you come outside right now, and we can settle this right now."
>
> 5. You then kicked a trash can and stated:
>
> 6. "Get up now, you fucking spineless punk."

During this incident Shift Supervisor Thomas Poolet interceded and requested that you leave the area. You ignored this order. CFSS Poolet had to place his hand on your shoulder to get your attention. You began to leave, only to return, and begin the threatening accusations all over again.

The above incident was witnessed by two other Officers in the Booking area. Their independent statements corroborate one another.

As has already been stated to you, your actions were totally unacceptable and certainly contrary to the DOC's established values...

As a result of your behavior, we find you in violation of Work Rule #8: "No employee shall willfully engage in any type of behavior or lack of behavior which constitutes negligence or endangers the safety of staff." and Work Rule #18: "No employee shall maliciously use profane, abusive or unprofessional language towards others or about staff members.".[1]

Your remarks were also made in front of other staff members, one of whom was a new Correctional Officer. There is no place where it is appropriate to debase and belittle other persons. Such a display of behavior at a workplace not only affects the persons involved, but the entire organization. It cannot and will not be condoned. As a Correctional Officer C, you are expected to act as a role model; you did not." (Grievant's Exhibit 3).

16. In concluding that Grievant had violated Rule #8, Arenz did not believe that Grievant had endangered the safety of staff but that he had acted negligently in his injurious comments to Jones. Arenz investigated whether there had been any previous similar incidents at CCCC and uncovered none. Arenz was aware of Grievant's prior performance evaluation and that Grievant had been suspended for two days in 1984 for refusing to obey a direct order. Although Arenz considered Hetzel's and Sweeney's written accounts of Jones' conduct in the M.A.

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[1]The quotations of the rules are not completely accurate since Rule #8 does not contain the word "willfully" and the last few words of Rule #18 are "any...staff member", not "staff members." However, we conclude that these errors are not significant.

unit, which accounts are consistent with Finding #6, Arenz did not conclude that Jones had committed any offense by his use of profane language to Hetzel and Grievant in the presence of inmates.

17. At Step II of the grievance procedure, the hearing officer ordered that three of Grievant's six weeks pay be restored to him, and denied further relief.

18. At all times relevant herein, the Contract provided, in pertinent part, as follows:

ARTICLE 6

EXCHANGE OF INFORMATION

> ... 5. In addition to the information which the State has specifically agreed to provide the VSEA under this Article, the State will also provide such additional information as is reasonably necessary to serve the needs of the VSEA as exclusive bargaining agent and which is neither confidential nor privileged under law. Access to such additional information shall not be unreasonably denied...

ARTICLE 13

EMPLOYEE PERSONNEL RECORDS

> ... 3. Any material, document, note, or other tangible item which is to be entered or used in any grievance hearing held in accordance with Article 17 of this Agreement, or hearing before the Vermont Labor Relations Board, is to be provided to the employee on a one-time basis, at no cost to him.

ARTICLE 16

DISCIPLINARY ACTION

> 1. No permanent...status employee covered by this agreement shall be disciplined without just cause. The parties jointly recognize the deterrent value of disciplinary action. Accordingly, the State will:
>
> a. act promptly to impose discipline...within a reasonable time of the offense;
>
> b. apply discipline...with a view toward uniformity and consistency;

c. impose a procedure of progressive discipline...in increasing order of severity;

d. In misconduct cases, the order of progressive discipline shall be:

i. oral reprimand;

ii. letter of supervisory counselling;

iii. written reprimand;

iv. suspension without pay;

v. dismissal.

... f. The parties agree that there are appropriate cases that may warrant the State:

i. bypassing progressive discipline...

as long as it is imposing discipline...for just cause.

... 7. The appointing authority...may suspend an employee without pay for disciplinary reasons for a period not to exceed thirty (30) workdays. Notice of suspension, with specific reasons for the action, shall be in writing...

... 9. In any misconduct case involving a suspension...should the Vermont Labor Relations Board find just cause for discipline, but determine that the penalty was inappropriate or excessive, the Vermont Labor Relations Board shall have the authority to impose a lesser form of discipline. (Grievant's Exhibit 2).

OPINION

At issue is whether the Employer violated the Contract by suspending Grievant for 15 days and through various other actions relating to the suspension. Grievant alleges various Employer actions violated the Contract. Each allegation will be discussed in turn.

Grievant contends that the Employer violated Articles 6 and 13 of the Contract by failing to provide him with copies of witnesses'

statements at the pre-disciplinary meeting of June 22, 1987. We conclude that a violation of Article 13 is not involved here since the provisions of that article apply to grievance hearings and not to pre-disciplinary meetings. However, we do believe a violation of Article 6 occurred. Article 6 requires the State to "provide such additional information as is reasonably necessary to serve the needs of VSEA as exclusive bargaining agent." The purpose of the June 22 meeting was to allow Grievant the opportunity to present his response to charges made against him. Clearly, copies of witnesses' statements were reasonably necessary for Grievant and his VSEA representative to adequately respond to charges made against him based on such statements.

However, Grievant has not demonstrated any prejudicial harm due to the Employer's actions. Although Grievant was not provided with copies of witnesses' statements at the June 22 meeting, he and his VSEA representative were allowed to review the statements at the meeting. No evidence was presented to indicate that this review was insufficient to allow Grievant proper representation.

Grievant next contends that the Employer violated the disciplinary provisions of the Contract because its investigation of the charges against Grievant was not fair and complete. Grievant maintains that management has a duty to fully and fairly investigate an employee's alleged misconduct by virtue of the necessity of just cause for

disciplinary action. We are unwilling to call into question the sufficiency of the Employer's investigation in the absence of any specific Contract provision giving the Board such authority or in the absence of any violation of an established due process right; particularly where Grievant has an opportunity before the Board for a complete, impartial review of the appropriateness of the disciplinary action taken. c.f. Grievance of Johnson, 9 VLRB 94, 105-108 (1986).

Finally, Grievant contends that no just cause existed for the disciplinary action taken; that the Employer inappropriately bypassed progressive discipline and that the penalty was inconsistent with that imposed on others for similar offenses.

There are two requisite elements which establish just cause for suspension: 1) it is reasonable to discipline an employee because of certain conduct, and 2) the employee had fair notice, express or fairly implied, that such conduct would be grounds for discipline. In re Grievance of Brooks, 135 Vt. 563 (1977). Pursuant to Article 16, Section 9, of the Contract, it is the task of the Board to make an independent judgment whether a penalty imposed by management is "inappropriate or excessive." Grievance of Sherman, 7 VLRB 380, 404 (1984).

In determining whether just cause exists, we need first determine whether the charged violations of the CCCC rules occurred. Grievant was charged with violating the rule prohibiting any type of behavior or lack of behavior which constitutes negligence and the rule prohib-

iting malicious use of profane, abusive or unprofessional language towards staff members.

"Negligence" taken in its ordinary meaning connotes a failure to do what a reasonably prudent man in Grievant's circumstances would do to accomplish his job mission, and means both a failure to act as well as an affirmative act taken which adversely affects the functions of the agency. Grievance of Swainbank, 3 VLRB 34, 47 (1980), Grievance of DeForge, 3 VLRB 204, 219 (1980). Grievant's actions towards Correctional Officer Jones demonstrated a failure to reasonably respond to Jones' ill-considered and disrespectful comments to him. Clearly, much better avenues than berating Jones existed for Grievant to appropriately address Jones' conduct, such as making his superiors aware of what had occurred verbally or in writing. Failure to use these avenues demonstrated a negligent disregard for appropriate procedures to handle improper conduct and adversely affected the operation of CCCC.

Also, Grievant's comments to Jones constituted malicious use of profane, abusive or unprofessional language. Surely, calling Jones a "fucking snapper," a "fucking asshole," and a "fucking spineless punk" demonstrated ill will and a desire on Grievant's part to see Jones suffer. His challenges to Jones to fight were malicious since they indicate a desire to harm him.

The charges against Grievant having been established, we look to the specific factors enumerated in Grievance of Colleran and Britt, 6

VLRB 235, 268-269 (1983), to determine the legitimacy of the disciplinary action imposed based on the proven charges. The pertinent factors here are the nature and seriousness of the offense in relation to Grievant's position; consistency of the penalty with those imposed upon other employees for similar offenses; the clarity with which the employee was on notice of any rules that were violated; mitigating circumstances and the adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

Grievant's offense was indeed serious. Belittling and degrading a fellow employee with profane, abusive language, as Grievant did here, is totally inappropriate in any circumstances. Grievant's offense was particularly egregious given that other employees were present during his verbal barrage and he was a senior officer. Grievant's actions were completely contrary to his obligation as a senior correctional officer to act as a role model. It is true that his inappropriate actions came directly in the wake of Jones' inappropriate actions towards him. However, such a mitigating circumstance in no way justifies or excuses Grievant's response.

Grievant was on express notice that his conduct violated facility rules and on implied notice that his conduct violated basic tenets of appropriate relations with fellow employees. The Employer had ample justification to bypass progressive discipline and suspend Grievant for his conduct. A penalty less than suspension would not have been adequate to make it clear that such conduct would not be tolerated.

However, we conclude that the penalty was inconsistent with that imposed upon others for similar offenses. Jones also was guilty of malicious use of profane language in calling Grievant a "lazy, fucking asshole." Such a comment demonstrated ill will towards Grievant. Yet, no disciplinary action was taken against Jones. The lack of penalty for Jones is indicative of the way management viewed the use of profane language. While Jones' actions were not nearly as serious as Grievant's misconduct, nonetheless they were in violation of work rule #18 for which Grievant was punished. The apparent attitude of management toward the use of profanity by staff and the absence of disciplinary action against Jones leads us to conclude that the 15 day suspension of Grievant was excessive. Accordingly, we believe it appropriate to reduce the suspension of Grievant by half.

ORDER

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

1. The Grievance of Richard Munsell II is GRANTED to the extent that the 15 day suspension imposed against him is reduced to a 7 1/2 day suspension;

2. The State of Vermont, Department of Corrections shall pay Grievant the wages Grievant would have earned if he had not been suspended for 7 1/2 days;

3. The interest due Grievant on back pay shall be at the rate of 12 percent per annum and shall run from the date the paycheck was

due during the period commencing with the last 7 1/2 days of Grievant's suspension and ending on the date Grievant is paid such sum; and

4. The parties shall submit to the Board by June 2, 1988, a proposed order indicating the specific amount of back pay due Grievant, and if they are unable to agree on such proposed order, shall notify the Board in writing that date 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. Any evidentiary hearing necessary on these issues shall be held on June 9, 1988, at 9:30 a.m. in the Labor Relations Board Hearing Room.

Dated the 20th day of May, 1988, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh, Chairman

Catherine L. Frank

Louis A. Toepfer