

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:

DAVID GRISWOLD AND THE  
VERMONT STATE COLLEGES STAFF  
FEDERATION, APT LOCAL 4023,  
AFL-CIO

DOCKET NO. 89-15

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On February 9, 1989, the Vermont State Colleges Staff Federation, AFT Local 4023, AFL-CIO ("Federation") filed a grievance on behalf of David Griswold ("Grievant"). The grievance alleged that Grievant was suspended for eight days without just cause, in violation of Article 12, Section 1 of the Agreement between the Vermont State Colleges ("Colleges") and the Federation, effective from July 1, 1987 to June 30, 1989 ("Contract").

A hearing was held before Labor Relations Board members Charles McHugh, Chairman; Catherine Frank and Louis Toepfer on September 21, 1989 in the Board hearing room in Montpelier. Attorney Jeffrey Jacobsen represented Grievant. Attorney Nicholas DiGiovanni, Jr., represented the Colleges.

The Colleges filed a brief on October 5, 1989, and the Federation filed a brief on October 10, 1989.

FINDINGS OF FACT

1. Johnson State College has a Department of Safety and Security. The Department is headed by a Director of Security and is staffed by security workers who provide 24-hour security coverage for the College. From 1983 to 1986, the Director of Security reported to the Dean of Students. Since 1986, the Director of Security has reported to the Dean of Administration and Finance, William Crangle.

2. Grievant has been employed as a security worker at Johnson since December, 1982. At all times relevant, he was a Security Worker II. At all times relevant, Grievant worked four days a week, and his scheduled hours were from 8:00 p.m. to 6:00 a.m. Grievant was entitled to a 37 and one-half minute meal break during each shift (Colleges Exhibit 15).

3. On April 22, 1983, Grievant received a warning from the Director of Security concerning "inappropriate conversations with female students or staff members". On August 16, 1985, Grievant received a written warning from the Director of Security regarding performance issues which had arisen over previous weeks. Between August 12, 1985 and September 29, 1988, no disciplinary action was taken against Grievant (Colleges Exhibits 4, 5).

4. In August, 1988, Crangle met with Grievant after receiving complaints from a female resident housing director about Grievant's conduct. Crangle directed Grievant to improve his relations with other College staff.

5. As part of their duties during a night shift, security workers are required to check and secure various buildings on the campus. When they have checked or secured a building, they enter the time they have completed such activities in a log. It has been the practice of security workers at Johnson to not carry the logs with them when checking and securing buildings, and to complete the logs when they return to the campus security office or at the end of a shift. In filling out the log, it has been the practice of security workers to approximate the times they completed the various activities. These practices have not been changed or modified by the Director of Security (Colleges Exhibit 12).

6. On June 17, 1988, while on duty, Grievant made a telephone call from the Johnson campus to Larry Ackerson, a fellow security worker who was off duty. Ackerson was at his home. Grievant spoke with Ackerson for 54 minutes. According to the log filled out by Grievant that night, he checked a building on campus four minutes after he began this phone call and secured another building which takes between five and 15 minutes to secure, four minutes after completing the phone call (Colleges Exhibits 13, 13A).

7. During the period August 11 to September 1, 1988, Grievant, while on duty, made four phone calls to Ackerson at Ackerson's home which lasted 95 minutes, 53 minutes, 47 minutes and 32 minutes, respectively (Colleges Exhibit 11).

8. Grievant made the phone call which lasted 95 minutes on August 11, 1988. According to the log filled out by Grievant that night, he checked four buildings on campus between six and 19 minutes after beginning this phone call. One hundred sixty to 180 individuals were spending the night on campus on August 11 (Colleges Exhibits 11, 12).

9. During the phone calls in question, Grievant was the only security worker on duty and was responsible for the security of the entire campus. The Johnson campus has 14 buildings plus a 51-unit apartment complex.

10. Johnson has a policy against personal phone calls, which is not actively enforced. Prior to the phone calls in question, Grievant was not told by his superiors not to make personal phone calls while on duty.

11. Crangle did not become aware of the phone calls in question until late September when he was reviewing telephone bills and records.

12. Johnson has several residence hall directors who rotate duty during night hours. When on duty, the residence hall director is on-call from 4:30 p.m. to 8:00 a.m. On the night of September 14-15, Jennifer Callahan was the residence hall director on duty. The dispatcher's log indicates the residence hall director on duty for the night. The security workers have access to the log and are expected to check to see who is on duty in the event the security worker has to contact the residence hall director due to an incident which arises (Colleges Exhibit 7).

13. At approximately 2:30 a.m. on September 15, 1988, some students outside of Arthur Hall, a dormitory on campus, told Grievant that an individual, a non-student visitor, apparently was having a bad drug experience in Arthur Hall and was screaming. Grievant went into Arthur Hall, saw the individual screaming, and determined he could not handle the incident alone. Grievant then went to the apartment of James Denoncourt, an off-duty residence hall director who resided in Arthur Hall, and woke him and told him of the problem. Grievant did not attempt to contact Jennifer Callahan, the resident hall director on duty. Grievant thought Denoncourt might know the individual. Both Denoncourt and Grievant followed the individual out of the dormitory, and attempted to control him and cope with this situation until law enforcement officers arrived. Grievant called the sheriff's department, in accordance with proper procedures. Subsequently, the sheriff's department and the police responded to the call.

14. Denoncourt filed a report on the incident later that morning with Crangle and complained that he, and not the resident hall director on duty, was contacted by Grievant. Grievant also completed an incident report that morning and placed it on the Director of Security's desk. However, Grievant's report apparently was misplaced and not seen by Grievant's superiors (Colleges Exhibit 6).

15. On September 23, 1988, Kristy Kenyon, a resident assistant, was present in a dormitory when she noticed that a male guest of a student had a bong, a type of drug apparatus. Kenyon took the bong from the man, and notified Michelle Parsons, the resident hall director on duty. Parsons called the security office and spoke to Grievant. Parsons told Grievant that she wanted to "get rid of the bong". Parsons did not tell Grievant how she came into possession of the bong, and Grievant made no inquiries in this regard. Grievant told her to "throw it away". Parsons would not and asked Grievant to get the bong. Grievant met Parsons, took the bong and threw it into the trash compactor. Grievant did not file a report on the incident (Colleges Exhibit 10).

16. Prior to this incident, Grievant had been advised by the Director of Security that drugs and drug paraphernalia should not be thrown away but kept as potential evidence. Grievant also was on notice that any unusual incident should be reported.

17. When Grievant threw away the bong, he did not know that any individual was identified as having possessed the bong. He conducted no investigation as to who had possessed the bong.

18. It is against College policy to have lighted candles in the dormitories (Joint Exhibit 8).

19. All security workers, including Grievant, were on notice that they should not enter a student's room unaccompanied by a resident staff person unless there was an imminent danger involving a threat to the safety of any person or serious damage to property.

20. On September 29, 1988, Grievant observed a lighted candle in a student's room while making his regular rounds. The door to the room was open and Grievant could see no one in the room. He asked a student speaking on the telephone in the hallway outside the room whether the candle was in her room, and the student replied it was not her room. Knowing that lighted candles were a violation of College regulations, Grievant entered the room and extinguished and confiscated the candle. Grievant then noticed that there was a woman student in the room. The student was reading in bed. Grievant spoke to the student about having candles in rooms, and left.

21. Grievant and the student reported the incident. The student complained that Grievant had entered the room without knocking or giving any kind of warning (Colleges Exhibits 8, 9).

22. When Crangle became aware of the Arthur Hall incident, the bong incident and the candle incident, he decided that Grievant should receive a written reprimand. When he subsequently became aware of the lengthy personal phone calls and corresponding log entries, he decided instead to suspend Grievant.

23. On September 29, 1988, Kent Goslant, Director of Security, informed Grievant that he was suspended for eight working days, from September 29, 1988, through October 12, 1988. The letter of suspension, which actually was written by Crangle, provided in pertinent part as follows:

The cause for this suspension is threefold:

1. Your poor attitude and dealings with your colleagues and students. Prior to the beginning of school, you met in Mr. Crangle's office and received a clear warning about your attitude and problems associated with working with the housing staff. This continues to be a problem which you have to resolve, and is evidenced most recently by your handling of:

- a) the drug case in Arthur on September 15, 1988, and
- b) the candle incident of September 29, 1988.

2. Your handling of incident #89-12-1 (pot smoking in Senators South). You did not feel it necessary to prepare an incident report on the situation, and you destroyed evidence by throwing the drug paraphernalia in the trash compactor. This could create serious consequences for the College in that we have destroyed evidence.

3. In reviewing the telephone bills for the months of July, August and September, it has been determined that you have made several extremely long telephone calls during times when you were supposed to be patrolling the campus. On September 11, 1988, you falsified a log by indicating that you were checking various buildings while at the same time the telephone log indicates you were on the telephone. On June 17, a 54-minute phone call was made from Sue Mann's telephone in Bentley during the same time you indicated you were patrolling the building.

We believe that these incidents following on the previous warnings, provide just cause for this disciplinary action. You and I have personally discussed the problem of your working relationships with other members of the College Staff. Also, I will not tolerate the falsification of official College documents, nor will I tolerate the misuse of College assets (telephone), or dereliction of duty.

Further violations of the College's rules, policies or accepted practices will result in the termination of your employment. A copy of this letter will become a part of your personnel file (Joint Exhibit 2).

24. The reference to "September 11, 1988" in Paragraph 3 of the letter of suspension was erroneous. The date Crangle intended to refer to was August 11, 1988.

25. Security workers at Johnson received very little training. Security workers did not receive the College's Security Workers Handbook until after Grievant was suspended (Joint Exhibit 7).

26. Article 12 of the Contract provides, in pertinent part, that "no employee shall be disciplined or discharged except for just cause" (Joint Exhibit 1).

#### OPINION

At issue is whether just cause existed for the eight-day suspension of Grievant.

We first discuss the Board's scope of review of management's disciplinary decisions. There are two requisite elements which establish just cause for discipline: 1) it is reasonable to discharge or otherwise 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 discharge or other discipline. Grievance of Gorruso, 150 Vt. 139 (1988). In re Grievance of Yashko, 138 Vt. 364 (1980). In re Grievance of Brooks, 135 Vt. 563 (1977). Grievance of Collieran and Britt, 6 VLRB 235, 265 (1983). The ultimate criterion of just cause is whether the employer acted reasonably in discharging or otherwise disciplining an employee for misconduct. Gorruso, supra, at 145.

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. Collieran and Britt, supra, at 265. Once the underlying facts have been so proved, the Board must determine whether the discipline imposed by the employer is within the range of its discretion given the proven misconduct. Id., at 265-266.

In Gorruso, the Court cited with approval the following statement by the Board in Collieran and Britt, supra, at 266, with respect to the proper standard of review:



The Board will not require that the employer prove by a preponderance of the evidence that its choice of discipline was proper. On this issue, the Board recognizes that a range of choices is available to the employer. If the State establishes management responsibly balanced the relevant factors in a particular case and struck a balance within tolerable limits of reasonableness, its penalty decision will be upheld. The Board will only alter the penalty selected by the employer if the employer imposes a penalty so severe, given the facts, that its choice amounts to an abuse of discretion.

In applying this analysis to this case, we conclude that the Colleges have established some, but not all, of the charges against Grievant. The Colleges specifically fault Grievant for his actions in four instances: 1) the handling of an individual apparently having a bad drug experience in Arthur Hall on September 15, 1988, 2) the candle incident on September 29, 1988, 3) discarding discovered drug paraphernalia, and 4) lengthy on-duty personal phone calls and related alleged falsification of security logs.

We conclude that Grievant committed no misconduct with respect to the Arthur Hall incident. Only one action of Grievant during this incident even approaches wrongdoing; that he woke up the off-duty residence hall director in Arthur Hall rather than contacting the residence hall director on duty. However, this strikes us as reasonable judgment by Grievant, given that the disturbed individual was creating a disturbance by his screaming which required quick action. It was reasonable for Grievant to contact the closest residence staff person, rather than waiting for the on-duty residence hall director to come from another building. Also, Grievant reasonably concluded that the resident hall director he contacted might know the disturbed individual, since he lived in the dormitory where the incident was taking place.

Grievant can be faulted only minimally for the candle incident, even though he entered a woman student's room without knocking, while the student was in the room, to remove a lighted candle. Given that the door to the room was wide open and that the room appeared to be vacant, Grievant's offense was minimal.

Grievant was at fault for discarding the bong given to him by a residence hall advisor and not reporting the incident. Grievant was on notice that drug paraphernalia should not be thrown away but kept as potential evidence.

The final charge against Grievant is that he was guilty of "falsification of official college documents... misuse of College assets (telephone)...(and) dereliction of duty" with respect to lengthy on-duty personal phone calls and related alleged falsification of security logs. We find that the Colleges have failed by a preponderance of the evidence to prove the charge. The evidence indicates that it was the established practice of security workers to not carry logs with them while they went to buildings and to approximate the times they checked and secured buildings. Grievant's time discrepancies never exceeded 20 minutes, a reasonable variance under the established practice.

While Grievant did misuse the telephone at the College by his personal phone calls and was derelict in his duty by engaging in the lengthy calls, as charged, the seriousness of the proven charge is lessened because the College did not actively enforce its policy against personal phone calls and Grievant had not been told previously by his superiors not to make personal phone calls while on duty.

In keeping the scope of our review in mind, we look to the specific factors enumerated in Colleran and Britt, supra, at 268-269, to determine the legitimacy of the disciplinary action imposed based on those charges which were proven. The pertinent factors here are the nature and seriousness of the offenses in relation to Grievant's responsibilities, Grievant's past disciplinary record, the effect of the offenses upon supervisors' confidence in Grievant's ability to perform assigned duties, the clarity with which Grievant was on notice that his conduct would be grounds for discipline, and the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by Grievant or others.

Grievant's offenses were not that serious in relation to his duties. The minor nature of the charges relating to the Arthur Hall incident, the bong incident and the candle incident as viewed by management is evident, since the management official who was determining the appropriate disciplinary action, William Crangle, concluded that Grievant's alleged offenses in these matters warranted only a written reprimand. We have concluded that Grievant was not at fault in the Arthur Hall incident, minimally at fault with respect to the candle incident, and only fully at fault as charged in the bong incident. Therefore, the seriousness of Grievant's offenses in these areas is substantially lessened.

The Colleges rely heavily on Grievant's alleged offenses relating to the lengthy personal phone calls and corresponding log entries to justify elevating the appropriate penalty from reprimand to suspension. However, Grievant's offenses in this area also are less serious than charged. We have concluded that he did not intentionally

make incorrect log entries as charged and that his offense of engaging in several lengthy personal phone calls while on duty was mitigated by lack of clear notice that personal phone calls were prohibited and would form the basis for serious disciplinary action. We believe employees should know that lengthy personal phone calls interfere with the performance of their duties and, thus, are prohibited. However, a suspension without warning for a first offense is an unreasonable penalty.

Grievant's past disciplinary record works in his favor. While he did receive two reprimands during his employment, he had not been disciplined for more than three years prior to his suspension. Also, the fact that Crangle advised Grievant shortly before the suspension to improve his relations with other staff at the College has no bearing on the appropriateness of the suspension. The proven charges do not involve Grievant's inadequate relations with other staff.

One of the linchpins to establish just cause for discipline is to demonstrate that the employee had fair notice, express or fairly implied, that conduct would be grounds for discipline. Grievant was on notice that discarding suspected drug paraphrenalia was inappropriate and, thus, could form the basis for discipline. Also, with respect to the candle incident, he should have known to knock on the student's door before entering. However, Crangle viewed these offenses, taken together with other unproven charges, as warranting at most a written reprimand. We conclude that, with respect to Grievant's offense concerning the lengthy phone calls, Grievant did not have fair notice that such calls would form the basis for a serious disciplinary action such as a suspension. Grievant had not been told previously by his superiors not to make personal phone calls

while on duty, and the College had not actively enforced a policy against personal phone calls. While all employees have at least implied notice that lengthy personal calls interfere with performance of duties and, thus, are prohibited, a suspension without warning for the first offense, when considered with the minor nature of Grievant's other offenses, was an unreasonable penalty given the circumstances of this case.

We recognize that the bong incident, the lengthy personal phone calls and, to a lesser extent, the candle incident, had an effect upon supervisors' confidence in Grievant's ability to perform assigned duties. However, it is evident that Grievant's offenses in this regard are due more to inadequate training of security workers and lack of notice than Grievant violating known policies of the College. Under these circumstances, we conclude that alternative sanctions to suspension existed to deter such conduct in the future by Grievant and others. Improved training, fair notice of prohibited conduct and use of lesser disciplinary sanctions than suspension could have been employed reasonably as a deterrence to Grievant's conduct.

In sum, we conclude that the Colleges acted unreasonably by suspending Grievant. The proven offenses were significantly less serious than charged, and Grievant lacked fair notice that the proven charges would be grounds for serious disciplinary action. The imposition of a suspension under such circumstances, rather than lesser available sanctions which would have served to deter such conduct in the future by Grievant and others, constituted a penalty so severe that its choice amounts to an abuse of discretion. Just cause existed for a lesser disciplinary action; a suspension simply was too severe a penalty.

The appropriate remedy to grant for this improper suspension is to order the suspension rescinded and to award Grievant back pay. Consistent with Supreme Court guidance, we are without authority to impose a lesser disciplinary action absent explicit language in the Contract giving us such authority, and must remand this matter to the Colleges for such further action as may be appropriate under the Contract between the parties. Grievance of Janes, 144 Vt. 648 (1984).

ORDER

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


1. The Grievance of David Griswold and the Vermont State Colleges Staff Federation, AFT Local 4023, AFL-CIO, is GRANTED;

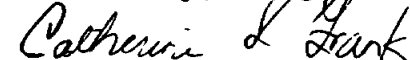
2. The eight-day suspension of Griswold for the period September 29, 1988, through October 12, 1988, is rescinded; and the Vermont State Colleges shall award Griswold back pay for that period plus interest. The interest due Griswold shall be at the rate of 12 percent per annum, and shall run from the date Griswold would have received his paycheck(s) for the period September 29, 1988, through October 12, 1988, to the date he receives the back pay award; and


3. This matter is remanded to the Colleges for such further action as may be appropriate under the Contract between the Colleges and the Federation.

Dated this 2nd day of November, 1989, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

  
Charles H. McHugh, Chairman

  
Catherine L. Frank

  
Louis A. Toepfer