VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 89-38
HAL COLLERAN	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On May 14, 1989, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Hal Colleran ("Grievant"), alleging that the State of Vermont, Department of Corrections ("Employer") violated the disciplinary and grievance articles of the collective bargaining agreement between the State and VSEA by demoting Grievant in that the demotion (a) is inconsistent with the Labor Relations Board's decision in VLRB Docket No. 82-40, Grievance of Colleran and Britt, 6 VLRB 235 (1983); (b) constitutes a double penalty for one offense; (c) is without just cause; (d) is not provided for in the Contract; (e) is in retaliation for Grievant's unsuccessful appeal to this Board; and (f) is inconsistent with the correctional facility's rules.

A hearing was held before Board members Charles McHugh, Chairman; Louis Toepfer and Leslie Seaver on October 26, 1989. Michael Seibert, Assistant Attorney General, represented the Employer. Michael Zimmerman, VSEA Staff Attorney, represented Grievant. At the hearing, the Board indicated that it would take notice of the entire record in VLRB Docket No. 82-40.

Grievant filed Requested Findings of Fact and Memorandum of Law on November 3, 1989. The Employer filed a Memorandum of Law on November 3, 1989.

FINDINGS OF FACT

1. The Findings of Fact of the Labor Relations Board in VLRB Docket No. 82-40, Grievance of Colleran and Britt, 6 VLRB 235 (1983), are incorporated herein by reference.

2. The Contract between VSEA and the State for the period July 1, 1981 to June 30, 1982 provided in pertinent part as follows:

DEFINITIONS

... DEMOTION - the change of an employee from one pay scale to another pay scale for which a lower maximum rate of pay is provided.

... PROMOTIONAL PROBATIONARY PERIOD - that working test period which applies when an employee is promoted to a position assigned to a higher pay scale in certain upward reallocation situations.

...ARTICLE 15

DISCIPLINARY ACTION

1. The parties jointly recognize the deterrent value of disciplinary action. Accordingly, the State will:

...

b. apply discipline with a view toward uniformity and consistency...

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

i. oral reprimand;
ii. written reprimand;
iii. suspension without pay;
iv. demotion;
v. dismissal.

The parties agree that there are appropriate cases that may warrant the State bypassing progressive discipline or applying discipline in differing degrees so long as it is imposing discipline for just cause.

3. At all times relevant herein, the Rules and Regulations for Personnel Administration have provided, in pertinent part, as follows:

6.0721 An employee demoted to a position in a lower class during a promotional probationary period shall be paid the salary received before promotion provided such rate does not exceed the maximum of the lower class, in which event salary shall be the maximum of the lower class.

...

10.02 Permanent Full-Time Appointment: Selection for permanent appointment shall be made for each position from the certificate submitted by the Director under the provisions of Section 9, Sub-section 9.01, except as otherwise provided. Persons so selected shall, after satisfactory completion of a probationary period, be given permanent status in the position occupied.

...

10.064 A performance evaluation of at least "Adequate" shall be required for completion of probation.

...

11.05 Demotion: An employee may be demoted at the discretion of the appointing authority for cause stated in writing to the employee...

4. On January 31, 1981, Rule 5 of the St. Johnsbury Correctional Facility Personnel Rules and Regulations provided that "(n)o employee or volunteer shall maliciously use profane or abusive language toward others or about any resident or staff member." While violations of some of those rules could, according to facility rules, result in suspension or dismissal upon a first offense, Rule 5 was not one of them (Grievance of Colleran and Britt, supra, at Findings of Fact #7, #8).

5. On December 31, 1981, Grievant, a permanent classified employee of the Vermont Department of Corrections, was in a promotional probationary period in the position Correctional Facility Shift Supervisor (then Pay Scale 14), at the St. Johnsbury Correctional Facility. Grievant had been promoted from Correctional Officer C and placed in the promotional probationary period on December 6, 1981, for a period of six months (Colleran and Britt, supra, at 236, Finding of Fact #1, Transcript of Hearing in VLRB Docket No. 82-40, page 217).

6. During the course of events on the evening of December 31, 1981, Grievant shouted "shut the fuck up", or words to that effect, at a female detainee, and applied handcuffs to her (Colleran and Britt, supra, at 246, Finding of Fact #29).

7. On February 5, 1982, Grievant was disciplined as a result of the incident on December 31, 1981. The letter of discipline provided in pertinent part as follows:

> The investigation does not sustain the allegation of use of excessive force against you personally, but does raise serious questions regarding your suitability as a Correctional Facility Shift Supervisor.
>
> Your action toward the female detainee in question was inappropriate and unprofessional in that you shouted obscenities at her in response to her verbal protests and complaints.
>
> After restraints had been applied to the female detainee, you failed to report the incident in writing, which is a violation of Department of Corrections Policy 1041 pertaining to use of force.
>
> The above reasons collectively or any one of them taken separately are sufficient to justify disciplinary action. In view of the serious nature of these particular incidents, this is an appropriate case for bypassing the progressive discipline requirements of Article 15 of the contract.
>
> You will, therefore, be suspended immediately for five (5) days without pay and will be demoted to the position of Correctional Officer B, Pay Scale 9 (Colleran and Britt, supra, at 252, Finding of Fact #49).

8. Even though not cited in Grievant's disciplinary letter, one of the bases for discipline against him was Rule 5 of the St. Johnsbury Personnel Rules and Regulations (Colleran and Britt, supra, at 252, Finding of Fact 50).

9. The decision concerning discipline was made by then-Commissioner of Corrections A. James Walton. Raymond Pilette was not employed at the St. Johnsbury facility at the time the

disciplinary action was imposed, and took no part in the discipline decision. Pilette became Superintendent of the St. Johnsbury facility in March 1982, and has remained Superintendent since that date.

10. Grievant subsequently filed a grievance concerning the suspension and demotion, which grievance reached this Board. On September 22, 1983, the Board issued its Findings of Fact, Opinion and Order in the case. Therein, the Board concluded, in pertinent part: 1) that Grievant was demoted as a disciplinary measure, and the Employer had to demonstrate just cause for the demotion; 2) that Grievant was not on fair notice that he had to file a use of force report concerning the December 31, 1981, incident, and thus could not be faulted for failure to file such a report; 3) that the only charge proved against Grievant was his use of profanity in violation of Rule 5 of the facility's rules, which rules limited the range of discipline for this offense to an oral or written reprimand, and prohibited the imposition of a suspension or demotion. The Board majority thus rescinded the suspension and demotion imposed on Grievant, and substituted in their place a written reprimand (Colleran and Britt, supra, at 261-263, 275-277, 278, 286-287).

11. The Employer appealed the Board decision to the Vermont Supreme Court.

12. On April 1, 1985, while the Employer's appeal was pending in the Supreme Court, Grievant was promoted to Correctional Officer C.

13. On June 13, 1988, the Supreme Court issued its decision on the Employer's appeal of the Board's September 22, 1983, decision concerning the discipline imposed on Grievant. The Court decision provided in pertinent part:

The Board found that the State proved only one of the two offenses against Colleran, and declared that a written reprimand was the appropriate penalty for the proven offense. The State was then ordered to substitute its disciplinary letter with a written reprimand consistent with the Board's decision.

This case is governed by our recent decision in Grievance of John Gorruso, No. 86-179 (Vt. May 27, 1988). Because the Board improperly substituted its judgment for the employer's, we reverse and remand. See Id. slip op. at 3-9).

Reversed and remanded for a redetermination of the proper penalty by the employer (Supreme Court Docket No. 83-587, Unpublished Decision).

14. On December 20, 1988, Grievant received two letters, both signed by Personnel Administrator Charly Dickerson, rather than Superintendent Pilette. The first letter provided in pertinent part as follows:

> Based on the facts as found by the VLRB (82-40), your actions of 12/31/81 violated a work rule involving the use of profanity and displayed inappropriate actions of a supervisor. Just cause exists for the imposition of a written reprimand.
>
> This action is being taken in accordance with the recent Supreme Court decision which remanded your case for re-determination of penalty. Accordingly, the Department will restore the five-day suspension originally imposed and submit for payment the value of that week (40 hours X $6.66= $266.40) plus an amount equivalent to annual interest of 12% (Grievant's Exhibit 8, page 1).

15. The second letter from Dickerson to Grievant provided in pertinent part:

> Based on the facts determined by the VLRB regarding the incident of 12/31/81 (#82-40), Pilette decided that you did not behave in a way acceptable of a shift supervisor in a promotional probationary period. Therefore, you are restored to the position of Correctional Officer C (PS 11) effective 2/5/82. The previous action of demoting you to COB level is rescinded (Grievant's Exhibit 8, pages 2 and 3).

OPINION

At issue is whether the Employer acted appropriately in demoting[1] Grievant upon remand from the Vermont Supreme Court "for a redetermination of the proper penalty by the employer" concerning the disciplinary action of suspension and demotion imposed on Grievant. That disciplinary action had been reversed by the Board in Grievance of Colleran and Britt, 6 VLRB 235 (1983).

Grievant contends that the demotion: a) is inconsistent with the Board's decision in Colleran and Britt, supra; b) constitutes a double penalty for one offense; c) is without just cause; d) is not provided for in the Contract; e) is in retaliation for Grievant's unsuccessful appeal to the Board; and f) is inconsistent with the correctional facility's rules.

The Employer contends that the post-remand demotion was not a reimposition of the same penalty of demotion for disciplinary reasons which the Board had found to be without just cause in Grievance of Colleran and Britt, supra. The Employer alleges that it imposed a different penalty on a different basis from the action originally grieved. In support of its position, the Employer maintains that Superintendent Pilette's decision to demote Grievant turned on the

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[1]We note that in the December 20, 1988, letter Grievant received, the Employer did not notify Grievant that he was "demoted" from his shift supervisor position. Instead, he was informed that he did not "behave in a way acceptable of a shift supervisor in a promotional probationary period" and that he was "restored to the position of Correctional Officer C". However, in its decision in Grievance of Colleran and Britt, supra, the Board found that the termination of Grievant's promotional probationary period in February, 1982, constituted a demotion, and we reaffirm that here. The effect of the termination of Grievant's promotional probationary period was to demote him to a lower-paying position.

fact that Grievant was in a promotional probationary period at the time and was based on a conclusion that the facts found by the Board in Colleran and Britt, supra, provided sufficient grounds to remove him from the promotional probationary period because of unacceptable performance. Thus, the Employer contends that the post-remand demotion, unlike the demotion grieved in Colleran and Britt, supra, was not a disciplinary action. Also, the Employer notes that a different penalty was imposed on remand because Grievant was demoted to a higher position than he was in Colleran and Britt, supra.

At the outset, we reject Grievant's contention that the present Contract between VSEA and the State governs this matter, rather than the Contract in effect as of December 31, 1981, when Grievant's conduct at issue occurred, and February 5, 1982, when Grievant originally was disciplined. There is no precedent to support Grievant's contention. In fact, in all grievances which have been remanded by the Supreme Court for a redetermination, the contract which has been applied has been the contract under which the original grievance was filed, not the Contract in effect at the time of remand. Grievance of Warren, 10 VLRB 65 (1987). Grievance of Troyse, et al, 6 VLRB 211 (1983). Grievance of Murphy, 5 VLRB 263 (1982). Vermont State Colleges Faculty Federation and Peck v. Vermont State Colleges, 4 VLRB 334 (1981). Grievant has presented no compelling reasons to cause us to diverge from this precedent. Also, we do not find relevant Grievant's work record subsequent to the original disciplinary action in 1982. It is clear that the redetermination of the proper penalty should be based on the applicable Contract and the proven facts which formed the basis of the Board's decision in Colleran and Britt, supra.

On the merits, we conclude that the Employer, in redetermining the proper penalty on remand, acted inappropriately in demoting Grievant. In Colleran and Britt, supra, the Board concluded that Grievant was demoted as a disciplinary measure and that, under the correctional facility's rules, the only charge proved against Grievant (i.e. use of profanity in violation of Rule 5 of the facility's Rules) justified at most the imposition of an oral or written reprimand. The Board thus concluded that the suspension and demotion of Grievant was without just cause, and the Board substituted in their place a written reprimand.

On appeal, the Supreme Court did not reverse the Board's conclusion that the Employer lacked just cause to suspend or demote Grievant, but objected to the Board imposing its own penalty of a written reprimand for Grievant's proven offense. The Court concluded that the Board, in so doing, "improperly substituted its judgment for the employer's", and the Court "remanded for a redetermination of the proper penalty by the employer".

Under these circumstances, the Employer's post-remand action of demoting Grievant, but treating it as a non-disciplinary termination of a promotional probationary period and restoration to a lower-rated position, constituted an inappropriate circumvention of the prohibition against demoting Grievant for disciplinary reasons. Having once decided that conduct engaged in by Grievant warranted a demotion for disciplinary reasons, and having that action reversed, the Employer then may not demote Grievant properly for the conduct by calling it not disciplinary. Just as an employer is bound to prove the reasons given for a disciplinary action at the time discipline is imposed, and

may not change and add to the reasons subsequently; In re Grievance of Warren (Unpublished Decision, Supreme Court Docket No. 83-640, August 22, 1986); Grievance of Earley and Ibey, 6 VLRB 72 (1983); it is similarly inappropriate to permit an employer to demote an employee for allegedly non-disciplinary reasons once a disciplinary demotion for the underlying conduct has been found without just cause. No just cause existed for Grievant's demotion on remand, just as no just cause existed for demotion at the time of the Board decision in Colleran and Britt, supra.

Having concluded that the Employer inappropriately demoted Grievant, we turn to determining what remedy to apply. In applying a remedy, we are seeking to make Grievant "whole"; to make Grievant "whole" in this case is to place him in the position he would have been in had he not been improperly demoted. Grievance of Merrill, 12 VLRB 222, 225-226 (1989). If Grievant had not been improperly demoted, he would have been two months into a six-month promotional probationary period as shift supervisor. Thus, we conclude he should be returned to that status. Also, Grievant is entitled to any back pay, plus interest, and benefits to which he was entitled if he had not been demoted.

ORDER

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

1. The Grievance of Hal Colleran is SUSTAINED;

2. The demotion imposed upon Grievant is rescinded. Grievant shall be reinstated to his position of Correctional Facility Shift Supervisor, retroactively to February 5, 1982, and Grievant shall be considered to be two months into a six-month promotional probationary period. Grievant shall

be awarded back pay, plus interest, and benefits from the effective date of his demotion until his reinstatement to the position of Correctional Facility Shift Supervisor;

3. The interest due Grievant on back pay shall be at the rate of 12 percent per annum and shall run from the date each paycheck was due commencing with Grievant's demotion, and ending on the date of his reinstatement to the Correctional Facility Shift Supervisor position; and

4. The parties shall submit to the Board by February 1, 1990, a proposed order indicating the specific amount of back pay and other benefits 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.

Dated this 17th day of January, 1990, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh, Chairman

Louis A. Toepfer

Leslie G. Seaver