

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 92-51
GARY ACKERSON AND VERMONT STATE)	
COLLEGES STAFF FEDERATION)	

FINDINGS OF FACT, OPINION, AND ORDER

Statement of Case

On October 16, 1992, the Vermont State Colleges Staff Federation ("VSCSF") filed a grievance on behalf of the VSCSF and Gary Ackerson ("Grievant"). The grievance alleged that the Vermont State Colleges ("Colleges") had violated Article 12, Section 1 of the collective bargaining agreement between the Colleges and the VSCSF ("Contract"), in effect from July 1, 1991 to June 30, 1993, by disciplining Grievant without just cause in issuing him a written reprimand.

A hearing was held before Labor Relations Board Members Charles McHugh, Chairman; Catherine Frank, and Leslie Seaver on May 20, 1993. Attorney Kimberly Rozak represented the Colleges. Shawn Flood, American Federation of Teachers Staff Representative, represented Grievant.

The parties filed post-hearing briefs.

FINDINGS OF FACT

1. Johnson State College (JSC") is part of the Colleges system and is located in Johnson, Vermont.
2. During all times relevant, Grievant worked in the Department of Security and Safety as a security officer on the

JSC campus. Grievant worked under the supervision of Dan Cotter, Director of Security and Safety. Cotter reported to the Dean of Administration, Robert Chamberlain. The Security and Safety Department is responsible for enforcing JSC's security and safety rules.

3. Correna Dezotelle enrolled as a student at JSC in January, 1992.

4. Approximately ten years prior to Dezotelle enrolling as a student at JSC, she and Grievant had a relationship that she characterized as "boyfriend/girlfriend". Dezotelle was a minor at the time and lived with Denise Audette. At some point while Dezotelle was living with Audette, Audette sought a legal restraining order against Grievant.

5. Just prior to her enrollment at JSC, Dezotelle and Grievant started dating again. Dezotelle attempted to terminate her relationship with Grievant in January, 1992, and requested that he not continue to contact her. Although Dezotelle requested that Grievant not contact her, he continued to do so and engaged in harassing conduct towards her: he followed her, called her, and contacted friends, family, and neighbors about her.

6. Dezotelle attempted to resolve the situation with Grievant outside of JSC by filing two requests for restraining orders in court. The court denied Dezotelle's requests (Colleges Exhibit 6).

7. Dezotelle also tried to informally resolve the situation with Grievant at JSC. She met with the Dean of Students, Susan Brady, in February, 1992, and brought an informal

complaint of sexual harassment against Grievant. She told Brady that she wanted Grievant's harassing behavior towards her to stop.

8. Brady met with Chamberlain and told him about Dezotelle's informal complaint of sexual harassment. Brady requested that Chamberlain meet with Grievant.

9. Chamberlain met with Grievant, Cotter, and Ken Washburn, JSC Chapter Representative for VSCSF, on or about February 22, 1992. Chamberlain told Ackerson that Dezotelle had brought an informal charge of sexual harassment against him. He told Grievant to cease any further contact with Dezotelle. Chamberlain told Grievant that if all contact with Dezotelle ceased, that would most likely end the matter as far as the College was concerned. Chamberlain informed Grievant that if he continued to contact Dezotelle, she had the right to pursue other legal options, including the right to file a formal complaint of sexual harassment against him with the College. Chamberlain warned Grievant that continued contact with Dezotelle could result in the College taking disciplinary action against him, up to and including termination. After this meeting, Cotter, who had daily contact with Grievant, restated Chamberlain's warning to Grievant.

10. Dezotelle had a part time work study job at JSC in the Audio Visual Center. Grievant's father was her supervisor. Grievant made several appearances at the department while Dezotelle was working. Dezotelle again complained to Brady and told her that she could not work in the Audio Visual Center because of Grievant's continued appearances at the center.

11. On April 5, 1992, Dezotelle filed with the College a formal complaint of sexual harassment against Grievant. At that time, she was still employed at the Audio Visual Center. In this formal complaint, Dezotelle detailed her relationship with Grievant before and after she enrolled as a student at JSC, as well as dates of incidents in which she felt harassed and threatened by Grievant after she had terminated her relationship with him (Colleges Exhibit 6).

12. In response to Dezotelle's complaint, JSC Affirmative Action Officer Katharin Brink sent Grievant a letter on April 7 in which she informed Grievant that a formal complaint of sexual harassment had been filed against him. Brink enclosed Dezotelle's written complaint with her letter. Brink's letter set forth the procedure that the College would follow in investigating the complaint and cautioned Grievant against his taking any retaliatory action against Dezotelle (Colleges Exhibit 5).

13. JSC President Robert Hahn assigned College employees Lynn Heglund and Brett Campbell to investigate Dezotelle's complaint. Heglund had previously worked as a civil rights investigator at the Vermont Attorney General's Office and had worked with the Governor's Commission on the Status of Women.

14. Heglund and Campbell interviewed Dezotelle and provided her with an opportunity to discuss each incident and provide them with information that would support her claim.

15. Heglund and Campbell met with Grievant and a VSCSF representative early in the investigation. This meeting was at Grievant's insistence because he felt they were ignoring his side of the story.

16. After Dezotelle filed her formal complaint of sexual harassment against Grievant, a male friend of Dezotelle told her that Grievant had confronted him in the library. After that incident, Grievant drove his car directly at Dezotelle's car while she was driving with her two children. Dezotelle contacted the Vermont State Police following this incident and thereafter documented with the State Police other incidents involving Grievant.

17. Heglund and Campbell interviewed several witnesses to determine the validity of Dezotelle's charges. Heglund met one time alone with Grievant. The investigation concluded with a third meeting, a quasi-formal meeting among the investigators, Grievant, Grievant's attorney, a VSCSF representative, and an attorney representing the Colleges. This setting provided a more formal setting for Grievant to respond to the investigators' inquiries.

18. The investigators wrote an investigative report based on their investigation, including interviews with Dezotelle, Grievant, and several witnesses. The investigators found cause to believe that Grievant had continued to contact Dezotelle despite five warnings not to contact her. Three of these warnings came from the College: from Chamberlain on February 22, 1993, from Cotter subsequent to that meeting, and from the notification of the formal charge of sexual harassment on April 7, 1992. (College's Exhibit 4).

19. Heglund and Campbell's report provided few details of alleged specific incidents or Grievant's response to such alleged

incidents. The report stated that after Grievant was warned by Chamberlain and Cotter in February, 1993, "four substantiated incidents took place". It also stated that after the formal charge of sexual harassment was filed against Grievant:

"...two further substantiated incidents occurred. On April 30, a male Johnson student was approached by [Grievant] in the college library and confronted in a manner intended to intimidate and was questioned as to whether this student was having sexual relations with Ms. Dezotelle".

Campbell had interviewed this student, Brian DeBritta, during the course of the investigation (College's Exhibit 4).

20. JSC President Hahn reviewed the investigator's final report and met with Grievant. Based on this report, Hahn concluded that there was insufficient evidence to support a charge of sexual harassment. He did not independently verify any of the information set forth in the report. His resolution of the complaint, a memorandum dated July 6, 1993, to Grievant, stated:

Following our meeting on this matter, I have decided that your interactions with Ms. Dezotelle have not constituted a violation of VSC Policy 331. I do, however, find that you have conducted yourself in an unprofessional manner.

Specifically, you were warned by your supervisor at least twice to refrain from having any contact with Ms. Dezotelle. You failed to heed those warnings. Also, your conversation with JSC student Brian DeBritta on April 30, concerning Ms. Dezotelle, was unprofessional in its manner and content.

Thus, you are hereby reprimanded for such unprofessional conduct. You are further warned that any other unprofessional conduct, or any other violation of VSC or JSC policies, procedures, rules, or regulations, will result in further discipline up to and including dismissal.

Finally, for the record, I want to make it very clear to you that the the College will investigate sexual

harassment and other complaints whenever they are made. As President, I am committed to pursuing any sexual harassment complaint thoroughly, and I am committed to a serious review and appropriate response whenever there is an expression of fear for safety by a student and/or an employee.

This reprimand will become part of your personnel file (Colleges Exhibit 3).

21. There is no specific provision in the Contract that defines unprofessional conduct. President Hahn based this disciplinary letter on his opinion that all College employees should conduct themselves in an appropriate and professional manner. He also considered the nature of the work of the security office where Grievant worked; that is, the enforcement of the College's safety and security rules.

22. Article 12 of the parties' Contract provides in pertinent part:

1. Except for probationary employees, no employee shall be disciplined or discharged except for just cause (Joint Exhibit 1).

OPINION

At issue is whether the Board should uphold a disciplinary action taken against Grievant, such disciplinary action being a July 6, 1992, letter of reprimand from JSC President Hahn. Hahn informed Grievant that he had conducted himself in an unprofessional manner by 1) continuing to contact a female student, who had made a sexual harassment complaint against Grievant, after Grievant had been warned to refrain from having any contact with her, and 2) engaging in an unprofessional conversation with a male friend of the student. We will address the two charges in turn.

Article 12 of the Contract provides that "no employee shall be disciplined without just cause." "Just cause" is established

upon a showing that: 1) the employee's conduct was sufficiently egregious to justify discipline, and 2) the employee was on fair notice that his or her conduct could be grounds for the discipline imposed. Grievance of Gorruso, 150 Vt. 139, 146 (1988). Grievance of Griswold and VSCSF, No. 89-602, Unpublished Decision (Vermont Supreme Court, Mar. 28, 1991). The ultimate criterion of just cause is whether the employer acted reasonably in disciplining the employee because of the misconduct. In re Brooks, 135 Vt. 563, 568 (1977). Griswold, supra. 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. Colleran and Britt, 6 VLRB 235, 265 (1983).

Once the underlying facts have been proven, we must determine whether the discipline imposed by the employer is within the range of its discretion given the proven misconduct. Colleran and Britt, 6 VLRB at 266. Having determined that just cause for discipline has been established, we can overturn the employer's choice of discipline only if it was so unreasonable as to amount to an abuse of discretion. Gorruso, 150 Vt. at 146 n.4. Griswold, supra.

Applying these principles to this case, we conclude that the Colleges has met its burden with respect to the first charge; that Grievant continued to contact a female student, who had made a sexual harassment complaint against Grievant, after Grievant had been warned to refrain from having any contact with her. The student made an informal charge of sexual harassment against Grievant prior to February 22, 1992 with the JSC Dean of

students. On February 22, 1992, Grievant's superiors, Robert Chamberlain and Daniel Cotter, met with Grievant and his VSCSF representative. Chamberlain warned Grievant at this meeting to stay away from Dezotelle. Such warning was clear and unambiguous. Chamberlain also warned Grievant at this meeting that he could be disciplined, up to and including termination, if he continued to contact Dezotelle. Grievant's direct supervisor, Cotter, later restated this warning. The College's Affirmative Action Officer also cautioned Grievant not to take any retaliatory action against Dezotelle in her letter of April 7, 1992, when she notified Grievant that Dezotelle had filed a formal charge of sexual harassment against him. We conclude that these warnings constituted fair and express notice to Grievant that continuing to contact Dezotelle could result in disciplinary action.

The evidence showed that Grievant failed to heed such warnings. After Chamberlain and Cotter warned Grievant, Grievant continued to appear at the Audio Visual Center where Dezotelle worked. Grievant did not deny that he had gone to the center while Dezotelle was working, and provided no evidence that it was necessary for him to stop by the center, or that doing so was within his normal work duties as a security officer. The evidence also revealed that after Grievant had been warned not to have any further contact with Dezotelle, he drove directly at her while she was in her car. Again, Grievant did not deny this charge, and he did not offer any explanation for this conduct. Although it is unclear whether this occurred while Grievant was

on duty, such action demonstrates a clear violation of his supervisors' orders to stay away from Dezotelle.

These are sufficient to show that Grievant failed to follow his supervisors' orders. Such failure by Grievant is sufficiently egregious to justify discipline. President Hahn, in issuing the letter of reprimand, relied on the investigators' report, which stated that they had substantiated a number of incidents in which Grievant had continued to contact Dezotelle. Although the College did not prove each incident, the proven incidents were sufficiently egregious to constitute unprofessional conduct justifying discipline.

The Colleges have a right to expect employees to follow the reasonable orders of supervisors, and the order here was reasonable. This is particularly so in a case such as this one where the College was on notice that a charge of sexual harassment had been filed and the alleged harasser violated an order to stay away from the complainant. Once an individual makes a claim of harassment against an employee, it is appropriate for management to order the employee not to have contact with the individual. This serves to protect the complainant who may have been harassed from any further harassment from the employee. It also protects the integrity of the investigation process to ensure that the employee does not seek to pressure the complainant to withdraw her complaints.

Grievant alleges that discipline was not justified because all of his contacts with Desotelle occurred while he was off-duty. The evidence before us does not indicate whether

Grievant was on or off-duty when he had contacts with Desotelle. In any event, even assuming that he was off-duty, this does not change our conclusion that the Colleges were justified in disciplining Grievant for off-duty contacts he had with Desotelle.

There must be a nexus between off-duty conduct and employment for an employer to be justified in taking any disciplinary action against an employee for such conduct. Grievance of Boyde, 14 VLRB 209, 226 (1990). We conclude that such a nexus exists here. Both Grievant and Desotelle were connected with the College, he as an employee and she as a student and work-study employee. Some of the contacts with Desotelle occurred while she was working on campus. Thus, whether Grievant was off-duty or on-duty, the contact was at Grievant's work-site. This is sufficient to establish the necessary nexus between Grievant's employment and his conduct.

The remaining incident of contact - driving his car at her car - was an incident obviously directed at causing fear in Desotelle. Off-duty contacts between the alleged harasser and the complainant which cause the complainant to fear for one's safety may cause fear of further adverse action by the alleged harasser at any time, including when on campus as a student or as an employee. This creates sufficient nexus between Grievant's employment and the contacts with Desotelle.

It is also pertinent in this regard that the nature of Grievant's work is to enforce safety and security rules, and the prohibition of contacts with Desotelle served to protect her safety and security from Grievant.

We now turn to the second charge against Grievant, that he engaged in an unprofessional conversation with DeBritten, a male friend of Dezotelle. We conclude that the Colleges did not establish by a preponderance of the evidence that the conversation between Grievant and DeBritten took place as detailed in the investigators' report and referenced in President Hahn's letter. DeBritten did not testify before us and Grievant did not testify about the substance of a conversation with DeBritten that took place in or near the library. Although Dezotelle testified that DeBritten told her that Grievant confronted him in the library, she was not a witness to this alleged incident and did not testify as to the substance of the conversation. Thus, the Colleges have not proven this charge by a preponderance of the evidence and we cannot find there was just cause for disciplining Grievant based on this alleged incident.

In presenting their case, the Colleges apparently thought it was sufficient to rely on the investigators' report to establish the charge involving the conversation. In so proceeding, the Colleges did not take into account that all Board hearings are de novo; that it is our duty to determine de novo and finally the facts of a particular dispute. Section 11.17, Board Rules of Practice; Colleran, 6 VLRB at 261, 265.

The fact that one of the two charges against Grievant has not been proven does not necessarily mean that the resulting discipline lacked just cause. Failure of the employer to prove by a preponderance of the evidence all the particulars of a disciplinary letter does not require reversal of a disciplinary action; in such cases the Board must determine whether the

remaining proven charges justify the penalty. Grievance of Regan, 8 VLRB 340, 366 (1985); Colleran, supra. Thus, we must determine whether the Colleges abused its discretion in issuing a letter of reprimand based on the one proven charge. We look to the factors articulated in Colleran and Britt, 6 VLRB at 268-269, to determine whether the the requisite standard of reasonableness has been met. The pertinent factors here are: 1) the nature and seriousness of the offense, 2) the type of employment, 3) the effect of the offense upon the supervisors' confidence in the employee's ability to perform assigned duties, 4) the clarity with which the employee was on notice that the conduct could lead to discipline, and 5) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

The proven charge of unprofessional conduct, based on Grievant's inappropriate contact with Desotelle in violation of reasonable orders of his superiors, was serious. This is particularly so in light of Grievant's position as a security officer charged with enforcing the College's safety and security rules. His inappropriate contact with an individual who had brought a charge against him that he had adversely affected her personal security and safety was related to the essential function of his position to enforce JSC's safety and security rules. The concern of Grievant's superiors with his misconduct given the nature of his work, and the fact he had violated their reasonable orders, was reasonable. The Colleges' warnings to Grievant were clear and unambiguous. Further, a letter of reprimand was a minor penalty given Grievant's misconduct. A lesser sanction would not have been adequate to deter such conduct.

In light of these factors, we conclude that a letter of reprimand meets the requisite standard of reasonableness based on the proven charge. Thus, we conclude that just cause for discipline existed and the College did not abuse its discretion in its choice of discipline.

In his post-hearing brief, Grievant argues that in, issuing the letter of reprimand, the Colleges violated the provisions of VSC Policy 311. However, VSC Policy 311 was not admitted into evidence or presented to us. Thus, such policy can play no part in our decision.

ORDER

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

1. The grievance of Gary Ackerson is SUSTAINED with respect to allegations of unprofessional conduct for engaging in a conversation with Brian DeBritta. Accordingly, the following will be expunged from the July 6, 1992, letter of reprimand:

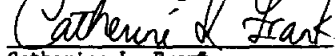
Also, your conversation in the library with JSC student Brian DeBritta on April 30, concerning Ms. Dezotelle, was unprofessional in its manner and content.

2. The Grievance of Gary Ackerson is DISMISSED in all other respects, and the July 6, 1992, letter of reprimand is sustained upon the sentence referenced in paragraph one being expunged.

Dated this 1st day of July, 1993, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Charles H. McHugh


Catherine L. Frank


Leslie G. Seaver