

GRIEVANCE OF:)
CLINT GLOVER) DOCKET NO. 94-69

Statement of Case

A hearing was held in the Labor Relations Board hearing room in Montpelier on March 2, 1995, before Board Members Charles McHugh, Chairman; Catherine Frank and Carroll Comstock. Assistant Attorney General David Herlihy represented the Employer. Vermont State Employees' Association Legal Counsel Samuel Palmisano represented Grievant. The parties filed briefs on March 22, 1995.

FINDINGS OF FACT

1. The Contracts provide in pertinent part as follows:

ARTICLE 12 PERFORMANCE EVALUATION

...

2 . . . Performance evaluations shall continue to be based exclusively on job duties, responsibilities, and other performance related factors. Individual factors on the rating sheet shall not be graded. Comments reflective of the individual factors or of the overall evaluation shall be placed on a separate sheet attached to the evaluation itself but shall not be considered to be a permanent part of the evaluation itself . . .

4 . . . During the rating year, the immediate supervisor shall call the employee's attention to work deficiencies which may adversely affect a rating, and, where appropriate, to possible areas of improvement. The immediate supervisor will accommodate a reasonable request by an employee for a meeting to discuss any such work deficiency, suggested improvement, or rating, or any performance evaluation standard or criterion that the employee considers unreasonable or unachievable.

...

ARTICLE 14 DISCIPLINARY ACTION

1. No permanent . . . 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 . . .
- d. In misconduct cases, the order of progressive discipline shall be:

- I. oral reprimand;
- ii. written reprimand;
- iii. suspension without pay;
- iv. dismissal.

...

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

I. bypassing progressive discipline . . .

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

10. If (sic) any misconduct case involving a suspension . . . should the Vermont Labor Relations Board find just cause for discipline, but determine that the penalty was unreasonable, the Vermont Labor Relations Board shall have the authority to impose a lesser form of discipline . . .

11. In any case involving dismissal based on performance deficiencies, the Vermont Labor Relations Board shall sustain the State's action as being for just cause unless the grievant can meet the burden of proving that the State's action was arbitrary and capricious . . .

DEFINITIONS

. . .

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

. . .

2. The State of Vermont opened the Northeast State Correctional Facility ("NSCF") in Newport, Vermont, in 1994. Managers and supervisors of the facility were working in the facility by January, 1994, at which time the contractors were still working. The facility had to be completed, and staff had to be hired, by March, 1994, when the inmates would begin to arrive. NSCF is a medium security facility, and includes violent and sexual offenders.

3. Raymond Pilette, NSCF Superintendent, and James Husband, NSCF

Chief of Security, were primarily responsible for the staffing and preparation of the facility. As Superintendent, Pilette was responsible for the overall operation of the facility. As Chief of Security, Husband was responsible for the security of the facility, and reported directly to Pilette. The Chief of Security oversees the shift supervisors, and is responsible for training them, evaluating them and supervising them. The shift supervisors are primarily responsible for the security of the facility during the shift, and supervise the correctional officers working on their shift.

4. Grievant has been employed by the Department of Corrections since 1987. He was a Correctional Officer I at the correctional facility in Burlington from 1987 until December 1992. In December 1992, Grievant began employment as a Correctional Officer I at the Northwest State Correctional Facility in St. Albans.

5. In the Fall of 1993, Grievant applied for a shift supervisor position at the new NSCF in Newport, which was two levels higher than the position occupied by Grievant. Grievant interviewed for the position with Husband and Barbara Russell, the NSCF Assistant Superintendent. Grievant subsequently was offered the shift supervisor position, and he accepted the job. Grievant did not begin his employment as a shift supervisor at NSCF until late January of 1994..

6. On October 31, 1993, Grievant was arrested for a suspected driving while intoxicated ("DWI") offense. Shortly thereafter, Grievant discussed his pending DWI charge with Michael Dineen, the Chief of Security at the St. Albans correctional facility (State Exhibit 1).

7. Sometime during the late Fall of 1993, Dineen had a conversation with Husband and Russell about St. Albans correctional facility employees who had

applied for positions at NSCF. Husband and Russell were at the St. Albans facility at the time interviewing applicants. During this conversation, Dineen informed Husband and Russell that Grievant had a pending DWI charge. Dineen relayed this conversation to Grievant.

8. Grievant accepted a plea bargain on the DWI charge, whereby he pleaded guilty to a civil DWI charge, which carried a 90 day license suspension, and a careless and negligent driving charge, which carried a concurrent 30 day license suspension. Grievant's license suspension was published in the Burlington Free Press, a daily newspaper. Grievant's conviction for the license suspension was effective on February 9, 1994, at which point he had started working at NSCF. Grievant did not tell Husband or Pilette about his license suspension (State Exhibit 1).

9. Grievant was one of five shift supervisors hired at NSCF. Throughout the early months of 1994, the NSCF managers and supervisors were extremely busy with the task of hiring new staff, establishing operational procedures, and otherwise performing tasks to prepare for the opening of the new facility.

10. On the morning of February 24, 1994, Randy Burke approached Grievant in the NSCF staff lounge. Burke is an employee of the State Department of Buildings, and was responsible for facility maintenance. Burke approached Grievant to get keys so that he could allow contractors access to spaces in which they were working. Grievant was upset that Burke had not obtained the keys from him on the prior night. Grievant spoke in a loud and angry manner towards Burke, and used profane language. Burke became angry, and an argument ensued (State Exhibit 5).

11. Shortly after the incident, shift supervisors Nelson Charron and Bob Sylvester entered the lounge. Neither had heard the argument, but when they entered the lounge Grievant appeared agitated. Grievant called Burke a "fucking asshole" and a "cocksucker", and said that he was "not going to take any more of (Burke's) fucking shit" (State Exhibits 6, 7).

12. When Husband heard about this incident that morning, he asked Burke, Charron and Sylvester to write reports on the incident. They wrote reports that day (State Exhibits 5, 6, 7). Husband spoke with Grievant about the incidents, and relayed to him the substance of reports made by Burke, Charron and Sylvester. Grievant informed Husband that Burke had provoked the situation and that he had reacted calmly. He also denied that he had used profane language about Burke to Charron and Sylvester.

13. By letter of March 8, 1994, Husband imposed a written reprimand on Grievant for the February 24 incident. The letter of reprimand provided in pertinent part:

After receiving the evidence and despite your testimony to the contrary, I have concluded that you did behave in the manner described by Randy Burke, Robert Sylvester and Nelson Charron, and I have decided to issue this written reprimand.

This situation involves two issues:

The first issue is your behavior on the day in question. You were clearly out of line in your response to Randy Burke and by virtue of the profanity and abuse directed towards him, you displayed behavior that is absolutely unacceptable for any employee of this facility. The seriousness of this misconduct is compounded by the fact that you are a Shift Supervisor and in a leadership role.

The second issue pertains to your personal credibility. Your

version of this situation minimized your involvement to the point of denial, despite three corroborative reports to the contrary. To put it simply, you cannot be effective in your position if I cannot count on you to report to me accurately and truthfully. The purpose of this document is to reprimand you for your conduct in this incident and to advise you that any reoccurrences of this type of situation in the future will result in progressively more serious disciplinary action, up to and including dismissal.

(State Exhibit 4)

14. It is not unusual for correctional employees to use profanity in conversations with each other at the correctional facility. Husband has not disciplined other NSCF employees for the use of profanity on the job.

15. Although Grievant's license was suspended for a three month period after his February 9, 1994, conviction, he continued to drive after that time. On more than one occasion, through late March 1994, he drove to work at NSCF in his correctional officer uniform. At all times relevant, Grievant drove with the conscious knowledge that his license had been suspended.

16. Sometime in March 1994, while Husband was attending a training session at the Vermont Police Academy, one of the staff told Husband that he had seen in the newspaper that Grievant's license had been suspended. Husband did not follow up on that information at that time.

17. In late March, someone else mentioned to Husband that Grievant was driving without a license. Husband contacted Orleans County Sheriff Murphy, and asked him about the status of Grievant's license. Sheriff Murphy told Husband that Grievant's license was suspended. Husband then told Sheriff Murphy that Grievant had been driving to work daily, and that Grievant had driven to work that day. When

Grievant left work that day, Sheriff Murphy stopped him and cited him for driving while his license was suspended.

18. By letter of April 18, 1994, Husband informed Grievant that he was suspending him for three days. The letter provided in pertinent part as follows:

The reason that I have suspended you is as follows:

1. On Friday, April 4, 1994, you confirmed, in the presence of your Vermont State Employees' Association representative, Gail Rushford, that despite your license being under suspension you consciously made the decision to drive yourself to and from work, in uniform, being fully aware of the illegality of your decision.

Correctional Facility Shift Supervisors are role models for their subordinates as well as the inmate population. As a uniformed officer, you represent the Department each time you are observed by the public. You knew, or should have known, that to violate the law on a daily basis by driving to and from the Northeast State Correctional Facility while your license was under suspension could result in a disciplinary action.

Any further, similar misconduct on your part may lead to increased disciplinary action being taken against you, up to and including your dismissal.

(Grievant Exhibit 4)

19. On or about June 8, 1994, while Grievant was on duty as shift supervisor, a correctional officer told Grievant that correctional officer Kathy Patenaude was visibly upset while on her post. Grievant went to Patenaude's post and offered to allow her to switch posts to the outside to relieve stress on her. Patenaude declined Grievant's offer.

20. The following day, Shift Supervisor Bob Sylvester approached Patenaude and told her that she might be in trouble because she had refused an order by Grievant to switch posts. Husband later approached Patenaude, and she told him

that Grievant had not ordered her to leave her post. Grievant's supervisors had made no conclusions or final decision with respect to any action to be taken by the Employer against Grievant at the time this incident was mentioned in the performance evaluation discussed below in Finding of Fact #23. Subsequent to the evaluation, no disciplinary action was taken against Grievant due to this incident.

21. Sometime in the Spring of 1994, Superintendent Pilette, in a meeting with Grievant and other supervisors, informed them that his one rule for them was "no fucking the help". Grievant believed that the statement was directed at him as he was involved in a relationship with a co-worker at the time. Grievant filed a sexual harassment complaint with the State Department of Personnel based on Pilette's statement. Rosamond Noyes, Employee Relations Chief for the Department of Personnel, investigated the complaint. In a June 29, 1994, letter resulting from her investigation, Noyes stated that she found "no evidence of sexual harassment", but further stated: "Mr. Pilette did agree that using profanity was inappropriate, and in the future, will choose his words more carefully" (Grievant Exhibit 3).

22. At some point during Grievant's promotional probationary period, Husband indicated to Grievant that it was uncertain whether Grievant would successfully complete his probationary period. Grievant was left with the impression that his probationary period might be extended.

23. On July 15, 1994, Grievant received a performance evaluation covering his promotional probationary period from late January 1994 to that time. In the evaluation, Husband gave Grievant an overall performance rating of "unsatisfactory". Husband recommended that Grievant not successfully complete his

promotional probationary period, and return to his Correctional Officer I position. In the evaluation, Husband made the following comments:

A number of situations have arisen during Clint's promotional probation that impact negatively upon Clint's ability to be viewed as a credible person, a positive role model and an effective member of this supervisory team.

The incidences that have been resolved thus far have resulted in progressive discipline. There is at least one issue pending resolution at the time of this writing.

Clint has seriously damaged effectiveness as a Shift Supervisor by involvement in a series of incidents in which his credibility has been at stake and found to be unsatisfactory.

Specifically, on 3/8/94, Clint was given a written reprimand following an incident on 2/24/94 in which he behaved abusively and unprofessionally with a facility maintenance worker and several peers. This situation was compounded by Clint's version of the events of that morning being less than credible.

On 4/18/94, Clint received a four day suspension without pay for an admittedly conscious decision on his part to continue to drive to and from work despite the fact that his driver's license had been suspended. This situation also involved his making a conscious decision not to inform his supervisor of the fact that he did not possess a valid operators license.

On 6/9/94, I received a verbal report from another shift supervisor that indicated there appeared to be more serious discrepancies in a set of facts reported by several members. My investigation of the situation discloses that Clint reported to a peer in the presence of another staff witness that an employee of the other shift supervisor was involved in behavior that could result in severe disciplinary action. As the issue progressed in the form of an investigation directed at the correctional officer, Clint denied ever having made the report and denied that the situation that he had reported ever existed. This situation is pending final resolution at the time of this writing.

I have met with Clint on a number of occasions and have

provided him with verbal notification that it would be unlikely that he would satisfactorily complete his promotional probation period.

This situation seriously reduces his effectiveness as a team member and negates his ability to perform in his present position.

I am recommending that Clint be returned to the position of Correctional Officer I.

(State Exhibit 3)

24. Superintendent Pilette concurred in Husband's recommendation that Grievant unsatisfactorily completed his promotional probationary period, and that Grievant be returned to his Correctional Officer I position (State Exhibit 3).

25. As a result, Grievant returned to work at the St. Albans facility as a Correctional Officer I. Grievant has remained in that position until the present.

OPINION

Grievant alleges that the Employer violated Article 12 and 14 of the Contracts by imposing a written reprimand on him, suspending him for three days, and issuing him an unsatisfactory performance evaluation which resulted in Grievant not successfully completing his promotional probationary period. We address each of these issues in turn.

Written Reprimand

Grievant received a written reprimand for a February 24 incident involving Randy Burke, a maintenance employee at the correctional facility. Grievant contends that the written reprimand he received was without just cause, because the reprimand was not warranted by the facts of the incident and was not imposed with "a view towards uniformity and consistency", and thus violated Article 14 of the Contract.

To establish just cause for discipline, it is necessary for the Employer to show that disciplining the employee for certain conduct is reasonable; and that the employee had fair notice, express or implied, that such conduct would be grounds for discipline. In re Brooks, 135 Vt. 563, 568 (1977). Grievance of Lawrence, 17 VLRB 360, 372 (1994).

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 reasonable given the proven facts. Id. at 266.

In issuing Grievant a written reprimand, the Employer charged Grievant with

unacceptable behavior by speaking in a loud and angry manner towards Burke, and using profanity, when Burke asked him for keys. The Employer further charged Grievant with demonstrating untruthfulness in connection with this incident by *minimizing his own fault to the point of directing all blame to Burke.*

We conclude that the Employer has met its burden with respect to these charges. Grievant did engage in unacceptable behavior by speaking in a loud and angry manner towards Burke, and using profanity, when Burke asked him for keys. Also, it is apparent that Grievant provoked this unnecessary confrontation. Further, Grievant did demonstrate untruthfulness in connection with this incident by telling his supervisor that Burke had provoked the situation, that he had reacted calmly, and that he had not used profane language.

The charges against Grievant having been proven, we look to the factors articulated in Grievance of Colleran and Britt, 6 VLRB 235, 268-69 (1983), to determine the legitimacy of the particular disciplinary action. The pertinent factors here are: 1) the nature and seriousness of the offense, and its relation to Grievant's position; 2) the effect of the offense upon supervisors' confidence in Grievant performing his duties; 3) the clarity with which Grievant was on notice that such conduct could lead to discipline; 4) the consistency of the penalty with those imposed upon other employees for similar offenses; and 5) the adequacy and effectiveness of alternative sanctions.

The offense by Grievant was relatively minor, but so too was the disciplinary action imposed. His inappropriate behavior towards Burke was sufficiently egregious to justify some discipline, particularly given his leadership role as a shift supervisor.

His untruthfulness with his supervisor exacerbated the offense by calling into question his personal credibility. The very nature of Grievant's duties as a shift supervisor required him to report actions accurately; dishonesty in which he engaged reflected on his credibility in reporting events and, consequently, constituted punishable conduct. Grievance of Johnson, 9 VLRB 94, 113 (1986).

His actions had an adverse effect upon his supervisor's confidence in his performing his duties. His supervisor understandably was concerned about Grievant's ability to engage in appropriate interactions with others in the workplace, as well as to accurately and truthfully report events to him.

Grievant had at least implied fair notice that his unacceptable behavior towards Burke, and his untruthfulness with his supervisor, could result in the imposition of discipline. Grievant contends that imposing discipline on him based, in part, on his use of profane language was inconsistent imposition of discipline because other employees used profane language in the workplace and they were not disciplined. We recognize that the use of profane language by correctional employees in conversations with each other is not unusual, but using profane language in an angry and inappropriate manner towards others in a correctional facility, which demonstrates ill will towards them, constitutes misconduct justifying discipline. Grievance of Munsell, 11 VLRB 135, 146-47 (1988). This is what occurred here.

In sum, Grievant's offenses were sufficiently serious under the circumstances for the Employer to appropriately bypass the oral reprimand step of progressive discipline and impose the relatively minor penalty of a written reprimand. It was reasonable for the Employer to conclude that a written reprimand

was an appropriate penalty for the combined offenses of inappropriate personal interactions and untruthfulness, and that an oral reprimand would have been inadequate to sufficiently deter Grievant from engaging in such misconduct in the future.

Three Day Suspension

Grievant received a three day suspension for engaging in the illegal action of driving his car to work while his license was suspended. Grievant contends that there was no just cause for the suspension because there was no nexus between the license suspension and his job, and because discipline was not imposed with a view towards uniformity and consistency.

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 Boyle, 13 VLRB 209, 227 (1990). Grievance of Earley and Ivey, 6 VLRB 72, 81 (1983). Grievance of Jamison, 10 VLRB 239, 243-44 (1987). Grievant contends that there is no nexus here because his license suspension resulted from an off-duty incident, and because a driver's license was not necessary for Grievant to perform his job duties.

We conclude that a nexus does exist between Grievant's job and the basis for his suspension. Contrary to Grievant's claim, he was not suspended because his license was suspended, but because he drove to work while his license was suspended. As a correctional supervisor, Grievant's duties involve the custody, treatment and training of inmates who have violated the law. Grievant's conduct concerning driving to work while his license was suspended demonstrated a

disregard for the law sufficient for the Employer to reasonably draw a connection between his conduct and his ability to supervise individuals incarcerated because they had violated the law. Boyd, 13 VLRB at 227.

Grievant bases his further contention that the Employer failed to impose discipline with a view towards uniformity and consistency on similar invalid grounds. He claims inconsistent discipline because other correctional employees have had their driver's licenses suspended, but have not been disciplined. Again, Grievant was not suspended because his license was suspended, but because he drove to work while his license was suspended. Grievant has not presented other instances where employees have driven to work while their licenses were suspended and, thus, his claim of inconsistent treatment must fail.

We conclude that the Employer had just cause to impose a three day suspension on Grievant due to his offense of driving to work while his license was suspended. This was a serious offense. The disregard for the law which he demonstrated is a characteristic contrary to what is needed by a correctional supervisor to adequately perform his duties to supervise employees and to supervise offenders incarcerated for violating the law. Boyd, 13 VLRB at 229. This offense was compounded by Grievant driving illegally while in uniform. Grievant had the responsibility to serve as a role model to subordinate employees, and to serve as a role model to inmates to further the Employer's goal of rehabilitating inmates. Id. He served as a poor role model as a consequence of his offense. This understandably resulted in his supervisors questioning his ability to gain the respect he needed from subordinates and inmates to adequately perform his duties.

Also, Grievant was on fair notice that he could be suspended for his conduct. He should have known that to violate the law by driving to work while his license was suspended could result in discipline in a work environment where offenders of the law are incarcerated.

His supervisors acted reasonably by suspending him for three days for this offense. The suspension came closely on the heels of Grievant receiving a written reprimand for other misconduct. The offense of driving to work while his license was suspended was more egregious than the offense resulting in the written reprimand, and sufficiently close in time, to justify the progressively more severe sanction of a three day suspension. The Employer reasonably concluded that a lesser sanction would have been inadequate to send the appropriate message to Grievant that serious misconduct in the future would result in a high level of discipline.

Unsatisfactory Performance Evaluation and Unsuccessful Completion of Promotional Probationary Period

Grievant contends that the unsatisfactory performance evaluation which he received at the conclusion of his promotional probationary period as a shift supervisor, resulting in the unsuccessful completion of that probationary period and return to his previous Correctional Officer I position, violated Articles 12 and 14 of the Contract. Grievant contends there was no just cause for the Employer's action. Specifically, he contends that the Employer inappropriately relied almost exclusively on misconduct issues to justify the unsatisfactory evaluation, inappropriately relied on performance issues which were not included in the performance evaluation, and

that the Employer did not put Grievant on adequate notice of performance deficiencies.

At the outset of our analysis, we note that specific guidance in the Contracts explicitly directed at promotional probationary periods is limited. The Definitions section of the Contracts refers to such as period as a “working test period”. No other pertinent provisions of the Contract explicitly focus on promotional probationary periods.

Given that Grievant was dismissed from the shift supervisor position at the conclusion of his promotional probationary position for performance deficiencies, this case is appropriately analyzed under Article 14, Section 11, of the Contracts, which provides: “In any case involving dismissal based on performance deficiencies, the (Board) shall sustain the State’s action as being for just cause unless the grievant can meet the burden of proving that the State’s action was arbitrary and capricious”. Grievance of Mason, 16 VLRB 222, 238 (1993).

A discharge may be upheld as one for just cause only if it meets two criteria of reasonableness: one that it is reasonable to discharge an employee because of certain conduct, and the other, that the employee had fair notice, express or fairly implied, that such conduct would be grounds for discharge. Id. at 238-39. In re Grievance of Muzzy, 141 Vt. 463, 468-69 (1982). An arbitrary decision is one fixed or arrived at through an exercise of will or caprice, without consideration or adjustment with reference to principles, circumstances or significance. Lewandoski and VSCFF v. Vermont State Colleges, 142 Vt. 446 (1988). “Capricious” is an action

characterized by or subject to whim. Appeal of Degreenia and Lewis, 11 VLRB 227, 229 (1988).

It is first necessary to make clear the scope of our review in this case. The Employer requests that we consider performance issues and areas which were not reflected in Grievant's written performance evaluation. This we decline to do. In reviewing dismissals, including dismissals from positions at the conclusion of promotional probationary periods, the Board will not look beyond the reasons given by the employer in the dismissal letter for the actions taken. Mason, 16 VLRB at 239, citing In re Grievance of Warren (Supreme Court Docket No. 83-60, Unpublished Decision, 1986). Thus, we limit our review to the grounds stated in the written performance evaluation in which Grievant was informed that he had not successfully completed his promotional probationary period.

Also, the Employer requests that we rely on an incident mentioned in the performance evaluation, involving Grievant's actions concerning possibly moving an employee from one post to another, to support Grievant's dismissal. This incident, however, was "pending final resolution at the time of (the) writing" of the performance evaluation. In other words, the Employer had not decided whether to take any adverse action against Grievant at the time the performance evaluation was issued. Under these circumstances, it is inappropriate for the Employer to rely on such an incident as a basis for the unsatisfactory performance evaluation. In the context of a disciplinary case, the Board previously has ruled that an employer may not suspend an employee without pay absent a determination by management that the allegations are substantiated. Grievance of Ackerson, 17 VLRB 105, 126 (1994). The

Board reasoned that a minimal essential of due process is that an employer must first determine misconduct has been committed, not just alleged, before disciplining an employee. *Id.* Analogously, here, the Employer must at least have determined Grievant demonstrated some deficiencies before including this incident as a basis to support an unsatisfactory performance evaluation. That did not occur, since the Employer had not determined by the time of the evaluation that Grievant had done anything warranting the taking of adverse action against him. In fact, the Employer never determined that adverse action should be taken against Grievant based on this incident.

This leaves the only grounds to support the unsatisfactory performance evaluation, resulting in Grievant's dismissal from the shift supervisor position, as being the incidents for which Grievant had previously received a written reprimand and a suspension. Under these circumstances, it was arbitrary and capricious for the Employer to dismiss Grievant from the shift supervisor position. This is because the Employer had previously considered it sufficient to reprimand and suspend Grievant for these incidents, and warn him that he could be dismissed for further offenses. In the absence of further deficiencies of Grievant to support the performance evaluation, Grievant lacked fair notice he could be dismissed for the reasons cited in the performance evaluation. He had fair notice that he could be dismissed only for further infractions. The performance evaluation resulting in Grievant's dismissal is fundamentally flawed, given that it lacks one of the fundamental tenets necessary to support an employee's dismissal - i.e., that the employee had fair notice he could be dismissed for certain conduct. Thus, we uphold Grievant's contention that the

Employer lacked just cause to dismiss him from the shift supervisor's position based on the unsatisfactory performance evaluation.

In lieu of imposing a specific remedy at this time for the Employer's violation of the Contract, we believe that under the circumstances it is appropriate to remand this matter to the parties to attempt to fashion an appropriate remedy based on our opinion herein. In so deciding, we are mindful that, unlike the employee in Mason, Grievant here was not completely removed from the state workforce, as he was returned to his previous position. c.f., 16 VLRB at 243. Also, almost a year has passed since Grievant was dismissed from the shift supervisor position, and time may have contributed to a remedy workable to both parties. Healing is a matter of time, but it is sometimes also a matter of opportunity. Further, the provisions of the Contract are far from adequate in providing direction on how such situations should be handled, and the parties can call on their experience in addressing problems which arise in promotional probationary periods to attempt to fashion an appropriate remedy.

ORDER

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

1. The Grievance of Clint Glover is SUSTAINED to the extent that the State of Vermont, Department of Corrections lacked just cause to dismiss Grievant from his Shift Supervisor position, at the Northeast State Correctional Facility, at the conclusion of his promotional probationary period based on an unsatisfactory performance evaluation; and is DENIED in all other respects; and
2. This matter is remanded to the parties to attempt to fashion an appropriate remedy based on our decision herein. The parties shall inform the Labor Relations Board in writing by July 26, 1995, whether they have been able to stipulate and agree to a resolution of this matter. If the parties are unable to stipulate and agree to a resolution of this matter, they shall notify the Board in writing by July 26, 1995, of specific areas of disagreement and a statement of issues which need to be decided by the Board.

Dated this 30th day of June, 1995, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh
Charles H. McHugh, Chairman

Catherine L. Frank
Catherine L. Frank

Carroll P. Comstock
Carroll P. Comstock