

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 95-39
DAVID GRISWOLD)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On June 27, 1995, the Vermont State Employees' Association, Inc. ("VSEA") filed a grievance on behalf of David Griswold ("Grievant") against the Vermont State Colleges ("Colleges"), alleging that the Colleges violated the collective bargaining agreement between the Vermont State Colleges Staff Federation/VSEA and the Vermont State Colleges, effective for the period July 1, 1994 to June 30, 1996 ("Contract"). Specifically, Grievant alleges that Article 12 of the Contract was violated because the Employer dismissed him in violation of his due process rights and because there was no just cause for dismissal.

A hearing was held on October 26, 1995, in the Vermont Labor Relations Board hearing room in Montpelier before Board Members Catherine Frank, Chairperson; Leslie Seaver and Richard Park. Attorney Nicholas DiGiovanni, Jr. represented the Colleges. VSEA Legal Counsel Samuel Palmisano 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. On June 12, 1992, the Colleges adopted a "Sexual Harassment and

Related Unprofessional Conduct" policy. This replaced an earlier policy that had been in effect for several years. The Sexual Harassment and Related Unprofessional Conduct policy is policy number 311 in the Colleges' Manual of Policy and Procedures and is commonly referred to as "Policy 311". The policy was mailed to all JSC employees after it was issued in 1992, and since 1992 has been given to employees in annual contract packets and is posted throughout the campus. Equal Employment Opportunity Commission guidelines are adopted in the policy. The policy states in pertinent part:

...

II. PHILOSOPHY

... Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

...

In determining what conduct constitutes sexual harassment, the question shall be determined from the perspective of a reasonable person of the gender and position of the person filing the complaint.

...

IV. RESOLUTION

Any . . . employee of the VSC who believes that this policy has been violated may seek to resolve the problem informally, prior to filing a formal written complaint as outlined below. They may consult informally with the offending party or communicate the problem to a person(s) designated by the president and request advice and/or assistance to resolve the problem informally . . .

A(n) . . . employee may be unable to resolve the problem through the informal process, referred to above, or may not wish to use the informal

process. If so, a(n) . . . employee who believes that this policy has been violated may file a formal written complaint directly with his/her immediate supervisor, dean of students, academic dean, college president or other college administrator designated by the president or with the VSC Director of Employee Relations and General Counsel.

Any VSC employee with whom a formal written complaint is filed shall notify the college president or Chancellor. The complaint will then be investigated by an administrator of the Vermont State College. The investigation shall be conducted with sensitivity to all involved and as confidentially as possible.

Any person who violates this policy shall be subject to prompt and firm disciplinary action as determined by the president or Chancellor. Such discipline may range from reprimand to dismissal.

Upon completion of the investigation the president, Chancellor, or designee shall meet with the parties to the complaint and shall, in confidence, discuss the final disposition of the matter . . .

(Colleges Exhibit 2).

3. The Colleges also issued specific procedures for implementing Policy 311. Once a formal charge is filed, one female and one male investigator is assigned to investigate the charge. The investigators interview the complainant, alleged violator and witnesses. They prepare a report at the completion of their investigation for the president, Chancellor and Policy 311 coordinator. If the investigators' report is accepted, it is then sent to the complainant and alleged violator. If there has been a finding of sexual harassment, the alleged violator is also sent a letter outlining the disciplinary action being contemplated (Colleges Exhibit 2).

4. During all relevant times, Pam Blum was the Policy 311 coordinator, Robert Hahn was the JSC president and there were approximately 11 investigators from whom the president could choose if an employee filed a formal complaint.

5. During all relevant times, Grievant worked in the Department of

Security and Safety ("Security Department") as a security officer on the JSC campus. Grievant began his tenure as a security officer with JSC in 1981 and remained in that capacity until his dismissal in January, 1995. Grievant worked under the supervision of Director of Security and Safety Dan Cotter. Cotter reported to Dean of Administration Robert Chamberlain. Grievant worked the evening shift which finished at midnight.

6. Grievant was one of three full time security officers. In addition to the full time security officers, the Security Department also hires two to four students to work part time during the school year and during the summer.

7. During all relevant times, Mike Laflin worked as a full time security officer in the JSC Security Department. Laflin generally worked from midnight until 8:00 a.m.

8. The JSC Security Manual sets forth the Colleges' "Officer Conduct Policy" and states in pertinent part:

II. Procedure

A. Unbecoming conduct

1. Every employee shall at all times conduct themselves in a manner which reflects most favorably on the Department and Johnson State College

...

3. All employees shall adhere to the policies set fourth (sic) by the CODE OF CONDUCT, failure to do so may result in disciplinary action (Colleges' Exhibit 3).

9. Security officers have varied duties, including, but not limited to,

patrolling campus, enforcing JSC parking and traffic rules and regulations, answering emergency calls and "securing" buildings. Officers "secure" buildings in the evening by systematically walking through each building to ensure that they are *empty and that all the doors are locked. Officers generally carry flashlights while they are walking through the buildings.*

10. Sandra Bedell began working as a full time security officer in February, 1993, and remained in that capacity during all relevant time periods. Bedell was the only full time female security officer. Until September, 1994, Bedell generally worked two days a week from 4:00 p.m. to 2:00 a.m., and two days a week from 10:00 p.m. to 8:00 a.m. She started working five days a week in September, 1994, *and from that time on worked the night shift from 10:00 p.m. to 6:00 a.m.* During all pertinent times, Bedell and Grievant's shifts overlapped by at least two hours.

11. Grievant spent a significant amount of time with Bedell at the beginning of her tenure in the Security Department. He patrolled campus with her and oriented her to the job during their overlapping shifts. Occasionally, Grievant picked up Bedell for her shift, in the Colleges' security vehicle, at her apartment on the JSC campus.

12. The Colleges provide uniforms for full time security officers. The Colleges issued Bedell a male uniform used by a former employee, Gary Ackerson. Ackerson is much larger than Bedell and his uniform was baggy and did not fit her properly. The Colleges did not provide Bedell with a woman's uniform for approximately 15 months. Employees in the Security Department often joked about

how Bedell looked in the male uniform.

13. During Bedell's initial 90 day probationary period, Grievant made remarks to her about the way her uniform fit that made her feel uncomfortable. He remarked about the way her breasts looked in the uniform and that she had "gotten into men's pants", or words to that effect. Grievant and Bedell were always alone when he made such remarks. Bedell reacted to such remarks with silence or by walking away.

14. Bedell complained to her supervisor, Dan Cotter, about Grievant's above-mentioned remarks. Cotter told Bedell that she could file a formal sexual harassment complaint and that she should document his remarks. Bedell did not want to file a complaint because she was new on the job and wanted to work the matter out herself. Cotter did not say anything to Grievant about Bedell's complaint or inform Grievant that he needed to alter his behavior.

15. Grievant was in the process of going through a difficult divorce when Bedell started working at JSC with him. He often complained about his wife and made remarks such as, "all women who divorce their husbands ought to be shot", "I ought to blow my wife's fucking head off", "women are such stupid bitches", and words to that effect.

16. Grievant commonly made derogatory comments about women in Bedell's presence. He made such statements as "women shouldn't be in the work place", "women should be home with their kids", "women don't belong in security", and words to that effect. These comments had the effect of making Bedell feel that Grievant did not want her working at JSC as a security officer.

17. Grievant also referred to particular women on campus that he disliked as “stupid bitches”. On one occasion, a female student had locked herself out of her room and Grievant stated, just outside of the student’s hearing, that he was going to “go let that fucking bitch in”.

18. Grievant criticized Bedell’s performance and made remarks to the effect that she would never get fired “because she is a woman”. He told Bedell one time that a woman had filed a sexual harassment complaint against him; he laughed and said she had not been able to prove it.

19. Grievant told Laflin that Bedell was “too nice” to be a security officer in that she often let people off with a warning instead of issuing a ticket for vehicle violations. Security officers generally considered Grievant to have a “gruff” manner, found him critical of their work and often did not like him when they initially started working with him.

20. Bedell was late for work a few times during 1994 because she overslept. Grievant gave her a clock radio so that she would not be late again.

21. Erin Peltier is a student at JSC and worked in the Security Department with two other student security officers, Grievant and Bedell during the summer of 1994. Grievant and the students passed the time by making jokes of a sexual nature. Grievant made a comment to Peltier one time in Grievant’s presence that the only thing about Peltier that “is virgin is your ears”, or words to that effect. Bedell never participated in such exchanges, and after Grievant made that particular comment to Peltier, Bedell walked away from Grievant and Peltier.

22. Bedell was uncomfortable in the security office during the summer

of 1994 because she found the constant sexual banter among Grievant and the students offensive and vulgar. At the beginning of the summer, Bedell walked away when they engaged in such behavior. As the summer progressed, Bedell complained to Grievant and to Peltier about their inappropriate language. After Bedell complained, Grievant and the students generally refrained from such conduct in her presence. There were occasions when Grievant and the students stopped talking when Bedell came into the room because they did not want to offend her. This had the effect of making Bedell feel apart and ostracized from the group.

23. Bedell and Grievant often shared responsibility for securing buildings.

Starting in April or May, 1994, Grievant scared Bedell several times while she was securing buildings. The first time this occurred, Bedell asked Grievant over the radio whether he had secured the sculpture building. He said he had not and she told him that she would secure it. Bedell entered the building and systematically checked each room as she walked through the building with her flashlight, locking doors and turning out lights. As Bedell was completing her task, she discovered Grievant quietly "hunched" in a corner when his badge reflected the light from her flashlight. Bedell was startled because Grievant had not warned her that he was there. She asked what he was doing there and Grievant did not respond. Grievant startled Bedell in this same manner five or six times between April or May and December 2, 1994.

24. At some point, Bedell confronted Grievant after he had frightened her four or five times in the above-mentioned manner. She told him she would defend herself with her flashlight against such unexpected encounters in the future. Grievant

did not frighten her again until December 2, 1994.

25. One evening in September, 1994, Grievant responded to an emergency call from a female student who had reported an unwanted sexual advance. Bedell asked Grievant the next day if the woman needed to go to counseling. Grievant made a joke about the size of the student's breasts and how they had heaved when she had sobbed.

26. Later that same evening, Grievant was discussing his sleep disorder with Laflin and Bedell. Grievant said that he was going to a sleep clinic. Bedell told Grievant that she sometimes gave her son warm milk when he could not sleep. Grievant replied that he would have warm milk "if he could find a woman who was milkin'", or words to that effect.

27. Grievant disliked a certain woman who was a performer in a dance ensemble that was performing on the JSC campus in late October, 1994. One time he gave her a traffic ticket and later told Bedell that he had "gotten that fucking bitch". Bedell was shocked and said, "David, you can't say things like that".

28. During all relevant times, Bedell complained at least three more times to Cotter about Grievant's behavior. Specifically, she complained that he was overly critical of her and that he used inappropriate language in her presence. One time, Bedell asked for a meeting but Cotter did not arrange one. Each time Bedell complained to Cotter about Grievant's behavior, Cotter told her that she could file a sexual harassment complaint.

29. Cotter issued Grievant an annual performance appraisal in July, 1994. He gave Grievant an overall rating of "Consistently meets standards". The Colleges'

annual appraisal form also provides a space for mandatory comments. Cotter wrote on Grievant's July, 1994 appraisal under "strengths" that he had worked hard "to improve working relationships with other staff" (Grievant's Exhibit 1).

30. In the Fall of 1994, Pauline Garber was a full time student at JSC. She lived in an apartment off campus during that semester. On November 1, 1994, at approximately 11:00 p.m., Garber drove a female friend to Arthur Hall, the friend's residence hall on the JSC campus. Arthur Hall is adjacent to the Martinetti Hall parking lot. The parking lot was nearly deserted. Garber temporarily parked next to the Martinetti fire lane. Before her friend got out of the car, a sheriff drove up next to Garber's car and told her that her bicycle rack was obscuring her license plate and that she would have to remove it. Garber and her friend got out of the car and started to remove the bicycle rack.

31. Grievant then drove up to Garber and yelled for her to "move that car". Garber was about to explain what she was doing when Grievant yelled a second time to "move that car". Garber told Grievant that she would say goodnight to her friend and then leave. Garber had dropped her keys when she had gotten out to remove the bicycle rack and could not find them right away. Grievant yelled at her to find her keys or he would have her towed.

32. On or about November 3, 1994, Garber complained to Dean Chamberlain about Grievant's conduct on the evening of November 1, 1994.

33. At some point prior to December 7, 1994, Chamberlain investigated Garber's complaint by talking to two witnesses to the incident. They both corroborated Garber's complaint that Grievant was rude to her and that he had not

given her an opportunity to explain what she was doing before he started yelling at her. Chamberlain did not discuss the matter with Grievant because Grievant was suspended for another matter on November 7, 1994, and did not return to the Security Department for approximately three weeks.

34. Cotter suspended Grievant without pay for ten days on November 7, 1994, based on a September 27, 1994, incident in which Grievant had entered a classroom and demanded that a student immediately remove his dog from the classroom and the building. Cotter stated in the disciplinary letter that "It is clear that your conduct . . . was unprofessional, confrontational, rude and disrespectful" in violation of Section II(A). Cotter also stated, in pertinent part:

"Unfortunately, this is not the first time the College has had to discipline you for similar actions. Any further actions such as this or other violations of College rules, policies or accepted practices will result in further discipline up to and including termination of your employment. . . (Colleges Exhibit 12).

35. Grievant had received numerous disciplinary actions during his 14 year tenure at JSC. Such disciplinary actions include:

- 4/22/83 Written reprimand - based on inappropriate comments made towards female students and staff.
- 8/16/85 Written reprimand - based on acting negligently in his duties by inappropriate conduct during an emergency medical call, conducting work for the Sheriff's Department while on duty at JSC and leaving campus while on duty.
- 9/29/88 Eight day suspension without pay - based on poor attitude and dealings with staff and students, handling of an incident involving drug paraphernalia and the misuse of the telephone.
- 12/5/88 Four week suspension without pay - based in part on sexual harassment towards a female member of the college community. The disciplinary letter stated, "The cause of this suspension is a result of the findings from the sexual harassment hearing. . ."; the severity of

discipline was based upon these findings and other unrelated misconduct violations (Colleges' Exhibit 17).

- 3/20/89 Written reprimand - based on inappropriate conduct and comments towards a member of the college community.
- 7/10/91 Written reprimand - based on negligence of duties, threatening another officer and insubordination to supervisor.
- 7/2/92 Written reprimand - based on being discourteous to a student security officer.
- 7/8/92 Suspended without pay for five days - based on violation of Section II(A) for being rude to a student.

(Grievance of Griswold, 16 VLRB 359 (1993); Colleges' Exhibits 12 - 20).

36. Grievant took annual leave after his ten day suspension and returned to work approximately three weeks later. Bedell was working with Grievant on December 2, 1994, and told Grievant that she was going to close and secure Martinetti Hall. As she checked the last room of the building, the boiler room, she turned on the light and saw Grievant sitting behind the generator. She was startled and asked him what he was doing there. He said he was smoking a cigarette, but she did not see a cigarette or smell smoke.

37. After this incident, Bedell continued with her work and informed Grievant that she was going to secure the sculpture building. Grievant insisted that she ride with him. He used the opportunity to complain that she had damaged the security vehicle several weeks earlier.

38. Bedell was upset by Grievant's behavior on December 2, 1994, and decided to avoid him the next night by coming to work two hours late. He was still at work when she arrived, and he commented that she must have overslept again.

Although Bedell had overslept and been late for work a few times in the past, she had not been late for three months.

39. On or about December 5, 1994, Cotter gave Grievant a letter which stated in pertinent part:

I have scheduled a meeting for you to meet with Bob Chamberlain and myself at 4:00 p.m. on Wednesday December 7, 1994 in Bob's office. At this meeting we need to address a complaint filed against you by a student named Pauline Garber. The basis of this complaint involves an incident in the Martinetti Parking Lot on Tuesday November 1, 1994.

This meeting may lead to disciplinary action so you may have Union Representation present (Colleges' Exhibit 4).

40. Just prior to the meeting with Chamberlain on December 7, 1994, Chamberlain gave Grievant a memorandum dated that day in which he set forth Garber's version of the incident. Such memorandum stated in pertinent part:

On November 3, 1994, Pauline Garber a JSC student came to my office to complain that on Tuesday evening at 11:00 p.m. on November 1, 1994 you were unprofessional and rude to her.

Pauline complained that while she was parked in Martinetti to drop off a friend near the walkway to Arthur Hall you approached her and demanded that she move the car. You said something close to "What are you doing parked here? Move it now," with no pause between the question and the demand. Pauline had been stopped there by the L.C.S.D. and asked to remove her bike rack. When she said "I will just say goodbye to my friend and leave," you yelled "move it now!" Witnesses to this exchange, Tyleen Kelly and Donald Koch, say you were yelling at this point.

When Pauline, then attempting to leave, momentarily could not find her keys, you yelled "Find them or I will have you towed."

The complainant (sic) and the witnesses all separately stated that you were "rude, loud and unprofessional" from the minute you arrived.

The purpose of this meeting is to give you the opportunity to respond to this complaint (Colleges' Exhibit 5).

41. Grievant and a union representative met with Cotter and Chamberlain on December 7, 1994. Grievant had an opportunity to tell his side of the story at this meeting. He told Chamberlain that he was performing his job as a security officer by asking Garber to move her car from a fire zone and was not rude to her.

42. Chamberlain concluded that it was within Grievant's duties to ask Garber to move her car from a fire zone, but he also concluded that Grievant had done so in a rude and unprofessional manner. Sometime between December 7 and December 12, 1994, Chamberlain determined, given Grievant's previous disciplinary history, that his conduct with Garber on November 1, 1994, warranted dismissal. Chamberlain did not have any further meetings with Grievant specifically about the Garber incident. At some point, he recommended Grievant's dismissal to President Hahn.

43. On or about December 13, 1994, Bedell filed a formal Policy 311 complaint against Grievant. She gave the complaint to Policy 311 coordinator Blum.

44. President Hahn appointed Coordinator of Support Services Linda Morse and Director of Athletics Peter Albright to investigate Bedell's complaint. Morse and Albright had received training in investigating sexual harassment complaints.

45. On December 13, 1994, Chamberlain gave Grievant a letter which stated in pertinent part:

This letter is to inform you that you are hereby suspended with pay. The suspension will remain in effect pending the outcome of the investigations of two complaints against you:

1. The complaint made by Pauline Garber concerning the incident in the

Martinetti parking lot on November 1, 1994.

2. A Policy 311 sexual harassment complaint, the details of which will be provided to you in a separate letter.

If the allegations in either or both of the above-mentioned complaints are substantiated, this will result in further disciplinary action up to and including termination of your employment (Colleges' Exhibit 6).

46. At some point, Hahn or Blum notified Grievant that Morse and Albright would be investigating Bedell's complaint. Grievant could have objected to either, or both, of the investigators under the Colleges' sexual harassment procedures. He did not do so.

47. Morse and Albright reduced Bedell's complaint to five separate complaints: that Grievant 1) constantly and pervasively used sexual and profane language; 2) constantly criticized Bedell's job performance, appearance and the role of women; 3) was constantly lying in wait for her in dark buildings; 4) fostered an environment of sexual humor during the summer, 1994, excluding and ostracizing Bedell; and 5) made sexual remarks about a student's breast size and a remark about curing his insomnia with warm milk if he could find a woman who was milking. They conducted an investigation of Bedell's complaint and interviewed Bedell, Grievant, Laflin, Cotter and Peltier (Colleges' Exhibit 11).

48. Morse and Albright wrote a six page report summarizing the complaint and their investigation. They concluded that "David Griswold's conduct had the purpose and effect of unreasonably interfering with Sandra Bedell's work performance and created an intimidating, hostile and offensive work environment

within the definition of sexual harassment under VSC Policy 311". The investigators also noted in their report that Cotter told them that Bedell had complained to Cotter four times, "sometimes in tears" (Colleges' Exhibit 11).

49. Albright and Morse forwarded their findings to President Hahn. He did not speak with the investigators but read their report carefully. On January 16, 1995, Hahn sent a letter to Grievant which stated in pertinent part:

As you know, the College suspended you from your duties with pay pending the outcome of investigations into (1) the complaint by Sandra Bedell that you sexually harassed her in violation of VSC Policy 311, Sexual Harassment and Related Unprofessional Conduct and (2) the complaint made by Pauline Garber concerning your actions relating to an incident in the Martinetti parking lot on November 1, 1994.

Regarding the complaint filed by Sandra Bedell, I now have the Investigator's Report (attached). I have accepted this report and its findings.

As a result of this report, which finds that you did violate VSC Policy 311 in your dealings with Ms. Bedell, I am contemplating terminating your employment from the College. Under Policy 311 and the accompanying Procedures for Implementation, you have the right to meet with me to discuss this matter, please contact my Executive Assistant, Dawn Kellogg, by Wednesday, January 18, 1995 to arrange a meeting. If we do not hear from you by the close of business on Wednesday, January 18, 1995, I will issue a letter terminating your employment at Johnson State College (Colleges' Exhibit 7).

50. On or about January 20, 1995, Grievant and his union representative, VSEA Senior Field Representative Gail Rushford, met with President Hahn and the Colleges' General Counsel Stanley Carpenter. At his meeting, Grievant told Hahn that his supervisor had never informed him that Bedell did not appreciate sexual humor. He also told Hahn that he had been suffering from a sleep disorder and was attending a sleep clinic. Grievant further told Hahn that he had recently been diagnosed as suffering from depression and was on a medication that he hoped would

help him cope with his depression. Grievant sought a leave of absence to seek treatment. There was no discussion at the meeting about the Garber complaint.

51. President Hahn reviewed Grievant's personnel file and considered the following factors before he determined that termination was appropriate: Morse and Albright's findings, the nature of Grievant's position as a security officer, Grievant's years of service, the number of previous disciplinary actions in Grievant's personnel file, and consistency of the proposed disciplinary action with action taken against other JSC employees.

52. On January 31, 1995, Hahn sent Grievant two letters. One letter addressed the Bedell complaint and stated in pertinent part:

...

Regarding the complaint filed by Sandra Bedell, I informed you on January 16, 1995 that I had received and accepted the report of investigators and that they found that you did in fact violate VSC Policy 311 in your dealings with Ms. Bedell. I further informed you that the disciplinary action I was contemplating was termination of your employment with the College.

Even after considering carefully the information and arguments you and your Federation representative gave at our informal meeting of January 10, 1995, I find that your actions with Ms. Bedell were in violation of VSC Policy 311 and, as such, constitute just cause for termination of your employment with the College, especially in light of your past disciplinary history at the Johnson State College.

Your employment at Johnson State College is terminated effective immediately (Colleges' Exhibit 8).

53. The second January 31, 1995, letter concerned the Garber incident and stated in pertinent part:

Currently you are under suspension for, among other reasons, your actions in the performance of your duties on the evening of Tuesday, November 1, 1994. On the evening in question you approached a student by

a car parked in the Martinetti parking lot and demanded that she move it. Asking someone to move a car is within your responsibility. However, Johnson State College Security Manual, Officer Conduct Policy, Section II-A, Unbecoming Conduct stated . . . "Every employee shall at all times conduct themselves in a manner which reflects most favorably on the Department and Johnson State College". Also, in your July 2, 1992 letter of reprimand you were instructed that "you will be courteous to members of the Johnson State College community, the public and to fellow employees. You will be tactful in the performance of your duties, exercise the utmost patience and discretion, and will not engage in argumentative discussions, even in the face of extreme provocation..." It is clear that your conduct on the evening of November 1, 1994 was disrespectful, all in violation of the above-mentioned policy and earlier warnings to you about this behavior.

In your letter of suspension dated November 7, 1994, you were informed that any subsequent violation of College rules, policies or accepted practices would result in further disciplinary action up to and including termination of your employment. You have received similar warnings in letters and reports, including a letter of suspension on July 8, 1993 and a letter of reprimand on July 2, 1992. Having been duly warned several times during your tenure at Johnson State College that further violations of College rules, policies or accepted practices would result in further discipline up to and including termination of your employment, you are hereby notified that your termination with Johnson State College is terminated immediately.

I believe that your actions in this matter provide just cause for this disciplinary action and your history of disciplinary action while at the College indicates that your behavior has been consistent over time and that repeated warnings have failed to produce improvement (Colleges Exhibit 9).

54. The Contract states in pertinent part:

ARTICLE 11. PERSONNEL FILES

6. With respect to any document older than two (2) calendar years, which document is contained in the employee's personnel file, the Vermont Labor Relations Board shall determine what probative weight to accord the document.

ARTICLE 12. DISCIPLINE AND DISCHARGE

Except for probationary employees, no employee shall be disciplined or discharged except for just cause.

...

4. A staff member shall not be disciplined for acts, except those which constitute a crime, which the college became aware of more than one year prior to the service of the notice of discipline except for sexual harassment.

...

(Joint Exhibit I).

OPINION

Grievant contends that the Colleges violated Article 12 of the Contract by dismissing him without just cause. Grievant also contends that the Colleges violated his due process rights by failing to provide him with a Loudermill pre-termination hearing.

Article 12, Section 1, 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 Ackerson, 17 VLRB 105, 124 (1994). Grievance of Griswold, 16 VLRB 359, 370 (1993). The ultimate criterion of just cause is whether the employer acted reasonably in dismissing the employee because of misconduct. In re Brooks, 135 Vt. 563, 568.

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. Griswold, 16 VLRB at 370. 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. Id. at 370-371. 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. Id.

The Colleges contend that Grievant violated the JSC sexual harassment policy, Policy 311, through his treatment of Security Officer Sandra Bedell. The Colleges further contend that Grievant was unprofessional, confrontational, rude and disrespectful, in violation of the JSC Code of Conduct through the November 1, 1994, incident with student Pauline Garber. We conclude that the Employer has met the burden of proof with respect to both of these charges.

Sexual Harassment

Policy 311 adopts federal Equal Employment Opportunity guidelines and standards set forth in sexual harassment cases decided by Federal courts. We have previously adopted the analysis developed by the United States Supreme Court, Federal courts and the Vermont Supreme Court in determining whether an employee was harassed on account of gender. Grievance of Butler, 17 VLRB 247 (1994). A hostile work environment exists when conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment. Meritor Savings Bank FSB v. Vinson, 447 U.S. 57, 65-67 (1986). Carrero v. New York City Housing Authority, 890 F.2d 569, 577 (2nd Cir. 1989). Hall v. Gus Construction Co., 842 F.2d 1010, 1013 (8th Cir. 1988). This occurs "when the workplace is permeated with discriminatory intimidation, ridicule, and insult" that is "sufficiently severe or pervasive to alter the conditions of the victim's employment". Harris v. Forklift Systems, Inc. 114 S.Ct 367, 370 (1993). Allen v. Department of Employment and

Training, 159 Vt. 286, 289-290 (1992).

This standard requires an objectively hostile or abusive environment - one that a reasonable person would find hostile or abusive - as well as the victim's subjective perception that the environment is abusive. Harris, 114 S.Ct. at 370. The determination whether an environment is "hostile" or "abusive" can be made only by looking at all the circumstances. Id. at 371. "These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Id.

The predicate acts underlying a sexual harassment claim need not take the form of sexual advances or other incidents of clearly sexual overtones to be actionable. Andrews v. City of Philadelphia, 895 F.2d. 1469, 1489 (3rd Cir. 1990). Hall, 842 F.2d at 1014. McKinney v. Dole, 765 F.2d 1129, 1138-39. Any harassment of an employee that would not have occurred but for the sex of the employee may, if sufficiently patterned or pervasive, constitute actionable sexual harassment. McKinney, 756 F.2d at 1138. Intimidation and hostility toward women because they are women obviously can result from conduct other than explicit sexual advances. Hall, 842 F.2d at 1014. For example, the pervasive use of derogatory and insulting comments relating to women generally and addressed to female employees personally may serve as evidence of a hostile environment. Andrews, 895 F.2d at 1485.

Applying these standards to the facts of this case, we conclude that Grievant's conduct created an intimidating, hostile or offensive working environment for Bedell

in violation of Policy 311.

Early in Bedell's tenure in the Security Department, Grievant made derogatory and insulting comments with sexual overtones about the way the male uniform Bedell was forced to wear fit her. Bedell took offense at these comments, and although she complained to her supervisor, the situation did not improve. Grievant continued to use inappropriate language and routinely made derogatory and insulting comments about his wife and women in general. He repeatedly demonstrated a lack of respect for women in general, women in the workforce and women in security positions. At no time did Bedell encourage this type of behavior. She initially reacted with silence or by walking away.

The atmosphere of sexual banter and innuendo escalated during the summer of 1994. Grievant and the student security officers passed the time by using vulgar language and telling jokes of a sexual nature until Bedell finally confronted Grievant. After Bedell complained about the language in the Security Department, Grievant and the students generally refrained from this behavior in her presence. Grievant's behavior did not totally cease, however, as he continued to make inappropriate and insulting remarks about women in Bedell's presence. In short, none of Bedell's efforts - silence, walking away or complaining directly to Grievant - were successful in changing Grievant's behavior with respect to the use of sexual and inappropriate language. The fact that a female student willingly participated in these discussions, and did not find them offensive, does not negate the harassing nature of them. We conclude that a reasonable person could find these remarks hostile and abusive.

Further actions of Grievant contributed to a hostile work environment for

Bedell. Starting in the Spring, 1994, Grievant surprised Bedell while she was securing buildings at night. Each time that such incidents occurred, Bedell told Grievant that she was about to secure a certain building; each time he would appear in that building, quietly sitting or standing in the dark without his flashlight on. Grievant's antics had a physically threatening effect on Bedell - a lone woman in what was supposed to be an empty building at night. These incidents occurred with enough regularity for us to conclude that Grievant's presence was not accidental, but was meant to scare Bedell. After the fourth or fifth time, Bedell warned Grievant to stop hiding and scaring her, but such request ultimately went unheeded. We view these actions in light of all the above mentioned circumstances and conclude that it was reasonable for Bedell to feel physically threatened when Grievant repeatedly hid out in buildings. Such conduct contributed to creating a hostile environment for her. By December 2, 1994, it was clear to Bedell that asking Grievant to cease this hostile and intimidating behavior towards her was not effective. At this point, she initiated a formal sexual harassment complaint with the Policy 311 coordinator.

In sum, the evidence demonstrates that Grievant created a hostile and offensive working environment for Bedell, rising to the level of sexual harassment.

Nonetheless, Grievant contends that he was not on notice that his behavior was offensive to Bedell or that he was in violation of Policy 311. We disagree. The Vermont Supreme Court determined that an employee had fair notice of potential dismissal based on sexual harassment under circumstances where the employer had posted a sexual harassment policy, the employee was aware of it, and the employee understood that he could be disciplined for engaging in such behavior. Grievance of

Gorusso, 150 Vt. 139, 147-148 (1988).

Applying these standards to the facts of this case, we conclude that Grievant was clearly on notice that his conduct was prohibited and that such conduct could lead to disciplinary action. The Colleges have had a policy prohibiting sexual harassment for many years; the most recent policy, Policy 311, was mailed to all employees at JSC in 1992, and has been sent to each employee with their annual contract packets since that time. In addition, the policy is posted throughout the JSC campus. The policy makes it clear that an employee can be disciplined for engaging in sexual harassment.

We also note that Grievant was suspended for four weeks in 1988 based, in part, on the findings of a sexual harassment committee. We do not know the particular facts associated with that case because the sexual harassment committee's findings were not attached to the disciplinary letter and were not admitted into evidence. However, we weigh the probative value of the letter without the committee's findings and conclude that it constitutes further evidence that Grievant knew that there was a prohibition against sexual harassment on the JSC campus and understood that he could receive disciplinary action for violating the sexual harassment policy. In sum, we conclude that Grievant had fair notice that his conduct could lead to disciplinary action.

Although we conclude that Grievant was on notice that his conduct could lead to disciplinary action, we find it extremely unfortunate for Bedell that, although she complained to her supervisor within her first 90 days of employment, the situation with Grievant continued for an additional 18 months.

Code of Conduct

The Colleges also charged Grievant with being unprofessional, confrontational, rude and disrespectful in his conduct with Garber on November 1, 1994. Grievant contends that the Colleges violated his due process rights in terminating him without a pre-termination hearing on this charge and that there was *no just cause for the imposition of discipline*.

We first address the threshold issue of whether the Colleges dismissed Grievant without providing him an opportunity for a pre-termination meeting, the so-called Loudermill meeting. In Cleveland Board of Education v. Loudermill, 470 U.S. 532, 538 (1985), the United State Supreme Court held that employees with a protected property right in continued employment could not be deprived of their employment without due process. The Court concluded that an essential principle of *due process* is that a deprivation of continued employment must be preceded by notice and opportunity for hearing. Id. at 542. The Court stated that the need for some form of pre-termination hearing is evident due to the “severity of depriving a person of the means of livelihood”, and because “some opportunity for the employee to present his (or her) side of the case is recurringly of obvious value in reaching an accurate decision” Id. at 542-43.

The Court held that “something less” than a full evidentiary hearing is sufficient. Id. at 545. The Court stated:

(T)he “pre-termination hearing need not definitely resolve the propriety of the discharge. It should be an initial check against mistaken decisions - essentially a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action . . .

The essential requirements of due process . . . are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement . . . The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. *Id.* at 545-46.

Applying these standards to the facts of this case, we conclude that, although the Colleges acted awkwardly, the Colleges did not violate Grievant's due process rights. Cotter's letter of December 5, 1994, warned Grievant that there had been a complaint filed against him and that he was to attend a meeting on December 7, 1994, which could lead to disciplinary action. Chamberlain notified Grievant in writing prior to the meeting of the specifics of the charge and the Colleges' evidence against him. Grievant had a full opportunity to respond to the charges at that meeting. If the Employer subsequently dismissed Grievant without more, Grievant's due process claim would have more merit on the basis that he had not been notified that the Colleges were contemplating dismissing him, but had just been notified that disciplinary action was being contemplated. Grievance of Gregoire, 18 VLRB 78, 95-96 (1995).

Events after that meeting, however, defeat Grievant's due process claim. Subsequent to that meeting, President Hahn notified Grievant by letter that, after reviewing the investigators' report on the Bedell issue, he was contemplating dismissal and provided Grievant with an opportunity to meet with him. Grievant and his union representative met with Hahn and the Colleges' General Counsel. Although the Garber incident was not discussed at this meeting, there was nothing to prevent Grievant from discussing the incident, or from offering reasons why he

should not be dismissed. He knew the Garber issue was still unresolved, and he also knew at this meeting that the employer was contemplating dismissal. Under these circumstances, Grievant's due process rights under Loudermill were protected sufficiently. *cf. Gregoire*, 18 VLRB at 97-98.

In addressing the merits of this charge, we conclude that the Employer has met its burden of proof. The evidence indicates that Grievant demonstrated unprofessional behavior by yelling at Garber to move her car before she had an opportunity to explain that she was about to do so. The parking lot was nearly empty, and there was no emergency or reasonable explanation for Grievant to initiate the interaction with Garber in the manner in which he did. Grievant contends that he was acting within his prescribed duties by asking Garber to move her car. Although Grievant may have been acting within the prescribed duties of a security officer, he was disciplined for the manner in which he carried out his duty. We conclude that he did so in an unprofessional and confrontational manner and there was just cause to discipline Grievant for his conduct.

Both 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, i.e., dismissal. The pertinent factors here are: 1) the nature and seriousness of the offenses and the relation to Grievant's position, 2) the effect of the offenses on Grievant's ability to perform at a satisfactory level, 3) Grievant's past disciplinary record, 4) the clarity with which Grievant was on notice that such conduct would lead to discipline, 5) potential for Grievant's rehabilitation, 6) mitigating circumstances, and 7) the

effectiveness of alternative sanctions.

We conclude that the proven charge against Grievant, concerning violating Policy 311 through his sexual harassment, was sufficient to justify Grievant's dismissal even absent consideration of the Garber incident; given the frequency, duration over time, context, seeming intentional nature of the acts, and the feedback that his behavior was offensive. Conduct that has the effect of creating an intimidating, hostile or offensive working environment for another employee is a serious offense. Grievant's behavior clearly rendered his performance unsatisfactory. It also prevented another employee from carrying out her duties as a security officer in an atmosphere free from harassment.

The Employer needs assurances that Grievant is able to carry out his duties in the JSC community without subjecting women to demeaning and insulting language and creating an offensive and hostile environment for them. Grievant's conduct jeopardized such faith and jeopardized the Security Department's ability to enforce JSC rules and regulations.

As stated earlier, Grievant was clearly on notice that he could be disciplined for violating Policy 311. Grievant's past disciplinary record is of paramount significance in demonstrating that lesser forms of discipline, including four suspensions since 1988, proved to be ineffective in deterring Grievant from engaging in prohibited conduct. Grievant's potential for rehabilitation appeared slight. In sum, Grievant's conduct with respect to the first charge was sufficiently egregious so that the Employer acted reasonably in dismissing him.

The Colleges' other basis for dismissing Grievant was that he violated the

security officer's code of conduct due to his actions with Garber on November 1, 1994. Although, standing by itself, this incident was relatively minor, it occurred in a context of Grievant's past disciplinary record. This included numerous incidents in which Grievant demonstrated similar unprofessional conduct with colleagues and students. Alternative sanctions had not been effective in controlling Grievant's behavior. Instances of misconduct insufficient of themselves may accumulate so as to provide just cause for dismissal. Grievance of Gadreault, 8 V.L.R.B. 87, 130 (1985); *Affirmed*, 152 Vt. 119 (1989). Suffice it to say that Grievant's misconduct in the Garber incident, and his harassment of Bedell, provided ample justification for the Colleges' dismissal of him, particularly given his extensive past disciplinary record.

Grievant contends that his psychological condition during 1994, depression and a sleep disorder, should be considered as mitigating factors in determining appropriate disciplinary action. Grievant gave insufficient notice to the Employer of his condition, and has presented insufficient evidence, for us to conclude that these mitigating circumstances suffice to justify a disciplinary action less than dismissal.

ORDER

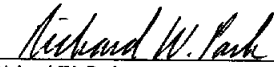
Now, therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the Grievance of David Griswold is DISMISSED.

Dated this 7th day of December, 1995, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


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