

GRIEVANCE OF: )  
 ) DOCKET NO. 95-3  
JOHN BRABANT )

### Statement of Case

Hearings were held on May 31, 1995, and June 22, 1995, at the Labor Relations Board hearing room in Montpelier before Board Members Charles McHugh, Chairman; Louis Toepfer and Catherine Frank. Assistant Attorney General David Herlihy represented the Employer. VSEA Legal Counsel Samuel Palmisano represented Grievant. The parties filed post-hearing briefs on July 6, 1995.

### FINDINGS OF FACT

1. Grievant is an Environmental Engineer C in the Compliance and Certification Section, Solid Waste Division, Department of Environmental Conservation, Agency of Natural Resources. He has worked for the Agency for approximately seven years. Prior to working in the Solid Waste Division, Grievant worked as a temporary employee in the Hazardous Materials Division. Prior to the incident which is the subject matter of this grievance, Grievant had not been disciplined.

2. Brian Heckenberger was an environmental engineer C in the Technical Assistance Section, Solid Waste Division. He began his employment with the Employer in 1988 or 1989 and left employment with the Employer in 1994. Prior to the incident which is the subject matter of this grievance, Heckenberger had not been disciplined.

3. The Solid Waste Division oversees Vermont's environmental solid waste laws and regulations; it investigates alleged violations of solid waste laws and regulations, reviews permit applications, issues permits and monitors permits for compliance. The Solid Waste Division is a small division and employees often discuss ongoing projects with each other. Heckenberger's role in the Division was to provide technical reviews of permit applications and projects. Grievant's role in the Division was, and is, to write permits and monitor permits for compliance. Grievant and Heckenberger often worked on the same projects and regularly interacted with each other. Members of the public are occasionally in the division's Waterbury offices.

4. During the relevant time period, Chris Wagner, Certificate and Compliance Section Chief, was Grievant's direct supervisor. Julie Hackbarth, Technical Assistance Chief, was Heckenberger's direct supervisor. Wagner and Hackbarth both reported to Ed Leonard, Director of Solid Waste. Leonard reported to William Brierley, Director of Operations. Brierley reported to Jack Long, Commissioner of Environmental Conservation.

5. Hackbarth became Heckenberger's supervisor in 1991. Heckenberger frequently was uncooperative with Hackbarth. The Employer moved into new facilities in Waterbury in August, 1991, and Heckenberger often complained to Hackbarth about lack of privacy and not having his own office. Immediately after the move, Heckenberger told Hackbarth that he was going to "have it out" with the Commissioner and he also told her he was going to "punch" Brierley because of his displeasure with the new facilities (Grievant's Exhibit 5).

6. Hackbarth frequently spoke with her immediate supervisor about Heckenberger's conduct. Leonard met and spoke with Heckenberger on a number of occasions, but did not impose disciplinary action. Leonard believed that Hackbarth had problems with Heckenberger because she did not like confrontation. He thought Hackbarth overreacted to Heckenberger (Grievant's Exhibit 5).

7. Heckenberger's behavior became increasingly hostile towards Hackbarth and she met several times with the Employer's personnel officer, Faye Wilder, for advice on disciplining Heckenberger. Wilder explained to Hackbarth the importance of separating misconduct from performance issues in order to impose disciplinary action under the Contract.

8. Hackbarth informed Leonard in May, 1994, that she was afraid that Heckenberger would become involved in physical violence in the workplace. Leonard and Hackbarth also approved an alternative work schedule for Heckenberger to accommodate his continued complaints about office noise and lack of privacy. During this period of time, Heckenberger was also experiencing health problems and was often absent from the workplace (Grievant's Exhibit 5).

9. The Employer often handles controversial issues and Grievant occasionally spoke out publicly against the Employer's actions. On one occasion, the Secretary of the Agency of Natural Resources supported a permit for an incinerator in Rutland. Grievant believed that the incinerator could not meet certain air and solid waste standards. He testified at a public hearing that the Secretary was exceeding statutory authority in supporting the permit. The permit was ultimately denied.

10. Grievant also testified publicly against the Agency when it was proposing legislative changes for large scale septic systems. Grievant believed the legislative proposals were in violation of Federal Environmental Protection Agency rules. The Agency later withdrew its proposed legislative changes.

11. It was well known in the Agency that Grievant publicly spoke out against Agency decisions. On one occasion, Grievant and an environmental enforcement officer, Patrick Coyne, were investigating allegations that a hazardous material container was faulty. Commissioner Long questioned Coyne about the investigation and stated, "What are you, some kind of Brabant follower?" or words to that effect.

12. Grievant felt he was held to different standards than other employees after he testified against the Rutland incinerator permit. He and a VSEA representative met with the Employer's attorney and discussed Grievant's concerns; he did not file a grievance over the matter. At some point, he agreed to bring his concerns to Agency management before going public with his complaints.

13. Grievant shared an office with Jeff Bordeau, an Environmental Engineer C in the Certificate and Compliance Section. Wagner also was Bordeau's immediate supervisor. Cases are assigned to engineers on a case-by-case basis. Grievant and Bordeau often discussed their respective projects. During all relevant time periods, the Division's engineering offices were separated by five foot walls with three foot entrance openings instead of doors. Grievant and Bordeau's desks were at right angles to each other. Bordeau's desk was near the entrance on the right side of the room and Grievant's desk was in the far right corner of the room.

14. At some point, the Employer had approved the Chittenden Solid Waste landfill's use of a new type of material to cover daily trash deposits. If fill is not applied properly, trash is exposed and attracts seagulls.

15. Bordeau received at least one telephone call about nuisance seagulls at the Chittenden landfill. Many employees in the Solid Waste Division were aware of the problem at the Chittenden landfill, including Grievant. On July 7, 1994, Bordeau received a letter of complaint about the landfill. The letter also enclosed pictures of the landfill and a video of seagulls at the landfill. Bordeau and Heckenberger were both assigned to investigate and review the complaint.

16. Heckenberger came into Bordeau and Grievant's office to discuss the

landfill problem with Bordeau. Grievant joined the discussion with Bordeau and Heckenberger. Heckenberger wanted to contact the landfill operator about the complaint. Bordeau and Grievant expressed concern that the landfill operator should not be given an early warning that the division planned to investigate the seagull complaint. Grievant advised Heckenberger that he should talk to the Solid Waste Division attorney before he did anything. Heckenberger left Grievant and Bordeau's office.

17. Grievant had no supervisory authority over Bordeau or Heckenberger and his discussion with Bordeau and Heckenberger was a collegial discussion among co-workers. At some point Bordeau also discussed the situation with Wagner, who also agreed that a surprise visit was the best way to proceed.

18. Heckenberger notified the landfill operator of the seagull complaint soon after leaving Grievant and Bordeau's office. Later that morning he returned to Bordeau and Grievant's office and told Bordeau that he had called the landfill operator. Bordeau and Grievant were each sitting at their desks and Bordeau was looking at the seagull pictures when Heckenberger entered their office.

19. Grievant entered into the discussion between Heckenberger and Bordeau and voiced his concern that Heckenberger had taken such action in light of their earlier discussions. The tone of the discourse between Heckenberger and Grievant was collegial at first; however, it soon escalated into raised voices and a discussion that had nothing to do with seagulls at the Chittenden landfill. Heckenberger told Grievant that the Chittenden Solid Waste landfill was not his

project and not his concern. At some point, Grievant got up and walked towards Bordeaux's desk and Heckenberger.

20. The discussion between Grievant and Heckenberger became more heated. Heckenberger told Grievant that he had a habit of sticking his nose into other people's business and that Grievant was a "crusader" who liked to be in the middle of a crisis. The discussion was loud and easily could be heard by other workers.

21. Grievant told Heckenberger to leave the office several times. Heckenberger refused to leave, stating that it was State property and Bordeaux's office, too. Grievant took Heckenberger's pen out of Heckenberger's shirt pocket, tossed it into the hall and said, "follow your pen", or words to that effect. Dwight Moody, an environmental engineer who was in an adjoining office, stood up when he heard the raised voices and observed this incident over the walls of the office.

22. Heckenberger responded by pushing Grievant back against his desk or the wall. Grievant regained his balance and put Heckenberger into a type of headlock. Heckenberger grabbed Grievant and the two men tussled back and forth and yelled obscenities at each other. Neither man attempted to disentangle from the other to bring the situation to a halt. Moody and another environmental engineer, Brian Harrington, came running into the room. By the time they arrived, Grievant and Heckenberger were still entangled, tussling and moving towards the far corner of the room. Grievant and Heckenberger hit the far wall with significant force. Heckenberger hit Grievant in the face. Harrington, Bordeaux and others managed to restrain Grievant and Heckenberger and to break up the physical and verbal altercation.

23. Both Grievant and Heckenberger had torn shirts and red marks on their necks. Grievant's nose was broken and he later received medical attention for his injuries.

24. Coyne saw Grievant a short time later, observed the scrape marks on his neck and his broken nose and took pictures of Grievant (Grievant's Exhibit 9).

25. The next day, July 8, 1994, Commissioner Long informed Grievant and Heckenberger that Brierley and Canute Dalmasse, Director of Water Resources, would conduct an investigation of the incident. Dalmasse has no supervisory authority over the Solid Waste Division. Long also directed Grievant and Heckenberger to stay away from each other and to refrain from discussing the incident with other staff. He advised them that each could have VSEA representation at their interviews with Brierley and Dalmasse (State's Exhibit 1).

26. Brierley and Dalmasse interviewed Grievant and Heckenberger, who each elected to have VSEA representation at their respective interviews. Brierley and Dalmasse developed a list of witnesses to the incident and jointly interviewed all of them.

27. Hackbarth concluded that she needed to inform Long, Brierley and Dalmasse of the difficulties she had experienced with Heckenberger during her tenure as his supervisor. She talked to Brierley about her concerns, and on July 13, 1994, she sent a memorandum to Long, Brierley and Dalmasse. In such memorandum, Hackbarth stated that she had been concerned that Heckenberger would become involved in physical violence in the workplace and she had brought such concerns to Leonard's attention in May, 1994. She attached five pages of



chronological notes concerning Heckenberger's behavior and his inappropriate interactions with herself and co-workers (Grievant's Exhibit 5).

28. On July 14, 1994, Heckenberger heard Grievant telling the Chittenden Solid Waste landfill operator about his confrontation with him on July 7, 1994. Heckenberger complained to Hackbarth and Leonard about Grievant talking about their altercation in public. A short time later, as Grievant walked by Heckenberger, Heckenberger verbally assaulted Grievant with foul language. Grievant did not respond to this verbal assault. The next day, Long placed them both on administrative leave with pay until the investigation by Brierley and Dalmasse was completed. He also directed them to stay away from the workplace. On July 29, 1994, Long notified Grievant that he could return to normal duty status on August 1, 1994 (State's Exhibits 3, 4).

29. While Grievant was on administrative leave, on or about July 20 1994, he and his small child went to his office after work hours and borrowed a piece of office equipment and used the bathroom.

30. Brierley, Dalmasse, Leonard and Wilder held many meetings. They discussed a wide range of disciplinary options and a wide range of alternatives with respect to Grievant and Heckenberger's ability to work together in the same physical location. Wilder cautioned against physically separating the men because that might be seen as a form of discipline. The possibility of dismissing both men was discussed, but such option was dismissed because Wilder and the division attorney advised that a dismissal would be an excessive penalty for a first offense of this

nature. Wilder advised that dismissal would only be warranted if such an incident occurred again.

31. At one point, Leonard told Hackbarth that Wilder and Brierley had also discussed not separating Grievant and Heckenberger to "see what would happen" (Grievant's Exhibit 10).

32. Brierley and Dalmasse read Hackbarth's July 13, 1994, memorandum during their investigation, but they did not believe that Heckenberger's past conduct was relevant to the July 7, 1994, incident. They concluded, after talking to all the witnesses to the July 7, 1994, incident, that there had been a mutual escalation of tempers, and that Grievant and Heckenberger were equally culpable in permitting the situation to get out of control.

33. Brierley and Dalmasse completed their investigation by the end of July, 1994. They met with Commissioner Long and reported their findings, conclusions and recommendations. They also prepared a written report for Long, dated August 5, 1994, which stated in pertinent part:

Both men engaged in escalating argument, loudness, profanity and physical violence. Either could have terminated the incident by walking away at any time during the encounter. None of the witnesses present specifically identified one of the individuals as having started the incident. Both should be held equally responsible.

...

Both men exhibited inability to control their emotional outbursts and an inability to control the escalation of their argument to physical violence... (State's Exhibit 6).

34. Brierley and Dalmasse recommended that Grievant and Heckenberger both receive a four-week suspension without pay. Brierley and Dalmasse considered

the advice they had received from Wilder and the division attorney, but did not review Grievant's personnel file or consider his length of service in recommending such discipline. They concluded that the July 7, 1994, incident was sufficiently inappropriate by itself to warrant a severe form of discipline under the Contract (State's Exhibit 6)

35. Brierley and Dalmasse also investigated the incident on July 14, 1994. They concluded that Grievant had not made any inappropriate response to *Heckenberger when Heckenberger verbally assaulted him. They recommended that Heckenberger receive a written reprimand and that Grievant not receive discipline for this incident (State's Exhibit 6).*

36. Brierley and Dalmasse recommended that Grievant receive a written reprimand for violating Long's directive to stay away from the office by returning to the workplace after work hours on July 20, 1994.

37. Long agreed with Brierley and Dalmasse's recommendations. He sent Grievant a letter, which stated in pertinent part:

Concerning the first incident, I find that the argument and physical altercation occurring on Thursday, July 7, 1994 between you and Mr. Heckenberger was unjustified, upsetting to others in the Solid Waste Division and reflected poorly on the Department and Agency. I conclude that at any time during the escalation of the argument and fighting that either of you, or both of you, could have ended the situation...

...You are hereby suspended without pay for 20 working days beginning August 8, 1994 and ending September 6, 1994. You return to regular duty status on September 7, 1994.

...

Concerning the [July 14, 1994] incident, I find that you acted appropriately and within the bounds of my direction. That is, you did not respond to the verbal outburst of Mr. Heckenberger (State's Exhibit 5).

### OPINION

Grievant alleges that the Employer violated Article 14 of the Contract by imposing a 20 day suspension. Specifically, the Grievant contends that there was no just cause for the discipline, progressive discipline was inappropriately bypassed and such discipline was not imposed with a "view towards uniformity and consistency".

To establish just cause for discipline, it is necessary for the Employer to show that disciplining the employee for certain conduct is reasonable; and 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 Glover, 18 VLRB 352, 363 (1995). On the issue of fair notice, the ultimate question is whether the conduct was or should have been known to the employee to be prohibited by the employer. Brooks, 135 Vt. at 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. 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.

The Employer charged Grievant with unacceptable behavior in the workplace because he became embroiled in an argument and physical altercation with co-worker Brian Heckenberger on July 7, 1994. The Employer charged that the incident was unjustified and that Grievant could have ended the situation at anytime.

We conclude that the Employer has met its burden with respect to these

charges. Grievant did engage in unacceptable and unjustified behavior on July 7, 1994. Grievant conceded that he raised his voice and was a willing participant in a verbal argument with Heckenberger. He claims, however, that soon after this argument started, he attempted to bring the situation to a close and add levity to the situation by taking Heckenberger's pen out of his pocket and throwing it out the door. Such action in the middle of a personal heated debate had a predictable result: Heckenberger lashed back at Grievant by shoving him. Grievant could have again brought the situation to a close by walking away, but responded by grabbing Heckenberger and placing him in a headlock. This action also had the predictable result of continued physical fighting which did not end until co-workers separated the men. Both parties were aggressors, both parties were responsible for an escalation to physical violence, and both parties could have walked away from the situation. Grievant provoked Heckenberger and exacerbated the initial heated verbal exchange by tossing his pen; he subsequently made no reasonable effort to bring the situation to a close.

The facts against Grievant having been proven, we look to the factors articulated in Grievance of Colleran and Britt, 6 VLRB at 268-69, 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 on Grievant's ability to perform at a satisfactory level; 3) the clarity with which Grievant was on notice that such conduct would lead to discipline; 4) Grievant's past disciplinary record; 5) the consistency of the penalty with those imposed upon other employees for similar offenses; 6) and the effectiveness of

alternative sanctions.

An argument that erupts into a physical fight in the workplace is egregious misconduct and a serious offense. The Solid Waste Division handles high profile cases that are often controversial. Grievant's job requires that he handle himself in a professional manner. He is required to interact with colleagues in his division and with the public, many of whom may hold different views or opinions than his. His supervisors need assurance that he has the ability to handle such discourse in a professional manner. His conduct jeopardized such faith and could have jeopardized the Employer's reputation as a professional agency if such conduct had become public.

Grievant clearly had implied notice that engaging in physical acts of violence was prohibited in the workplace. Grievant cannot plausibly claim that the Employer would condone such behavior. He should have known that such conduct would result in the imposition of serious disciplinary action.

The Employer initially considered the most extreme disciplinary action, dismissal, but was counseled not to take this extreme measure. It imposed a 20 day suspension, which is two-thirds of the maximum period of suspension permitted under the Contract. Although Grievant's disciplinary record was not specifically reviewed, the Employer's decision not to dismiss Grievant and Heckenberger, resulted, in part, because the Employer had not previously taken disciplinary action against either employee. We recognize that a 20 day suspension is a significantly severe form of discipline with serious financial implications. However, we conclude that it was a reasonable penalty given the nature of the offense. Because of the

extreme nature of the incident, the Employer was justified in bypassing lower levels of discipline. A lesser form of discipline may not have been adequate to sufficiently deter Grievant from repeating such conduct.

We also conclude that the Employer met the contractual requirement that discipline be applied with a “view towards uniformity and consistency”. Grievant contends that he should not have received a penalty equal to the one received by Heckenberger. Grievant reasons that Heckenberger was more culpable for the July 7 incident and that Heckenberger, unlike Grievant, had a history of inappropriate behavior. We disagree with Grievant. We have concluded that both men were *equally responsible for the affray and the evidence indicates that neither employee previously had been disciplined*. Under these circumstances, we conclude that it was *reasonable for the Employer to impose the same level of discipline on both men*.

Grievant offered additional arguments which we will briefly address. First, Grievant contends that the Employer breached its duty to control Heckenberger’s behavior because it had been on notice that Heckenberger may have a propensity towards physical violence. Whatever might have motivated Heckenberger to participate initially, the weight of the evidence is that both men were independently responsible for the events of July 7, 1994. The level of Grievant’s participation was sufficient to establish culpability.

Grievant also contends that the Employer was motivated by bad faith to impose a heavy penalty because Grievant was known to engage in whistleblowing activities. Grievant raises this issue as a mitigating factor to the Employer’s choice of discipline. We conclude that Grievant’s whistleblowing allegation was untimely raised. Allegations of discrimination due to whistleblowing activities are properly brought by invoking Article 71, the “whistleblower” provision of the Contract.

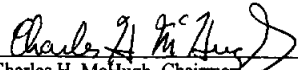
Grievant did not allege a violation of Article 71 in his grievance filed with the Board. Section 18.3 of the Board Rules of Practice requires that a grievance filed with the Board contain a concise statement of the nature of the grievance and specific references to the pertinent rule or regulation alleged to have been violated. The grievance filed here contained no reference to an alleged violation of Article 71. Thus, Grievant raised this issue in an untimely manner. Grievance of McCort, 16 VLRB 70, 109 (1993). In any event, the evidence does not support a conclusion that the suspension imposed on Grievant was motivated by his whistleblowing activities.


ORDER

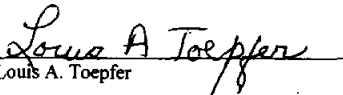
NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the Grievance of John Brabant is DISMISSED.

Dated this 24 day of September, 1995, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

  
Charles H. McHugh, Chairman

  
Catherine L. Frank

  
Louis A. Toepfer