

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	
THOMAS PORWITZKY)	DOCKET NO. 95-44
)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of case

On July 6, 1995, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Thomas Porwitzky ("Grievant"), alleging that the State of Vermont, Department of Corrections ("Employer") violated Article 14 of the collective bargaining agreement between the State of Vermont and the VSEA for the Corrections Bargaining Unit, effective for the period July 1, 1994 to June 30, 1996 ("Contract"), in imposing a written reprimand on Grievant. Specifically, Grievant alleged that there was no nexus between Grievant's job and his off duty conduct, that there was no just cause for a written reprimand and that the Employer bypassed progressive discipline in imposing such discipline.

A hearing was held on October 19, 1995, in the Labor Relations Board hearing room in Montpelier before Board Members Catherine Frank, Chairperson; Louis Toepfer and Richard Park. Assistant Attorney General David Herlihy represented the Employer. VSEA Legal Counsel Samuel Palmisano represented Grievant. The parties filed briefs on November 2, 1995.

FINDINGS OF FACT

1. Grievant has worked as a Correctional Officer I ("COI") at the Northwest State Correctional Facility since approximately 1989. Prior to the incident

which is the subject matter of this grievance, Grievant had not received any disciplinary action.

2. Grievant sustained a work related knee injury and was absent from work from October 1992 to October 1994. During this time period, Grievant received workers' compensation.

3. Grievant was a VSEA shop steward from 1991 to 1993. During his tenure as shop steward, Grievant compiled home telephone numbers of all the Department of Corrections bargaining unit members at the facility and kept such telephone numbers in a notebook. Some of the telephone numbers came from records maintained by the Employer in the facility control room.

4. Geoffrey Pretty has been a COI at the Northwest Regional Correctional Facility since March, 1992. He is not Grievant's supervisor.

5. Pretty is an instructor of a video camera class for correctional officers. On January 20, 1995, Grievant attended one of Pretty's classes. Grievant, Pretty and another officer participated in a role playing "incident" in which two correctional officers rushed at and restrained an inmate. Grievant played the part of the inmate and hurt his wrist when Pretty rushed at him. Some members of the class joked that Grievant would be filing another workers' compensation claim.

6. Sometime subsequent to the January 20, 1995, video camera class, Grievant was unable to work because he experienced lightheadedness and dizziness. Grievant filed a workers' compensation claim because these physical symptoms were the result of an adverse reaction to medicine Grievant was taking related to his earlier workers' compensation injury. This workers' compensation claim was not

related to the incident in Pretty's video camera class in which he had hurt his wrist.

7. A supervisor later asked Pretty whether he thought Grievant had hurt his wrist during his video camera class. He then asked Pretty to review the video *tape of the incident*. Pretty reviewed the video tape and *could not conclude whether* Grievant had hurt his wrist.

8. Pretty told the Superintendent of the facility, Stephen Maranville, that he had reviewed the video tape of his January 20, 1995, video camera class and was not sure whether Grievant had hurt his wrist. Pretty reviewed the video tape a second time with other correctional officers. During this second viewing, the officers joked about Grievant filing another workers' compensation claim.

9. While Grievant was out on sick leave, he heard a rumor that Pretty had shown the video to Maranville to show him that Grievant had not hurt his wrist in his camera class. Grievant also heard that Pretty had shown the video to other correctional officers, who had joked about Grievant filing another workers' compensation claim.

10. Grievant had Pretty's unlisted telephone number in his shop steward notebook and tried to call him at home. Pretty was not home and Grievant left a message that "Tom called". Pretty received the message, but did not know who Tom was and disregarded the message.

11. The next day, Grievant called Pretty again at home and left a message with Pretty's wife that "Tom from work called". Grievant then went to the facility and complained to at least two supervisors about the rumor he had heard involving Pretty and the video.

12. Pretty called the facility after he received Grievant's second telephone message. He determined that it had been Grievant who had called him twice at home and called Grievant to find out why he was trying to get in touch with him.

13. Grievant was still upset because of the rumor he had heard. He told Pretty that he thought Pretty had gone to the superintendent with the video because he was trying to get a promotion to COIL. Grievant also told Pretty "you don't know who you are fucking with" and he "had not heard the last of this", or words to that effect. Grievant's tone was stern. He did not intend to sound threatening and did not yell or scream at Pretty. Pretty did not feel threatened by Grievant.

14. Pretty complained to Maranville about Grievant calling him at home and swearing at him. Pretty did not indicate to Maranville that he feared for his safety. Pretty also wrote an incident report to Maranville in which he provided the details of Grievant's telephone conversation and also complained that he had an unlisted telephone number and had never given it to Grievant. Maranville did not fear for Pretty's safety after he heard and read Pretty's complaint (State's Exhibit 1).

15. On or about February 10, 1995, Northwest Security and Operations Supervisor Michael Dineen gave Grievant a letter which stated in pertinent part:

This letter is to inform you to report to the Superintendent's office on Monday, February 13th at 1000 hours to discuss circumstances surrounding an allegation of misconduct.

The incident involves you contacting another employee of the facility at their home and making threats or what he perceived to be threats toward him.

If it is determined that you violated facility rules in the above listed violations, discipline, up to and including dismissal, may be imposed. . .

(Grievant's Exhibit 1).

16. Grievant met with Maranville and admitted that he had called Pretty at home. Maranville told him not to call Pretty at home again. Grievant believed that he had received an oral reprimand.

17. Maranville considered Grievant's actions serious because correctional officers have to know that they can depend upon each other and the safety and security of the correctional facility depends on officers working together as a team. Maranville felt that Grievant's first telephone call to Pretty may have been in the heat of the moment, but the fact that he called Pretty again the next day indicated a failure to "cool down" with the passage of time and raised questions about Grievant's ability to be perceived as a team player..

18. On February 15, 1995, Maranville sent Grievant a written reprimand. Such reprimand stated in pertinent part:

A meeting was held in my office on February 13, 1995 to discuss circumstances surrounding an allegation of misconduct. The incident involved you contacting another employee and making what he perceived to be threats toward him.

Upon review of the evident (sic) I believe you did engage in behavior the employee could perceive as threatening.

Based on this I am issuing you a letter of reprimand. This letter serves as such. I also want to take this opportunity to place you on notice that this behavior is unacceptable for any reason. You are advised that further such conduct on your part could result in additional discipline, up to and including dismissal being imposed. . . (Grievant's Exhibit 2).

OPINION

Grievant alleges that the Employer violated Article 14 of the Contract by issuing a written reprimand to him for his contacting another employee and making

what could be perceived as threats towards him. Specifically, Grievant contends that there was no nexus between Grievant's job and his off duty conduct, there was no just cause for the discipline and that the discipline imposed bypassed progressive discipline.

Although Grievant did not pursue his nexus claim in his post hearing brief, we briefly address the issue as a preliminary matter. 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 Ackerson, 16 VLRB 262, 272 (1993). Grievance of Boyde, 13 VLRB 209, 227 (1990). Grievance of Jamison, 10 VLRB 239, 243-44 (1990). We conclude that such a nexus exists here. Grievant called Pretty to talk about an issue that grew out of the work place and related exclusively to their working relationship. Grievant's conduct in initiating such telephone calls to Pretty is sufficient to establish the necessary nexus between Grievant's employment and his conduct.

Pursuant to the Contract, the Employer is to impose a procedure of progressive discipline for misconduct, such order of progressive discipline being: i) oral reprimand, (ii) written reprimand, (iii) suspension without pay, and (iv) dismissal. Article 14, Section 1(d), Contract. There are appropriate cases that may warrant the Employer bypassing progressive discipline. Article 14, Section (f)(I). Such disciplinary action may only be imposed for just cause. Article 14, Section 1.

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 Brabant, 18 VLRB 410, 421 (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.

Having decided that sufficient job nexus exists, we turn to deciding whether the Employer's charges were proven and just cause existed for the letter of reprimand. Grievant was charged with engaging in misconduct - attempting to call a co-worker two times at home and, upon reaching him, making remarks over the telephone that could be perceived as threatening. We recognize that the co-worker actually was not threatened by Grievant's conduct, but such behavior nonetheless could be perceived as threatening. Grievant demonstrated poor judgment by such misconduct and some disciplinary action was warranted.

In determining whether the specific discipline imposed was reasonable, we conclude that the Employer acted unreasonably in bypassing progressive discipline. The first step of progressive discipline, oral reprimand, was bypassed. Prior to this incident, Grievant had never been disciplined. The Employer did not explain why it was necessary to bypass progressive discipline, and we conclude that Grievant's misconduct did not warrant bypassing it. It is pertinent that, while his behavior could

be perceived as threatening, Pretty did not actually perceive it as threatening. Under the circumstances, an oral reprimand would have been an adequate and effective sanction to impose on Grievant.

ORDER

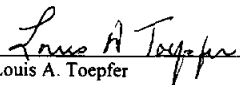
Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED:

1. The grievance of Thomas Porwitzky is SUSTAINED; and
2. The State of Vermont, Department of Corrections, shall rescind the February 15, 1995, letter of reprimand from Superintendent Stephen Maranville to Grievant and remove such letter from Grievant's personnel file.

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

VERMONT LABOR RELATIONS BOARD


Catherine L. Frank, Chairperson


Louis A. Toepfer


Richard W. Park