VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 97-17
JOHENRY NUNES	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On March 2, 1997, the Vermont State Employees Association, Inc. ("VSEA") filed a grievance on behalf of Johenry Nunes ("Grievant") against the State of Vermont Agency of Human Services, Department of Corrections ("Employer"), alleging that the Employer had violated Articles 5 and 14 of the collective bargaining agreement between the State and the VSEA for the Corrections Bargaining Unit ("Contract"), effective for the period July 1, 1996 to June 30, 1997. Specifically, Grievant alleged there was no just cause for his demotion and that such discipline bypassed progressive discipline and was not imposed in a uniform and consistent manner. Grievant also alleged that the Employer discriminated against him on account of his sexual orientation.

A hearing was held on July 17, 1997, in the Vermont Labor Relations Board hearing room in Montpelier before Board Members Catherine L. Frank, Chairperson; Leslie G. Seaver and Carroll P. Comstock. Attorney Richard Davis, Jr., represented Grievant. Assistant Attorney General David Herlihy represented the Employer. On September 18, 1997, the parties filed post hearing briefs, and Grievant filed a deposition of Dr. Stewart Manchester.

FINDINGS OF FACT

1. At all times relevant Grievant was a Correctional Officer II ("CO II")

at the Employer's Northwest State Correctional Facility ("NWSCF"). He was hired in November 1986 as a Correctional Officer I and promoted to CO II in June 1993. CO II's are senior to CO I's and possess supervisory authority over CO I's. Until the action giving rise to this grievance, Grievant had never received disciplinary action throughout his tenure as a correctional officer.

2. NWSCF is a medium security and close custody facility. A majority of the inmates are incarcerated in medium security living units ("pods") in which they have a relative amount of freedom. The ratio between correctional officers to inmates is one to 30 in such units. D Pod is a close custody unit and its inmates lead a very structured day. D Pod lodges the most incorrigible and unmanageable offenders in the correctional system. The ratio between staff and inmates in D Pod is one to ten, except during the third shift when it is one to 20.

3. D Pod is accessed through a sallyport with locking doors on each end. After passing through the sallyport, there is a corridor with doors on both sides leading to the pod office and other rooms, such as an activity room, storage room, telephone room, and mop and laundry rooms. There is a desk in this corridor area where a correctional officer generally sits. Beyond this area are the two living units, Units I and II, each containing 10 single bed cells. The two doors leading to the living units generally are locked, although they may be kept ajar during the third shift (Grievant Exhibit B).

4. Inmates assigned to D Pod often exhibit anti-social behaviors. Prior to the incident which gave rise to this grievance, it was not uncommon for D Pod inmates to intentionally flood the unit by plugging up their toilets. They would then

sweep the overflowing sewage into the unit. It also was not uncommon for certain inmates to spread feces on walls and doors.

5. After the detection of flooding or feces spread on walls or doors, correctional officers generally put on rubber boots and ordered inmates to clean the affected areas with mops and bleach. D Pod windows cannot be opened, the ventilation is poor, and mops often are not cleaned properly. The smell of sewer often lingers in the air long after it is cleaned up and puddles remain on the floor for days, occasionally with pieces of toilet paper floating in them.

6. Just prior to the incident which gave rise to this grievance, the potential flooding in D Pod had been partially solved by the officers in charge of shifts shutting off the units' water supply, except for specific periods.

7. Correctional officers obtain their unit and shift assignments through a system of seniority shift bidding. Grievant successfully bid for the CO II first shift position on D pod and began such duties on or about September 16, 1996.

8. When Grievant left his shift on D Pod on September 19, 1996, the unit was clean. Flooding occurred during second shift (2:00 p.m. to 11:00 p.m.) The flooding was cleaned up, but not thoroughly and the floor remained damp. Puddles, pieces of toilet paper and waste remained on the floor. At approximately 9:30 p.m., a D Pod inmate smeared feces on the inside of the Unit I door. The smeared feces were not cleaned up during that shift, and it was not cleaned up on third shift, 11:00 p.m. to 7:00 a.m., September 20, 1996.

9. CO II Kevin Coon was the third shift officer on D Pod the evening of September 19 - 20. The pod smelled worse than usual because of the smeared feces

and Coon was not happy to work in such conditions. It is difficult to clean a unit on third shift because there is only one officer on duty in the pod. Acting third shift supervisor Patricia Dumas entered D Pod, and went no further than the office area; the smell in the unit nauseated her. She did not ask Coon to clean it. Dumas informed acting first shift supervisor Gregory Machia of the situation in D Pod when Machia arrived at work on September 20, 1996.

10. All first shift correctional officers meet on Tuesday and Friday for roll call. The presiding shift supervisor takes attendance, makes announcements and informs the officers of incidents which may have occurred on the previous shift. Dumas presided at roll call on September 20 and apprised the officers of the situation in D Pod.

11. Grievant was upset when he heard about the condition of D Pod. CO I Michael O'Dell, who was scheduled to work with Grievant in D Pod, stated that "just the thought" of working in the unit made him sick. Grievant and another correctional officer who was standing next to him at roll call, CO Clifford Williams, engaged in a heated discussion about the administration and disciplinary reports. Grievant expressed displeasure with the administration and its failure to follow through on inmate disciplinary reports, called "D.R's". Grievant blamed the administration for the problems in D Pod and stated that D.R's were not investigated properly and were dropped or dismissed (State Exhibit 8).

12. Grievant and CO I Michael O'Dell went to D Pod after roll call to assume their duties. The odor hit them as soon as they entered the pod. They did not get any further into the unit than the officer's desk in the corridor. O'Dell started

gagging, his eyes began to water, tears ran down his face and he felt sick. Grievant felt sick to his stomach and immediately called Machia on the telephone. Grievant told Machia that he and O'Dell were sick because of the smell of feces in the unit and they could not work. Grievant was upset and yelled into the telephone. There was a discussion about Machia bringing bleach and gloves to the unit. Grievant felt ill from the smell; he started perspiring and his throat felt dry (State's Exhibit 6).

13. Machia arrived at D Pod with bleach and cleaning materials. O'Dell was gagging and putting ice on his face. Grievant was loud and agitated and told Machia that he was sick. He repeatedly told Machia that he could not assume the unit, that the unit was unsafe and that he was not going to jeopardize his health. Machia ordered Grievant and O'Dell to start working, but Grievant insisted that they were sick and needed to go home. At some point, Coon volunteered to continue working because Grievant was so agitated and the situation was getting out of hand. Machia relieved O'Dell and Grievant from D Pod. He did not believe that Grievant or O'Dell really were sick, and he ordered Grievant to work in F Pod and ordered O'Dell to work in H Pod (State's Exhibit 6).

14. Grievant went to F Pod, but still felt ill; phlegm developed in his throat and he felt hot and dizzy. He called Machia and told him that he needed someone to drive him to the hospital.

15. First shift generally has three or four "float" officers who are not assigned to particular positions. Float officers are available to replace an assigned officer if the assigned officer needs to leave his or her post.

16. Machia informed Superintendent Stephen Maranville of the situation

in D Pod when he arrived at work at 8:20 a.m. Maranville told him that he wanted to see Grievant and O'Dell before they left the facility. Machia sent a float officer to relieve Grievant in F Pod and told Grievant that Superintendent Maranville wanted to see him before he left.

17. Maranville was on the telephone when Grievant arrived in the administration area. Grievant still felt nauseous and went to the men's room and vomited.

18. Maranville observed Grievant gagging and going into the men's room. He concluded that Grievant's actions were exaggerated and insincere. It did not make sense to Maranville that Grievant would still be sick to his stomach an hour and a half after leaving D Pod.

19. At approximately 9:10 a.m., the nurse on duty saw Grievant. She checked him over and noted on a "reportable occurrence form" that Grievant was "warm to touch . . . pulse racing . . . [he] stated he was nauseous and had vomited just prior to our arrival - some [vomitus] evident on shirt . . . palpitation did incur gagging" (Grievant Exhibit A).

20. O'Dell gave Grievant a ride to see his doctor, Dr. Stewart Manchester. Grievant told Dr. Manchester about the sewage odor in D Pod and that he had felt nauseous and had vomited. Grievant's blood pressure was mildly elevated, which was not uncommon for Grievant, and his abdomen area was tender. Dr. Manchester concluded that the sewage odor caused Grievant's condition, which he diagnosed as "gastritis secondary to the exposure to the human sewerage". Dr. Manchester concluded that, although Grievant's reaction to the offense odor was a delayed

reaction, individuals may react in various ways to such circumstances, and Grievant's delayed reaction was medically feasible. Manchester gave Grievant an acid blocking medication to reduce the stomach inflammation, told him to take the rest of the day off from work and wrote a sick note for him. Grievant called the facility and asked to have someone pick him up so he could get his vehicle and go home.

21. Maranville relieved Grievant from duty with pay that same day and sent him a letter which stated in pertinent part:

> Effective September 20, 1996 you are temporarily relieved with pay for a period of up to 30 days in order for the Department to conduct an investigation into the following allegations:
>
> That you refused to accept your assigned and bid post on September 20, 1997 when ordered to do so by a Shift Supervisor.
>
> . . .
>
> (State Exhibit 1)

22. Maranville conducted an investigation. He interviewed O'Dell, Machia, and Coon, and reviewed their written reports and the D Pod supervisor logs. He also interviewed Grievant. Maranville was aware that Grievant had seen a nurse on September 20 and he reviewed her note, but did not speak to the nurse about Grievant's medical condition. He also knew that Grievant had seen a doctor and that the doctor had written a sick note for Grievant, but he did not speak to him. Maranville did not speak to either the nurse or doctor because he had already concluded that Grievant had feigned his illness and was not genuinely sick. Maranville believed that Grievant also lied during the investigation because he had told him that he had asked Machia to bring bleach and gloves to the unit and Machia claimed that he was the one that offered to bring the bleach and gloves.

23. Maranville concluded that there was just cause for discipline and sent Grievant a letter on October 8, 1996, which stated in pertinent part:

> I have completed my review of the incidents on September 20, 1996 at approximately 0700 hours in D Wing.
>
> Based on my knowledge of the facts as I believe them to be it is my decision that you be suspended without pay for a period of fifteen (15) workdays. . . Additionally, you will be demoted from the position of Correctional Officer II to that of Correctional Officer I.
>
> I view your conduct in this incident to be gross misconduct and warrants the discipline imposed. In your position of COII you are expected to provide leadership to subordinate staff. I believe you lied regarding some of your actions and statements. It is also extremely noteworthy that you did not actually go into Unit I and check it. I also view your conduct as insubordinate and was disruptive to the orderly running of not only D Wing, but the institution as it required the shift supervisor to devote time and resources to resolve the issue.
>
> . . .
>
> (State Exhibit 2)

24. Grievant grieved this action and the 15 day suspension was rescinded at the Step II level.

25. O'Dell also received disciplinary action for the incident on September 20, 1996.

26. Correctional officers other than O'Dell and Grievant have gagged, vomited, become sick and used sick time because of the sewage problem in D Pod. They have not received disciplinary action for taking such leave.

MAJORITY OPINION

At issue is whether the Employer violated Article 14 of the Contract by demoting Grievant from his COII position to a COI position. Grievant contends there was no just cause for such demotion, and the Employer inappropriately bypassed progressive discipline, in violation of Article 14 of the Contract. Grievant did not pursue his second claim, either at the hearing or in his post hearing brief, that the Employer violated Article 5 of the Contact by discriminating against him on the basis of sexual orientation. We deem that issue waived by Grievant.

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 Grievance of Brooks, 135 Vt. 563, 568 (1977). Grievance of Porwitzky, 18 VLRB 530, 535-536 (1995). On the issue of fair notice, the ultimate question is whether the employee knew, or should have known, the conduct was prohibited. Brooks, 135 Vt. at 568. Grievance of Towle, ___ Vt. ___ (1995).

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 insubordination and gross misconduct for lying during the investigation of his actions on September 20, 1996, and for refusing to work on D Pod that day. With respect to the first charge, Superintendent

Maranville's October 8, 1996, disciplinary letter charged that Grievant had "lied regarding some of [his] actions and statements". At the hearing, the Employer specifically charged that Grievant had lied during the investigation of his conduct on September 20, 1996, because he claimed that he had told his supervisor on the telephone to bring some bleach and cleaning materials to the unit and his supervisor claimed that he had told Grievant that he was bringing such materials to the unit. Grievant contends that the Employer had not put him on notice prior to hearing that he was being disciplined for lying about the bleach incident.

In reviewing a disciplinary action, the Board will not look beyond the reasons given by the employer in the disciplinary letter for the action taken; Grievance of Swainbank, 3 VLRB 34, 48 (1980); but will not turn disciplinary letters into dialectic exercises. Grievance of Erlanson, 5 VLRB 28 (1982). A letter which adequately puts an employee on notice of the misconduct will not be considered deficient. Id. at 39.

Applying these standards to the facts in this case, we conclude that Grievant was not provided adequate notice through the disciplinary letter that he was being charged with lying about the bleach incident. Nonetheless, even if the Employer had put Grievant on adequate notice, we conclude that it has not been shown by a preponderance of the evidence that Grievant lied about this incident. There was a discussion between Grievant and his supervisor about the supervisor bringing bleach and gloves to the unit, and we cannot attribute differences in the description of this incident between Grievant and his supervisor to anything other than different recollections.

The Employer also charged Grievant with insubordination for his failure to

accept his post assignment on September 20, 1996. There is no dispute that Grievant failed to accept his position on D Pod. However, Grievant contends that the smell in the unit made him physically sick and he was unable to work there.

There is no dispute that the working conditions on D Pod on the morning of September 20, 1996, were poor due to smeared feces, sewage and offensive odor in the unit. We accept Grievant's representations that he felt ill as soon as he walked into the unit; indeed, the previous shift supervisor became nauseous just walking into the pod. Although Grievant did not vomit until approximately one and one-half hours after walking into the unit, a delayed reaction to sewage smells is not uncommon. The facility nurse who examined Grievant two hours later found that he was still warm and that his heart was racing. Grievant's doctor also supported Grievant's contention that he felt ill from the sewage smell in D Pod, and that it was medically feasible to have a delayed reaction to such an overpowering odor as raw sewage.

The fact Grievant felt ill, however, does not justify his behavior that day. As the senior correctional officer assigned to the unit for first shift, Grievant had a responsibility to set an example for CO I O'Dell who was working with him. O'Dell, who had earlier complained about feeling sick just thinking about D Pod, became sick when he and Grievant entered the pod. Grievant did nothing to improve the situation by becoming agitated, loudly claiming that the smell was also making him sick and insisting that he go home. The third shift correctional officer finally volunteered to continue working because Grievant was so agitated and the situation was getting out of hand. Grievant overreacted to the situation, used poor judgment

and exacerbated an already bad situation by his conduct.

Although we find that Grievant's conduct was inappropriate, we conclude under the totality of the circumstances that the Employer did not establish by a preponderance of the evidence the charge that Grievant's conduct was insubordinate and that his conduct rose to the level of gross misconduct. We are troubled that Superintendent Maranville made such a determination based on an inadequate investigation. Maranville made no reasonable effort to investigate Grievant's contention that the smell in D Pod made him so sick that he could not work. Maranville knew when he imposed disciplinary action that Grievant had seen the facility nurse and had gone to a doctor, but did not speak to either of these professionals. Maranville simply concluded that Grievant had feigned his illness and made no effort to investigate or substantiate Grievant's contention that he had been ill when he left his pod. This does not reflect the careful deliberation that should occur before a serious disciplinary measure is imposed. Maranville's failure resulted in him making charges of insubordination and gross misconduct not supported by the evidence given Grievant's illness attributed to the condition of D Pod.

In sum, the Employer has demonstrated that Grievant engaged in misconduct warranting just cause for discipline. However, Grievant's misconduct did not rise to the level of insubordination and gross misconduct charged in the disciplinary letter.

Failure of the employer to prove by a preponderance of the evidence all the particulars of the disciplinary letter does not require reversal of a disciplinary action. Grievance of Regan, 8 VLRB 340, 366 (1985). In such cases, the Board must determine whether the remaining proven charges justify the penalty. Grievance of

Colleran and Britt, 6 VLRB 235 (1983). A lesser charge of misconduct against Grievant having been proven, we look to the factors articulated in Colleran and Britt, 6 VLRB at 268-69, to determine whether the proven charge justifies a demotion from CO II to CO I.

The pertinent factors here are: 1) the nature and seriousness of the offense and its relation to the employee's duties and position, including whether the offense was frequently repeated; 2) the employee's past disciplinary record; 3) the employee's past work record; 4) the effect of the offense upon supervisors' confidence in the employee's ability to perform assigned duties; 5) mitigating circumstances surrounding the offense; and 6) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

When all the circumstances are considered, we conclude that Grievant's misconduct was not serious enough to justify a demotion. Grievant's overreaction to the situation and use of poor judgment did not reflect a pattern of behavior on his part. Grievant had not been disciplined previously, and had a good work record.

Mitigating circumstances also are an important consideration in this case given the deplorable condition of D Pod that morning and its effect on Grievant's health. Although these mitigating circumstances do not completely exonerate Grievant, they provide some justification for some of his actions. It was not reasonable for Grievant's supervisors to lose confidence in Grievant's ability to perform assigned duties, and demote him, given this isolated incident. Accordingly, we conclude that a sanction less than demotion would have adequately and effectively deterred similar conduct in the future.

Although we conclude that Grievant's misconduct warranted disciplinary action less severe than demotion, we are unable to impose a lesser form of discipline under the terms of the Contract. According to Article 14, Section 10, of the Contract, we have the authority to impose a lesser form of discipline only in cases involving a suspension or dismissal. Since this case involves neither a suspension nor a dismissal, we are unable to impose a lesser form of discipline under the terms of the Contract. Consistent with Supreme Court guidance, we are without authority to impose a lesser disciplinary action absent explicit language in the Contract giving us such authority, and must remand this matter to the Employer for such further action as may be appropriate under the Contract. Grievance of Janes, 144 Vt. 648 (1984). Grievance of Griswold, 12 VLRB 252, 265 (1989); *Reversed on Other Grounds*, Unpublished Decision, Sup.Ct. Docket No. 89-602, March 28, 1991.

Catherine L. Frank, Chairperson

Carroll P. Comstock

DISSENTING OPINION

I disagree with my colleagues' conclusions that the Employer did not establish by a preponderance of the evidence that Grievant was insubordinate. I weigh Grievant's conduct on D Pod on September 20, 1996, in light of the statements he made just prior to setting foot into the unit; he had loudly complained during roll call that the administration was at fault for the D Pod inmate behavior

problems. His subsequent behavior upon entering D Pod - loudly claiming that he was too sick to work and becoming increasingly agitated - were actions consistent with someone trying to make a point that the administration was not doing its job, rather than demonstrating that he was too ill to perform his duties in D Pod. Although I agree with my colleagues that the conditions in D Pod were poor on September 20, 1996, I believe that Grievant's actions were intended to make a dramatic showing of his displeasure with the administration. Under the circumstances, Superintendent Maranville reasonably concluded that Grievant was feigning illness.

Further, Grievant's conduct displayed a disregard for his duties as a CO II, a characteristic contrary to those needed by such correctional officers to adequately perform their jobs. His actions and comments from the moment he heard about the situation served only to exacerbate a bad situation, and set an extremely poor example for the other officers present and perhaps even for the inmates if they heard him shouting from the office. His refusal to accept his post was a serious offense particularly given the obvious security needs of a correctional facility to be adequately staffed. I conclude that Grievant's conduct rose to the level of insubordination, and the Employer acted reasonably in demoting Grievant to a CO I.

Leslie G. Seaver

ORDER

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

1) The Grievance of Johenry Nunes is SUSTAINED;

2) The State of Vermont Agency of Human Services, Department of Corrections, shall rescind Johenry Nunes' demotion from Correctional Officer II to Correctional Officer I, reinstate him to his Correctional Officer II position, and award him backpay plus interest for all time spent in the demoted position of Correctional Officer I; and

3) This matter is remanded to the Employer for such further action as may be appropriate under the Contract.

Dated this 4th day of December, 1997, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Catherine L. Frank

Catherine L. Frank, Chairperson

Carroll P. Comstock

Carroll P. Comstock