

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 96-67
RUPERT PETTY)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On July 26, 1996, the Vermont State Employees' Association, Inc ("VSEA") filed a grievance on behalf of Rupert Petty against the State of Vermont, Agency of Human Services, Department of Corrections ("Employer"), alleging that the Employer violated the collective bargaining agreement between the State and the Corrections Bargaining Unit, effective for the period July 1, 1996 to June 30, 1997 ("Contract"). Specifically, Grievant alleges that the Employer violated Article 14 of the Contract in dismissing him in that the Employer improperly bypassed progressive discipline, failed to apply discipline with a view toward uniformity and consistency, and dismissed Grievant without just cause.

Hearings were held on January 2 and 3, 1997, in the Vermont Labor Relations Board hearing room in Montpelier before Board Members Louis Toepfer, Acting Chairman; Leslie Seaver and Richard Park. Assistant Attorney General David Herlihy represented the Employer. VSEA Legal Counsel Samuel Palmisano represented Grievant. The Employer and Grievant filed post-hearing briefs on January 16, and 17, 1997, respectively.

FINDINGS OF FACT

1. The Contract provides in pertinent part as follows:

ARTICLE 14 DISCIPLINARY ACTION

1. No permanent . . . employee covered by this agreement shall be disciplined without just cause. The parties jointly recognize the deterrent value of disciplinary action. Accordingly, the State will:

...

b. apply discipline . . . with a view towards uniformity and consistency;

c. impose a procedure of progressive discipline . . .

d. In misconduct cases, the order of progressive discipline shall be:

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

...

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

- i. bypassing progressive discipline . . .

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

2. Grievant worked as a Correctional Officer 1 from 1993 until his dismissal on July 9, 1996, at the Marble Valley Regional Correctional Facility ("MVRCF") in Rutland, Vermont. Grievant maintained satisfactory performance evaluations throughout his employment (Grievant's Exhibit 12).

3. Grievant received one disciplinary action during his tenure as a Correctional Officer. He was suspended for 30 days on December 18, 1995, due to his October 8, 1995, off duty conduct which resulted in his arrest and confinement in a correctional facility for burglary, simple assault and violating an abuse prevention order. Grievance of Petty, 20 VLRB 44 (1997).

4. The majority of inmates at MVRCF are housed in 4 living units called pods. The units are designated with letters; A, B, C, and D; and are referred to as A-Pod, B-Pod, C-Pod and D-Pod. Approximately 25 inmates share a pod. A pod consists of two tiers of cells, a shower room and a day room. The day room has tables, benches and a television. Two inmates share one cell which has a bunk bed, toilet, sink and desk. The lights in the cells are controlled by correctional staff. Each cell door has a small window which enables correctional staff to see inside the cell without opening the door. The bunk beds are adjacent to the door and visible from the cell door window.

5. Access to a pod can only be made through a locked secure door. During the first and second shift, there is a unit officer inside each pod. The unit officer is responsible for all aspects of supervision of the inmates during his or her assigned shift (Grievant's Exhibit 13; State's Exhibit 8).

6. Grievant was regularly assigned to work as a unit officer in D-Pod, a medium security unit. Prior to his December 18, 1995, disciplinary action, Grievant generally worked the second shift. After he returned from the 30 day suspension referenced in Finding of Fact No. 3, he was primarily assigned to work the third shift, although he occasionally worked overtime on other shifts.

7. The Employer promulgates post orders which detail the various responsibilities of correctional officers. Newly hired correctional officers are trained to understand the post orders through attending classes conducted at the Vermont Police Academy, attending classes at the correctional facility and working with field training officers. The MVRCF procedural directive for unit officers in medium security units states in pertinent part:

III. POST ORDERS

The following post orders are designed to aid the medium security unit officers in the performance of their duties. They are designed to be used in conjunction with facility policy and procedure:

...

2. He/she shall conduct sixty (60) minute security checks in his/her assigned POD and shall observe each inmate in the POD at least every thirty (30) minutes.

...

13. He/she shall perform headcounts in his/her assigned POD per procedure.

(Grievant's Exhibit 13, page 49).

8. Correctional officers are specifically instructed to carry out these post orders by conducting informal and formal security checks. On May 27, 1996, the practice at MVRCF for carrying out informal security checks was for the unit officer to walk around the living unit on the hour, checking the shower room, locks and doors, making a mental note of whether all the inmates were in the unit, and generally observing the pod for any unusual activity. On the half hour, the unit officer walked through the unit and made the same observations as were made on the hour, except that the shower room, locks and doors were not checked.

9. Unit officers also conduct two formal head counts on each shift at times dictated by the facility directive. MVRCF procedural directive # 7004 set forth the manner in which unit officers conduct formal headcounts as follows:

IV. PROCEDURE

2. Formal headcounts shall be taken at the following times: 0330, 0730, 1130, 1530, 1900 2330.

3. All inmates present in their assigned living units shall be secured into their appropriate cell and remain visible until released by the officer conducting the count. Upon verifying the inmate's presence, the officer shall place his initials in the appropriate space next to that inmate's name. No inmate shall be counted without actually having been seen by the officer. Once the headcount is completed, all residents shall be released from their cells.

4. Officers shall enter a circle in the appropriate headcount space for all inmates not accounted for (Grievant's Exhibit 13, pages 71-72).

10. The formal headcount procedure at the facility required all inmates to be secured in their assigned cells. They could be anywhere in the cell as long as they were visible and identifiable to the unit officer through the cell window door. Officers were not required to enter the cells to conduct headcounts, but could look in the cell window to verify the presence of an inmate. Grievant was trained that a good rule of thumb was to "see skin" to verify the inmate's presence if the inmate was on his bunk with a blanket over his body (State's Exhibit 13).

11. Under MVRCF operating procedures in place on May 27, 1996, at the conclusion of the formal headcount the unit officer gave his or her time check form to a correctional officer outside the pod, called a "rover".

12. The rover's primary responsibility in a correctional facility is to open the security doors for inmates leaving and returning to their pods for activities such

as attending educational classes or going to court. The rover conducts pat searches of residents as they return to their pods.

13. Under MVRCF operating procedures in effect on May 27, 1996, a correctional employee was responsible for providing the rover with a list of residents at court and an educational instructor was responsible for providing the rover with a list of residents attending classes. These lists are called verification lists. The rover compared the names the unit officers had circled on their time check forms to the verification lists. If an inmate's name was on a verification list, the rover placed his or her initials inside of the circle on the appropriate pod time check form. The rover was not verifying that he or she has seen the inmate by initializing inside the circle, but was confirming that the inmate's name had appeared on a verification list (Grievant's Exhibit 13, State's Exhibit 8).

14. Under MVRCF operating procedures in place on May 27, 1997, the facility incorporated an inmate incentive program into the informal and formal security checks. Inmates received "points" for certain behaviors, such as making their beds and locking themselves in for the "1900" (i.e., 7:00 p.m.) formal headcounts.

15. Inmates have the opportunity to take educational courses while incarcerated at MVRCF. Classes are conducted in the education building. The education building is separate and apart from the main correctional facility but within the perimeter of the correctional facility wall. It consists of two rooms, a classroom and a boiler room. A locked door separates the boiler room and the classroom; this door is not generally used and only correctional officers have a key to this door. The classroom and the boiler room each also have an external door on opposite sides of

the building. Correctional officers and teaching staff have keys to these doors. The external boiler room door automatically locks when the door closes (State's Exhibit 14).

16. On May 26-27, 1996, Grievant worked the third shift, from 11:30 p.m. until 7:30 a.m. After working that shift, he went home, slept approximately three hours and returned to MVRCF to work the second shift at 3:30 p.m. on May 27.

17. On May 27, 1996, Correctional Instructor Tom Giffin conducted a current events class in the education building for 27 MVRCF inmates from 3:00 p.m. to 3:50 p.m.

18. The post orders for education staff require them to "verify the presence of all inmates in the education building each hour on the half hour." During the relevant time period, this was not the standard operating procedure at MVRCF because it was too time consuming. Instead, the educational staff simply prepared a list of inmates attending their classes at the beginning of each class and gave this list to the rover; there was no further verification of the inmates' location.

19. On May 27, 1996, Giffin prepared a list of inmates attending his current events class and gave it to Correctional Officer Darrell Gannon, who was working as the second shift rover (Grievant's Exhibit 13).

20. Grievant conducted the "1530" (i.e., 3:30 p.m.) formal headcount on May 27, 1996, prior to Giffin releasing the inmates from his class at 3:50 p.m. Grievant observed 15 inmates missing from the unit, including inmates James Lertola and Brian Witham. He placed circles next to all the missing inmates' names on the D-Pod time check form.

21. Gannon checked all the names with circles on Grievant's time check form against his verification lists and placed his initials inside all the circles. This indicated that these inmates were on verification lists and, thus, were either in court or in the education building.

22. At 3:50 p.m., Giffin radioed the perimeter officer, Robert Carroll, and told him that he was ready to release the inmates from his class. Giffin also may have stated that he was "ready to release all but two minimums"; it was not uncommon for an educational instructor to retain one or two inmates to clean the classroom at the end of class. Under MVRCF operating procedures, Carroll radioed Gannon to instruct him to pat search the inmates as they returned to the facility.

23. Correctional facility perimeter officers are primarily responsible for providing security and supervision of the facility's perimeter fence by observing the yard and inmate activity in the yard (Grievant's Exhibit 13; State's Exhibit 8)

24. Perimeter Officer Carroll positioned himself in the corner of the facility parking lot where he could see the entrance to the education building and observe the inmates walk to the main facility. In this position, Carroll was not in a position to observe the back side of the education building, nor was he in the position to observe the side of the building where the exterior boiler room door is located.

25. According to the standard operating procedure in place at MVRCF, Carroll did not count the number of inmates as he observed the inmates returning to the main facility, and he was not told how many inmates would be returning. According to standard operating procedure, Gannon pat searched the returning inmates; he was not given the number of inmates returning and did not have a list

of the names of returning inmates for positive identification.

26. Two inmates who were attending Giffin's class, Lertola and Witham, did not return to the main facility after class. It is believed that they slipped undetected to the back side of the education building while the inmates were returning to the main facility and entered the exterior boiler room door. Under the operating procedures in effect on May 27, 1996, such actions would have been possible if other inmates created a shield by grouping together - for example, to light cigarettes - as the perimeter officer could not observe all sides of the education building from his location in the parking lot.

27. It is not known how Lertola and Witham were able to enter the exterior boiler room door, as it automatically locks when it closes. The door is sometimes left propped open by a garden hose in the spring and summer when the garden crew is working. After Lertola and Witham entered the boiler room, they apparently then used materials or tools inside the boiler room to open the exterior door to exit the room, as it was later discovered that the interior side of the exterior door had been damaged and pried open.

28. Carroll did not detect Lertola or Witham leaving the group of inmates exiting from the education building. He did not observe and report any unusual activity.

29. Gannon did not detect that two inmates had not returned from the education building when he pat searched the returning inmates and opened the security door for their return to the facility.

30. MVRFCF post orders for educational staff in effect on May 27, 1996,

stated in pertinent part:

II. PARAMETER

The educational staff will be responsible for the security of the educational building when in operation. Educational staff will inspect all areas of the education building during operating hours to ensure compliance with security . . .

IV. GENERAL DUTIES

...

10. The last educator leaving the [education] building at the end of the day should check to see that all doors and windows are secured . . . and that no inmates are left anywhere in the building . . .

(Grievant's Exhibit 13, pages 65-66).

31. Under MVRCF operating procedure in effect on May 27, 1996, the education staff followed this directive by walking around the building and checking the exterior doors to ensure that they were locked. It was not the practice at the time to look inside the boiler room. Vocational Coordinator Ted Lindgren and Tutor Sharon Cupoli also worked in the education building on May 27, 1996. Cupoli was the last instructor to leave the building. Lindgren checked the back of the education building and observed that the exterior boiler room door was shut.

32. Grievant conducted informal headcounts every 30 minutes after the 3:30 p.m. head count. He did not notice the absence of Lertola or Witham, and he did not sense or observe any unusual activity in his unit.

33. Grievant conducted his second formal headcount, the "1900" count, at 7:00 p.m. He believed that he saw Witham sleeping in his bunk and initialed the 1900 hour column next to Witham's name. He did not "see skin", but believed that

he saw the top of Witham's head.

34. Grievant was very familiar with Witham's habits. It was not unusual for Witham to be in his bunk reading or sleeping. Witham was a loner and did not spend time socializing with other inmates in the day room. Grievant gave Witham incentive points for being locked in his cell.

35. Grievant observed that Lertola was not in his cell during the 7:00 p.m. formal headcount and placed a circle next to his name. He asked Lertola's roommate where Lertola was and was told that he may be in the kitchen. Grievant notified Gannon that Lertola was not in his cell. Gannon could not verify Lertola's location. Grievant or Gannon notified shift supervisor Gary Paollilo that they could not locate Lertola. Paollilo instructed Carroll to check the perimeter. Paollilo also contacted Superintendent Tallon at his home to inform him that there was an inmate missing. Grievant and Gannon did a visual check of D-Pod between 7:05 p.m. and 7:10 p.m. and did not detect any unusual activity.

36. Grievant and other officers began cell by cell searches of their units. A cell by cell search is one in which an officer opens each cell door and goes into the cell to verify inmates' location. At some point, Paollilo told the officers to cease the cell by cell search because it was apparent that Lertola had escaped from D-Pod unit and he needed officers in the yard to assist in checking the perimeter and fences.

37. Carroll discovered that the boiler room door had been tampered with and broken open from the inside. He also discovered blood on the blacktop where it appeared that Lertola had escaped over the wall. He notified Paollilo of this, and the facility notified the Vermont State Police that there had been an escape.

38. The MVRCF post orders for unit officers states in pertinent part:

IV. CONTINGENCY PLANS

...

E. Escape or attempted escape:

Upon discovery of an escape from an assigned pod, the medium security officer shall:

...

3. Secure all inmates in their assigned calls.

4. Take a formal headcount of the unit . . .

(Grievant's Exhibit 13, page 52)

39. All inmates were locked in their cells when Grievant discovered Lertola's absence. Paollilo ordered all inmates to remain locked in their cells; they remained locked in until 8:45 p.m. At some point, Grievant and Gannon walked through Grievant's unit and looked through all the cell windows to determine whether all the inmates were in their cells. They did not discover Witham's absence by this search.

40. Grievant did not conduct a formal headcount on May 27 after he had discovered Lertola's absence during the 7:00 p.m. formal headcount. The D-Pod time check form for Grievant's shift does not indicate that he conducted a formal headcount after the 7:00 p.m. headcount (State's Exhibit 8, Grievant's Exhibit 13).

41. Grievant conducted informal headcounts every 30 minutes after discovering Lertola's absence until the end of his shift at 11:30 p.m. He did not discover that Witham also was missing from the unit.

42. Temporary Correctional Officer Dane Cooley replaced Grievant as the

unit officer for the third shift. The third shift unit officer conducts the formal head counts for all three medium security units, which combined have approximately 75 inmates. At 11:30 p.m., Cooley conducted the "2300" formal headcount of the three units and accounted for all inmates in the units, except Lertola. He did not notice Witham's absence at that time. After Cooley completed his formal headcount, he felt that something was not quite right in D-Pod and in Witham's cell. He asked Correctional Officer Frederick Kerner to accompany him to Witham's cell. It is standard procedure for unit officers on the third shift to request that another officer accompany them into a cell. They opened the cell door and discovered that Witham was not in his bunk. A second search followed and Witham was not discovered within the facility. Tallon and the State Police were informed that a second inmate also had escaped.

43. Lertola and Witham were later found in New York State.

44. Hearings Administrator William Anderson and Director of Security and Supervision Michael O'Malley investigated the escape for the Employer. They concluded that the inmates had slipped into the boiler room in the manner set forth in Finding of Fact No. 26. They further concluded that Lertola and Witham then used a tool in the boiler room to open the exterior door, traveled to the perimeter fence, using the education building as a screen, and climbed over the fence where they were met by two female accomplices who drove them away.

45. Anderson and O'Malley found that the MVRCF procedures used when inmates returned to medium security from the education building were inadequate and made seven recommendations, including the following four:

1. Institute a procedure for accounting for inmates returning from the Education Building that addresses the number of inmates and includes a positive identification by name.

2. Revise standards for identification of inmates during headcounts. Recommend requirement to "see flesh or skin" before counting an inmate as present.

3. Recommend Education Post Order include the requirement that a list of the inmates in the Education Building should be made and given to the "Rover".

4. Recommend Perimeter Officer post order include requirement that Perimeter Officer, as final act of the day, make a final tour of the perimeter and report to higher authority.

...

(Grievant's Exhibit 13, page 8).

46. The Employer did not investigate how Lertola and Witham were able to enter the boiler room. Although it is believed that they entered the boiler room in the manner set forth in Finding of Fact No. 26, there also is the possibility that they entered the boiler room directly from the education room.

47. Tallon sent Grievant a Loudermill letter on June 24, 1996, informing Grievant that Tallon was contemplating dismissing him. The letter provided in pertinent part as follows:

Your dismissal is being contemplated due to your violation of work rule #1 - no employee shall violate any provision of the collective bargaining agreement of (sic) any State or Department work rule, policy, directive, local work rule, or post orders.

On May 27, 1996 you as the assigned officer in D-Unit were responsible to conduct sixty minute security checks in your assigned unit and observe each inmate in the pod at least every thirty minutes. You failed to do so.

You were also required to conduct headcounts in your unit per facility

headcount procedure. You failed to do so.

Upon discovery of escape you were required to secure all inmates in their cells and conduct a formal headcount. You failed to do so.

Your failure to act according to responsibilities of a unit officer and follow the aforementioned procedures constitutes gross misconduct.

As a result of your misconduct, an inmate assigned to your living unit who had escaped at approximately 1610 hours from the education building was not detected by you to be missing. Further, you did in fact count this inmate as present during the 1900 formal headcount. Based upon this misconduct, staff did not determine that the inmate was missing until after the 2300 hour headcount (Grievant's Exhibit 10; State's Exhibit 10).

48. Tallon met with Grievant and his VSEA representative prior to *deciding whether to dismiss him*. Tallon concluded that Grievant violated work rule # 1. Tallon determined that, in failing to conduct proper headcounts and security checks, Grievant committed the most serious offenses a correctional officer could commit. He also took into consideration the repercussions Grievant's actions had on the Employer because of the media attention, and the amount of time it took to discover that a second inmate had escaped. Tallon concluded that Grievant had lost all credibility with staff and would not be able to perform his job as a correctional officer. Tallon informed Grievant on or about July 9, 1996, that he was dismissed for the reasons set forth in his May 24, 1996, Loudermill letter (Grievant's Exhibit 11, State's Exhibit 11).

49. Tallon also took action against Cooley because of his failure to conduct a proper "2300" headcount in that he initially failed to detect Witham's absence. Although Tallon could have dismissed Cooley without regard to "just cause" in that he was a temporary employee without the protection of the Contract,

he decided to not assign him to work for a week, which had the same practical effect as suspending him for 5 days. Tallon imposed a less severe action against Cooley than he did against Grievant because: 1) Cooley had only worked six months and did not have the same level of training as Grievant; 2) Cooley had been responsible for approximately 75 inmates, whereas Grievant had been responsible for only 25 inmates; and 3) Cooley had caught his mistake right away.

50. Tallon did not impose disciplinary action on Giffin, Carroll or Gannon because he concluded they were following the standard operating procedures in place at MVRCF at the time for educational staff, perimeter officers and rovers.

51. There have been escapes from other state correctional facilities during the five years preceding the May 27, 1996, escape of Lertola and Witham from MVRCF. The resultant the disciplinary action taken against employees has varied:

- On July 19, 1991, an inmate escaped from the Chittenden Correctional Center by walking out the front door; a correctional officer received a 5 day suspension and the superintendent received a letter of reprimand.
- On April 8, 1991, an inmate escaped from a work crew at the Woodstock Correctional Center; a correctional officer received an 8 day suspension.
- On May 7, 1993, an inmate escaped from the St. Johnsbury Correctional Center; no disciplinary action was imposed.
- On June 24, 1994, two inmates escaped from the Woodstock Correctional Center; two correctional officers received performance feedback.
- On August 19, 1993, six inmates escaped from the Chittenden Correctional Center; the superintendent was reassigned.
- On February 26, 1996, an inmate escaped from St. Johnsbury Correctional Center; a correctional officer received a 5 day suspension (Joint Exhibits 1 - 51).

OPINION

Grievant contends that the Employer violated Article 14 of the Contract in dismissing him by improperly bypassing progressive discipline, failing to apply discipline with a view toward uniformity and consistency, and dismissing him without just cause.

The ultimate criterion of just cause is whether an employer acted reasonably in discharging an employee for misconduct. In re Grievance of Brooks, 135 Vt. 563, 568 (1977). There are two requisite elements which establish just cause for dismissal: 1) it is reasonable to discharge an employee because of certain conduct, and 2) the employee had fair notice, express or fairly implied, that such conduct would be grounds for discharge. Id. In re Grievance of Yashko, 138 Vt. 364 (1980).

We first decide whether the Employer has established the charges made against Grievant in the dismissal letter. The Employer charged Grievant with violating facility procedures in connection with the escape of two inmates on May 27, 1996, by: 1) *failing to conduct sixty minute security checks in his assigned unit* and failing to observe each inmate in his unit every thirty minutes, 2) failing to conduct headcounts in his unit according to facility headcount procedure, and 3) failing to secure all inmates in their cells and conduct a formal headcount after the discovery of an escape.

We conclude that the Employer has proven the essence of these charges by a preponderance of the evidence. The Employer established that Grievant failed to properly conduct security checks in his assigned unit every half hour, on the hour and the half-hour. The procedure required Grievant to "observe each inmate in the pod

at least every thirty minutes." In practice, this required that unit officers walk through their units every thirty minutes, be alert for unusual activity and make mental notes that all inmates were in the unit. It is apparent that Grievant failed to conduct such checks properly. He failed to notice the absence of escaped inmate Lertola for approximately 3 hours, from 4:00 p.m. until his 7:00 p.m. formal headcount. He also failed to discover the absence of escaped inmate Witham for the remainder of his shift after 4:00 p.m., a period longer than seven hours. Under these circumstances, we conclude that the Employer has shown by a preponderance of the evidence that Grievant failed to properly conduct 30 minute checks on May 27.

We also conclude that the Employer established that Grievant failed to conduct headcounts in his unit according to facility headcount procedures with respect to the 7:00 p.m. formal headcount on May 27. The pertinent procedure required that no "inmate shall be counted without actually having been seen by the officer". In conducting the 7:00 p.m. headcount, Grievant did not discover that Witham was not in his cell. Although Grievant believed he saw the top of Witham's head when he conducted the headcount, he did not actually see Witham as he was not in his cell at that time. Thus, Grievant violated facility procedures by counting Witham as present although he had not actually seen him.

Grievant also was charged with violating facility procedures requiring him to secure all inmates in their cells and conduct a formal headcount after the discovery of an escape. This charge was essentially proven because, even though all inmates were secured in their cells after the escape, Grievant did not conduct a formal headcount after the escape. There was no indication on the time check list, or any

other document submitted into evidence, that such a formal headcount had been conducted. Indeed, had Grievant conducted a proper formal headcount, he should have detected Witham's absence shortly after he discovered that Lertola had escaped. We recognize that Grievant and other unit officers had started conducting cell by cell searches after the discovery of Lertola's escape, but the shift supervisor directed them to cease such search. Although Grievant may have discovered Witham missing through a cell by cell search, this type of search was not mandated by facility procedures as was a properly conducted formal headcount.

We look to the factors articulated in Colleran and Britt, 6 VLRB at 268-69, *to determine whether the proven charges justify dismissal. The pertinent factors here are:* 1) the nature and seriousness of the offenses, and their relation to the employee's duties and position, 2) the clarity with which Grievant was on notice of the prohibited conduct, 3) the notoriety of the offenses and their impact upon the reputation of the employer, 4) the effect of the offenses upon supervisors' confidence in Grievant's ability to perform assigned duties, 5) the consistency of the penalty with those imposed upon other employees for similar offenses, 6) the potential for Grievant's rehabilitation, and 7) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

Grievant's offenses were serious. Essential duties of correctional officers are *to supervise criminal offenders and ensure that they remain within the custody of the Department. Their duties and the various exercises they engage in throughout their shifts - properly performing informal and formal security checks and headcounts, and completing time check forms and verification sheets - are carried out to prevent*

escapes or, alternatively, to detect an escape as soon as possible. Grievant fell seriously short in performing these crucial duties the evening of May 27 through not properly conducting 30 minute security checks and formal headcounts. As a result of his dereliction of duties, the escape of two inmates was not discovered until well after it should have been detected. Grievant clearly had notice that violating facility procedures with respect to such crucial duties was prohibited conduct which could lead to disciplinary action.

The seriousness of Grievant's offenses was exacerbated by the publicity surrounding the escapes. The publicity associated with two inmates escaping from the same facility at the same time had a detrimental effect on the Employer's reputation concerning securely confining inmates. Also, Grievant's offenses of improperly failing to detect an inmate escape understandably undermined supervisors' confidence in Grievant's ability to perform assigned duties.

We also conclude that the Employer did not violate the contractual requirement that discipline be imposed "with a view towards uniformity and consistency". Grievant contends this contractual provision was violated because of the disparity between his dismissal and an effective 5 day suspension for temporary Correctional Officer Cooley, who also initially failed to detect Witham's absence, and the fact that no other employees were disciplined due to the escape. Grievant also maintains that he was treated in a disparate manner because other correctional officers have failed to follow procedures which resulted in inmate escapes at various times, and none of them were dismissed.

We find meaningful differences between Grievant's conduct and Cooley's,

the most significant being that Cooley caught his error immediately after conducting his first formal headcount while Grievant failed to detect Witham's absence for the last seven hours of his shift. Also, Cooley was responsible for three times as many inmates as Grievant. In addition, the Employer appropriately considered Cooley's lack of experience in taking action against him. Cooley had worked for the Employer for only six months, while Grievant had significantly more experience making him better trained to detect escapes.

The fact no other employees were disciplined as a result of the escape of inmates Witham and Lertola also does not demonstrate disparate treatment of Grievant. The evidence indicates that the other employees involved in the escape were following proper procedures. Any further fault for the escape itself and/or the delayed detection is more appropriately placed with weaknesses in facility procedures rather than the involved employees.

We further find substantial differences between Grievant's situation and inmate escapes at other correctional facilities. These other incidents occurred over a span of several years, at correctional facilities other than MVRFC, and involving different chains of command. Superintendent Tallon made the decision to dismiss Grievant, and Tallon was not involved in the disposition of discipline with respect to any of the other employees involved in escapes. Also, the evidence does not indicate other escape cases involved employees whom had recently received 30 day suspensions for other offenses, as Grievant had received in this case. Under these circumstances, we conclude that Grievant failed to demonstrate disparate treatment of Grievant with respect to imposition of discipline.

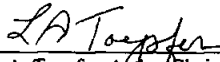
In sum, we conclude that this case presents an appropriate use of progressive discipline. Grievant had received a 30 day suspension five months earlier for other serious offenses. It was reasonable for the Employer to conclude that Grievant's potential for rehabilitation was slight given these serious offenses occurring close together, and that a disciplinary action short of dismissal would not have been adequate to deter Grievant from committing serious misconduct in the future. Just cause existed for Grievant's dismissal.

ORDER

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

Dated this 10th day of April, 1997, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD



Louis A. Toepfer, Acting Chairman



Leslie G. Seaver



Richard W. Park