

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 96-72
THOMAS PORWITZKY)	
GRIEVANCE OF:)	
)	DOCKET NO. 96-79
THOMAS PORWITZKY)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On August 19, 1996, as amended on September 9, 1996, Thomas Porwitzky ("Grievant") filed a grievance, Docket No. 96-72, over his dismissal as a Correctional Officer 1 by the Department of Corrections ("Employer"). Grievant alleged that his dismissal violated Articles 5 and 14 of the collective bargaining agreement between the Vermont State Employees' Association ("VSEA") and the State of Vermont for the Corrections Bargaining Unit, effective July 1, 1996 to June 30, 1997, ("1996-97 Contract") because: 1) his dismissal constituted discrimination on the basis of disability, 2) his dismissal was not based in fact or supported by just cause, 3) the Employer improperly bypassed progressive discipline, and 4) the dismissal was improperly based on union membership and activity.

On October 21, 1996, Grievant filed a grievance, Docket No. 96-79, over a three day suspension which preceded his dismissal. Grievant alleged that the suspension violated Articles 5 and 14 of the collective bargaining agreement between the VSEA and the State for the Corrections Bargaining Unit, effective July 1, 1994 to June 30, 1996, ("1994-96 Contract") because: 1) the suspension was not based in fact or supported by just cause, 2) the Employer improperly bypassed progressive

discipline, 3) the Employer failed to impose discipline with a view toward uniformity and consistency, 4) the suspension was improperly based on union membership and activity, and 5) the Employer created a hostile work environment by using threats, intimidation and harassment.

A hearing in Docket No. 96-79 was held on December 12, 1996. Hearings in Docket No. 96-72 were held on December 12, 1996, and January 9, 1997. Docket No. 96-72 and Docket No. 96-79 were not consolidated for hearing. The hearings in both cases were conducted in the Labor Relations Board hearing room in Montpelier before Labor Relations Board members Louis Toepfer, Acting Chairperson; Leslie Seaver and Richard Park. In Docket No. 96-79, VSEA Legal Counsel Samuel Palmisano represented Grievant; Assistant Attorney General David Herlihy represented the Employer. In Docket No. 96-72, Grievant represented himself, and Assistant Attorney General Herlihy represented the Employer.

In Docket No. 96-79, Grievant filed a post-hearing brief on December 31, 1996; the Employer filed a brief on January 2, 1997. The parties filed post-hearing briefs in Docket No. 96-72 on February 3, 1997.

FINDINGS OF FACT

Docket No. 96-79

1. The 1994-96 Contract provides in pertinent part:

Article 5

No Discrimination or Harassment

Section 1. No Discrimination, Intimidation or Harassment

In order to achieve work relationships among employees, supervisors and managers at every level which are free of any form of discrimination,

neither party shall discriminate against, intimidate, nor harass any employee because of . . . handicap, membership or non-membership in the VSEA, filing a complaint or grievance, or any factor for which discrimination is prohibited by law.

...

Article 14 **Disciplinary Action**

1. No permanent or limited status 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:

a. act promptly to impose discipline . . . within a reasonable time of the offense;

b. apply discipline . . . with a view toward 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 . . .

...

2. The appointing authority or authorized representative . . . may dismiss an employee for just cause . . .

...

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 . . . Board shall have the authority to impose a lesser form of discipline.

2. In October of 1989, Grievant began his employment with the Employer as a temporary correctional officer at the Northwest State Correctional Facility ("NWSCF") in St Albans, Vermont. Grievant became a permanent employee in March of 1990.

3. Grievant suffered a work-related knee injury in October 1992. The injury involved a weight-bearing pocket of the knee. Grievant remained out of work until the latter part of 1994. In June, 1994, Grievant underwent surgery to reduce the size of his stomach and assist him in losing weight. Grievant returned to work in late 1994 after losing more than 100 pounds.

4. In February of 1995, Grievant began to experience dizziness and lightheadedness. Grievant's physicians recommended that he not work. The physicians concluded that Grievant's symptoms were caused by medication which he had been taking as a result of his knee injury, and they took him off the medication. Grievant was cleared by his physicians to return to work in October or November 1995 in a light duty capacity. Grievant performed administrative tasks at the facility for a few weeks in early 1996. Grievant also entered into a work hardening program during the winter of 1996. The purpose of work hardening was to recondition Grievant's body to adjust to the rapid weight loss.

5. On April 8, 1996, Grievant met with NWSCF Superintendent Stephen Maranville, Chief of Security Michael Dineen, and Jane Shaw and Robert Klandl, who were involved in monitoring the state workers' compensation program. At the time of the meeting, Grievant's physicians had restricted Grievant to lifting not more than 75 pounds. Maranville and Dineen decided this restriction precluded Grievant

from returning to his former duties as a correctional officer with inmate contact because Grievant would be unable to perform functions which may arise such as removing inmates in the event of a fire, stopping a suicide attempt, and using force during an inmate disturbance. Maranville and Dineen informed Grievant at this meeting that they were going to assign him to work in the control room. Grievant objected to being assigned to the control room. Nonetheless, Maranville and Dineen assigned Grievant to begin work in the control room on the third shift, April 10 - 11, 1996, from 11:00 p.m. to 7:00 a.m. Grievant was expected to continue his work hardening program as well as returning to work (Grievant Exhibit 1).

6. On April 10, 1996, Grievant attended a four hour work hardening session during the day. Grievant then reported to the facility to begin the third shift at 11:00 p.m. Prior to that evening, Grievant had limited experience in the control room.

7. The control room is a secure place at the main entrance to inmate-occupied areas. The room is encased in bullet proof glass on three sides, which allows control room officers to observe individuals seeking access to the room and the prison exit. The door to the control room leads to an area referred to as the sallyport. The sallyport is a hallway with doors on either end, one leading to inmate areas (the "two door") and the other to non-secure administrative areas and an unguarded exit (the "one door"). The "one door" and the "two door" are controlled electronically from the control room and cannot be opened at the same time, making the sallyport a buffer between inmates and the exit. The door to the control room is controlled manually by a large brass key which operates a dead bolt. It is a facility

security procedure that the door to the control room is to be unlocked only when both the one door and the two door are secured (State Exhibit 7).

8. The control room contains video monitors and control panels. The control panels have over 100 buttons and switches which operate most of the doors in the facility, including cell doors, unit doors, outside doors, and security gates. The control room also contains firearms and ammunition, chemical weapons, and keys to vehicles. An individual in the control room could release all inmates from their cells and allow them to escape. One inmate enters the sallyport to mop the floor. Inmates pass through the area around the sallyport to go to the cafeteria to eat their daily meals.

9. The control room is often staffed by one officer during the third shift from 11:00 p.m. to 7:00 a.m. However, on the third shift on April 10 - 11, 1996, Grievant was assigned to the control room as a second officer to further his training as a control room officer. He was assigned to work in the control room with Correctional Officer Joseph Boudreau. Grievant indicated to Boudreau during the shift that he was unhappy about being assigned to work in the control room. During the shift, Boudreau primarily operated the buttons and switches on the control panels, which are at the end of the control room away from the control room door. Grievant, meanwhile, was primarily responsible for working "the keys". Officers are not allowed to carry personal keys inside inmate areas, so each officer entering the facility passes his or her keys through a sliding drawer which allows for the passing of objects from the sallyport to the control room. The sliding drawer is located

adjacent to the control room door. The officer working keys also is responsible for operating the control room door.

10. At approximately 6:15 a.m. on April 11, Shift Supervisor Peter Machia came to the control room. Machia asked Grievant if he could leave a coffee pot in the control room for an officer who would be coming in for first shift. Grievant agreed, and opened the control room door to accept the coffee pot from Machia. After Machia left, Boudreau asked Grievant if the control room door was secure. Grievant indicated that it was secure. Grievant failed to securely shut the door.

11. Subsequently, at approximately 6:55 a.m., Correctional Officer Michael O'Dell came to the "two door" to be let into the control room. Boudreau let him into the sallyport by opening the "two door". When O'Dell leaned against the control room door, the door opened. The door had remained unlocked since Machia had left the control room.

12. By letters dated April 15, 1996, Superintendent Maranville informed Grievant and Boudreau that he wanted to meet with them "to obtain responses . . . regarding your involvement in and actions on April 11, 1996, at approximately 0655 hours where while you were in the Control room, the control room door was discovered open" (Employer Exhibits 2, 3).

13. Grievant and Maranville met on April 24, 1996. During the meeting, Grievant recalled accepting the coffee pot from Machia but did not accept responsibility for leaving the control room door open on April 11. Grievant claimed that the staff was "out to get" him and that he was being subjected to a hostile work environment (State Exhibit 6).

14. Maranville wrote a letter to Grievant dated May 2, 1996, which provided in pertinent part as follows:

After review of the facts available to me, it is my belief that you keyed the door to the Control Room open to accept a coffee pot from another staff and you failed to key it back so that it shut securely. I find that Officer Boudreau who was working in the control room at the same time specifically asked if the door was secure to which you replied in the affirmative.

Based on the above it is my decision that you be suspended without pay for a period of three (3) work days. I base this on what I believe to be your lack of willingness to accept responsibility for your actions. During our conversation you clearly attempted to shift any responsibility you may have had in the incident. My decision for three days is also based on the extreme importance of the security of the control room. If an inmate had gotten between the one and two doors, there would have been direct access to the Control Room . . .

I want to caution you that involvement in similar or additional behavior may be subject to further discipline up to and including dismissal . . .

(State Exhibit 1).

15. Maranville took no disciplinary action against Boudreau for the April 11 incident. He concluded Boudreau had acted reasonably by asking Grievant whether the door was secure, and acting on Grievant's representation that the door was secure.

16. There was another incident involving the control room door on February 20, 1996. Then, two correctional officers assigned to the control room had an argument in the control room about the contents of a job announcement. They stepped into the sallyport to look at the job announcement that was posted on a bulletin board opposite the control room door. The officers allowed the control room door to lock shut behind them so that they were locked out of the control room. To

reopen the control room door, it was necessary to radio a correctional officer who was posted outside on the facility's perimeter. It took several minutes for the perimeter officer to enter the facility and reopen the control room door.

17. During the time the control room was inaccessible, neither correctional officers nor inmates were able to move between units. This meant correctional officers would not have been able to assist other officers or inmates in the event of violence or medical emergencies.

18. The two correctional officers involved in the February 20 incident acknowledged their responsibility in being locked out of the control room and expressed regret to Maranville over their actions. Maranville gave one of the employees a one day suspension, and imposed a half-day suspension on the other employee. Maranville gave both officers the choice of forfeiting annual leave in lieu of being suspended without pay. Grievant was not given the option of forfeiting annual leave rather than losing three days pay over his suspension. The willingness of the two officers involved in the February 20 incident to accept responsibility for their actions, and Maranville's confidence that they would not be involved in a similar incident in the future, contributed to Maranville imposing a lesser disciplinary action on them than he would have otherwise (Grievant Exhibits 4, 5).

Docket No. 96-72

19. The provisions of Articles 5 and 14 of the 1996-97 Contract pertinent to Docket No. 96-72 are identical to the pertinent provisions of the 1994-96 Contract

set forth in Finding of Fact No. 1. In addition, the following provisions of Article 36, Sick Leave, of the 1996-97 Contract are pertinent to Docket No. 96-72:

2b. Use of sick leave

1. The use of earned sick leave credits shall be authorized by an appointing authority or his or her designated representative for an employee who is absent from work and unable to perform his or her duties because of illness, injury or quarantine . . .

...

3. An employee who has an accumulated sick leave balance shall be authorized its use although recovery and return to duty is impossible. However, periodically, at the request of the appointing authority or representative, the disability or illness and inability to perform position requirements, must be certified by a licensed physician or osteopath.

...

5. Unless physically unable to do so, an employee shall notify his or her supervisor or other person designated by the appointing authority no later than one hour prior to the beginning of the scheduled workday, of his or her inability to report to work and the nature of the illness . . .

...

3. RESPONSIBILITIES

(a) The employee shall . . .

(4) obtain a doctor's certificate if requested by the supervisor.

20. After Grievant met with Superintendent Maranville on April 24, 1996, concerning the April 11 control room incident discussed above in Docket No. 96-79, he was scheduled to work a shift in the control room beginning at 7:00 a.m. Grievant left the facility immediately after the meeting, however, rather than working the scheduled shift. Grievant did not inform Maranville that he intended to not work his

scheduled shift that day. Grievant did not obtain permission to leave from anyone with authority to allow him to leave.

21. Grievant did not return to work after April 24, 1996. On April 27, 1996, Grievant called the facility and advised the shift supervisor that he would not be into work that evening for his regularly assigned shift. Less than one hour before Grievant called the facility, co-workers of Grievant observed him at a local bar playing pool and drinking beer (State Exhibit 24).

22. On May 3, 1996, Superintendent Maranville sent Grievant a letter which provided in pertinent part:

The purpose of this letter is to direct you to report to my office on May 13, 1996 at 1300 hours. The purpose of this investigatory meeting is to gain responses from yourself regarding unauthorized absences. This will be your opportunity to provide myself with documentation and evidence for your absences on April 24, 25, 26, 27, 28 and May 1, 3, 4, and 5. The last two dates are based on your calling in and advising you will be out until May 6, 1996. Documentation should be in the form of Doctor's notes that explain the reason and need for you to be absent each day as well as other documentation you may wish to submit.

As discipline may be imposed as a result of this meeting you have the right to VSEA or legal counsel to be present with you at the meeting.

(State Exhibit 10)

23. Grievant met with Maranville on May 13, 1996. At, or before, the meeting, Grievant presented Maranville with a May 2, 1996, note from a medical doctor referring Grievant for "psychology services" (State Exhibit 27). Grievant also presented Maranville with a memorandum from Constance Vitale, a mental health counselor with a Master's degree. The memorandum provided:

I saw Tom Porwitzky for an initial counseling session today. He appears to be an intelligent, articulate and well-balanced man who is experiencing a great deal of difficulty in the way of harassment at his job. Tom has been a corrections officer for quite a few years and it has become increasingly difficult for him to work in spite of a strong desire to return to his job as a corrections officer. Given the information I received from Tom today I would understand his need to stay out of work until the issues of harassment are resolved.

(Grievant Exhibit 27)

24. Maranville informed Grievant that the memorandum from Vitale was not a sufficient basis for him to be excluded from working; that it was based on self-reporting information from Grievant and Vitale was not a doctor.

25. During the May 13 meeting, Grievant indicated to Maranville that he thought Maranville and other supervisors were harassing him. At one point, Grievant stated that he thought he was being harassed because he had taken Maranville to the Labor Relations Board the previous year, and that he made Maranville "pack a decision where the sun don't shine", or words to that effect. Grievant also told Maranville that he was going to "do something else" with regard to the harassment of him. Grievant did not elaborate what he meant by this latter statement; Maranville perceived the statement as a threat.

26. Grievant's reference to the Labor Relations Board decision involved a case where the Board reduced a written reprimand imposed by Maranville against Grievant to a verbal reprimand. Grievance of Porwitzky, 18 VLRB 530 (1995).

27. In mid-May 1996, Grievant made a complaint that he was being harassed by Superintendent Maranville, Security and Operations Supervisor Michael Dineen, Assistant Superintendent Brian Bilodeau, and facility training officer Geoff

Pretty. Two personnel administrators for the Agency of Human Services, Susan Blair and Peter Garon, were assigned to investigate the complaint. On May 21, 1996, Blair and Garon met with Grievant to obtain specific information on his harassment claim. Grievant alleged that Maranville was creating a hostile work environment for him because Grievant won his grievance at the Board concerning his written reprimand, and that Maranville was treating him unfairly by assigning Grievant to work in the control room despite Grievant's request to be assigned elsewhere. Grievant alleged that Maranville stated to him at a meeting that "this ought to teach you a lesson for going to the VLRB", or words to that effect. Grievant alleged that Dineen harassed Grievant by stating to him, "we're not going to put a lot of money into an old truck", and telling him that the staff perceived him as a malingerer. Grievant alleged that Pretty harassed him by showing a training film to other staff in which Grievant appeared to hurt his wrist; this training film was at issue in the written reprimand which Grievant grieved to the Board. Grievant alleged that Bilodeau created a hostile work environment for him by telling Grievant in a meeting: "When you take the Superintendent to the Labor Board, you can't get much", or words to that effect (State Exhibits 12, 18).

28. We conclude that Grievant did not demonstrate that Maranville stated to Grievant at a meeting that "this ought to teach you a lesson for going to the VLRB", or words to that effect. Dineen did tell Grievant that some of the staff perceived him as a malingerer. He also stated to Grievant that "we're not going to put a lot of money into an old truck". This was in reference to Grievant requesting permission to attend training sessions, and Dineen expressing reluctance to do so

given the amount of time Grievant was out of work on workers' compensation and the limited period of time Grievant had been back at work. We conclude that Grievant did not demonstrate that Bilodeau told Grievant in a meeting: "When you take the Superintendent to the Labor Board, you can't get much", or words to that effect.

29. In a June 6, 1996, letter, Richard Turner, Director of Correctional Services for the Department of Corrections, informed Grievant that his harassment complaint was being investigated and that the "individuals involved have been made aware of the issue and have been placed on notice not to engage in any behaviors that can be construed as continuing harassment or retaliation against you". Turner further stated:

With the above in place, it is our belief that you can return to work. You are hereby directed to report to work on your normally assigned shift commencing on June 11, 1996 at 0700 hours.

(State Exhibit 13)

30. Grievant received the letter from Turner within a day or two after June 6. Grievant did not return to work on June 11. On June 11, Superintendent Maranville called Grievant and informed him that he would have to produce a doctor's certificate to justify any absences. Grievant called the facility on June 12 and spoke with shift supervisor Charles Cross. Grievant informed Cross that he thought Maranville's requirement to produce a doctor's certificate constituted harassment against him, and that he was not going to return to work until the harassment of him was resolved (State Exhibit 14).

31. At the conclusion of their investigation, Blair and Garon concluded that there was no evidence that Maranville, Bilodeau, Dineen or Pretty harassed Grievant or created a hostile work environment for him. Turner informed Grievant of this by a June 13, 1996, memorandum (State Exhibits 15, 18).

32. On June 14, 1996, Turner sent a letter to Grievant which provided:

As a result of a report of a conversation you had with CFSS Charlie Cross on June 12, 1996, I find it necessary to clarify your rights and responsibilities for you.

First, as a result of a complaint of harassment you made, the Agency of Human Services Personnel Unit has conducted an investigation. As you know, one of the first steps was to talk directly with you, and gather information regarding the nature of your complaint and the individuals you considered to be harassing you. Those individuals were all then put on notice that a complaint had been made regarding their behavior, and that the Department would not tolerate any harassment or retaliation against you for having made a complaint.

That step having been taken, I properly notified you that you were expected to return to work. When you called in to say that you were sick, Superintendent Maranville properly asked that you provide a physician's certificate to support your request for authorization of sick leave usage.

Now I understand that you have objected to Superintendent Maranville's actions. Let me be very clear. Superintendent Maranville has not been relieved of his management responsibilities over you, and you have not been relieved of your responsibility to respond appropriately to his supervision of you. It is your responsibility to provide a physician's certificate if Mr. Maranville asks for one, and it is your duty to follow his other instructions or orders.

The investigation has been completed, and the conclusion reached is that your rights under the law have not been violated in any way. Therefore, as far as the Department is concerned, your allegations of harassment do not provide any basis for not working. I understand that you have filed a grievance over these issues. It is your responsibility to work during the time that any grievance is pending.

The documentation you have provided to date does not provide sufficient basis to approve your request for the use of the sick leave as it did not come

from a physician. Your request must be supported by a physician's certificate that you were unable to perform your duties due to a medical condition on the day or days you requested sick leave. The note must include a diagnosis, prognosis and how the illness specifically prevents you from performing your specific job duties. This documentation must be given to Superintendent Maranville by 6/19/96. Since the investigation has concluded that you have not been harassed in the work place, that will not provide the basis for approving your request.

Failure to provide such a certificate by 6/19/96 to Superintendent Maranville will result in us considering you absent without leave and may subject you to disciplinary action up to and including dismissal. In the future failure to report to work as scheduled in the absence of approved leave may subject you to discipline up to and including dismissal.

(State Exhibit 16)

33. Grievant did not provide a physician's certificate to Maranville by June 19 as directed by Turner. On June 20, 1996, Maranville called Grievant on the telephone, and told him he was calling about Grievant's failure to produce a physician's certificate. Grievant stated: "I'd prefer not to talk with you at this point", or words to that effect. Grievant then hung up the telephone. Following the telephone conversation, Maranville wrote a letter to Grievant that day directing him to meet with Maranville on June 26 to discuss his unexcused absences and refusing to speak with Maranville, and stating: "I have a continuing expectation from you that you will report for work as scheduled" (State Exhibit 17).

34. After Grievant met with Maranville on June 26, he had a counseling session with Vitale. Vitale referred Grievant to seeing a psychiatrist as soon as possible (Grievant Exhibit 31).

35. Grievant's absences from work from April 24, 1996, forward disrupted staffing patterns at the facility. Substitutes had to be found to replace him

for the shifts he did not report to work, and substitutes normally received overtime compensation.

36. On July 3, 1996, Commissioner of Corrections John Gorczyk designated Jacqueline Kotkin, Area Manager for the Department of Corrections, to conduct pre-dismissal, or Loudermill, proceedings with respect to Grievant (State Exhibit 19).

37. On July 5, 1996, Kotkin informed Grievant that the Employer was contemplating dismissing him. Kotkin stated the following reasons for the contemplated dismissal: 1) the three day suspension imposed on Grievant for the April 11, 1996, control room incident; 2) leaving his post on April 24, 1996, without permission and without notifying his shift supervisor; 3) calling in sick on April 27, 1996 despite being seen that evening at a local bar drinking beer, dancing and playing pool; 4) failing to substantiate his absences and making inappropriate statements at a May 13, 1996, meeting with Superintendent Maranville; 5) failure to provide medical documentation for his continuing absences by June 19, 1996, as directed by Richard Turner; and 6) refusing to discuss his absences with Maranville in the June 20, 1996, phone conversation, and hanging up the telephone on him. Kotkin stated the following in her July 5, 1996, letter:

In summary, you have been absent from work since April 24, 1996, without any authorization, beginning that absence by disappearing from your post without notification to appropriate personnel. You have been repeatedly directed to report to work and you have failed to do so. You have asserted that a medical condition precludes your return to work but have repeatedly failed to provide documentation which supports that claim as you have been repeatedly instructed to do. You have been observed in a night club acting in a manner which was inconsistent with a virtually contemporaneous

claim of sickness. You have made insubordinate and threatening statements to your Superintendent, and have literally refused to talk with him about these issues and hung up the phone. These actions appear in the aggregate to accumulate to just cause for bypassing progressive discipline, and for your dismissal.

(State Exhibit 20)

38. Kotkin provided Grievant with an opportunity to meet with her before the final decision was made whether to dismiss Grievant. Kotkin met with Grievant and his two representatives - VSEA Steward Lincoln Barbieri and VSEA Field Representative Gary Hoadley - on July 11, 1996. Grievant did not provide a physician's certificate at this meeting justifying his continuing absences. Grievant provided Kotkin with a copy of a note dated June 12, 1996, from Vitale, which stated in pertinent part: "The situation at his work place and the investigation into his allegations of harassment are causing him acute distress. Until the issue is resolved it is expected that Tom will need continued support". Grievant also gave Kotkin a copy of the June 26 note from Vitale referring Grievant to see a psychiatrist as soon as possible, and informed Kotkin that he had an appointment to see Dr. Mark Keller, a psychiatrist. Grievant further told Kotkin that he would not return to work until there was a change in the conclusions of the investigation into the harassment charges which he had made (Grievant Exhibits 27, 31).

39. Kotkin notified Grievant by letter dated July 18, 1996, that he was dismissed from his Correctional Officer I position. Kotkin referenced the reasons set forth in the July 5 Loudermill letter as the reasons for Grievant's dismissal (State Exhibit 21).

OPINION

Docket No. 96-79

At issue in Docket No. 96-79 is the 3 day suspension imposed on Grievant. Grievant contends that his suspension violated Articles 5 and 14 of the 1994-96 Contract because: 1) the suspension was not based in fact or supported by just cause, 2) the Employer improperly bypassed progressive discipline, 3) the Employer failed to impose discipline with a view toward uniformity and consistency, 4) the suspension was improperly based on union membership and activity, and 5) the Employer created a hostile work environment by using threats, intimidation and harassment.

To establish just cause for discipline, it is necessary for the Employer to show that disciplining the employee for certain conduct is reasonable; and that 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 Lawrence, 17 VLRB 360, 372 (1994).

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. Grievance of 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.

In issuing Grievant a three day suspension, the Employer charged Grievant with compromising the security of the facility by failing to securely shut the door to the Control Room after opening it to accept a coffee pot from another employee, and

demonstrating a lack of willingness to accept responsibility for his actions. We conclude that the Employer has met its burden with respect to these charges. On April 11, 1996, Grievant opened the control room door to accept a coffee pot from another employee, and then failed to securely shut the door after the employee handed Grievant the coffee pot and left. Grievant had an opportunity to correct this error, as his co-worker in the control room asked him if the control room door was secure. Grievant failed to correct his error, however, as he erroneously indicated that the door was secure. Grievant exacerbated the situation when he met with Superintendent Maranville and did not accept responsibility for leaving the control room door open on April 11.

The charges against Grievant having been proven, we look to the factors articulated in Grievance of Colleran and Britt, 6 VLRB 235, 268-69 (1983), to determine the legitimacy of the particular disciplinary action. The pertinent factors here are: 1) the nature and seriousness of the offense, and its relation to Grievant's responsibilities; 2) the effect of the offense upon supervisors' confidence in Grievant performing his duties; 3) the clarity with which Grievant was on notice that such conduct could lead to discipline; 4) the consistency of the penalty with those imposed upon other employees for similar offenses; 5) mitigating circumstances surrounding the offense; and 6) the adequacy and effectiveness of alternative sanctions.

Grievant's offense was serious given his responsibilities as a control room officer to protect the security of the correctional facility. Grievant's failure to securely shut the control room door created the possibility of an inmate having direct access to the control room once the inmate had gotten between the "one door" and

the "two door". An inmate in the control room could have disastrous effects as the control room contains weapons and ammunition, and an inmate in the control room could release all inmates from their cells and potentially allow them to escape.

The offense seriously eroded supervisors' confidence in Grievant performing his duties. Grievant had objected to working in the control room, and his negligent actions and failure to accept responsibility for leaving the control room door open understandably made Grievant's supervisors lack confidence that he would be attentive to his control room duties.

Grievant had fair notice that such conduct could lead to discipline. By the very nature of their duties, correctional officers are aware of the importance of security and are on notice that they may be disciplined if they compromise security.

Grievant contends that the discipline imposed on him was not consistent with that imposed on two correctional officers assigned to the control room who had allowed the control room door to lock shut behind them so that they were locked out of the control room on February 20, 1996. One of the employees received a one day suspension, and a half-day suspension was imposed on the other employee; both officers were given the option of forfeiting annual leave in lieu of being suspended without pay. This offense was serious in that it meant correctional officers would not have been able to assist other officers or inmates in the event of violence or medical emergencies.

Upon examining the circumstances, we conclude that the Employer acted reasonably in imposing a more severe suspension on Grievant than the other two employees. The two correctional officers involved in the February 20 incident

acknowledged their responsibility in locking themselves out of the control room and expressed regret to Superintendent Maranville over their actions. Their acceptance of responsibility, and Maranville's confidence that they would not be involved in a similar incident in the future, contributed to Maranville imposing a lesser penalty on them than he would have otherwise. This supervisory confidence that the two officers would responsibly perform their control room duties in the future contrasted sharply with the reasonable lack of supervisors' confidence in Grievant performing his duties, and justified imposing a more severe penalty on Grievant. It was reasonable for the Employer to conclude that Grievant needed to be sent a stronger message than the other employees on the significance of inattention to duties given his failure to accept responsibility for his actions.

Grievant contends that mitigating circumstances surrounding his offense warrant rescinding the three day suspension. Specifically, Grievant maintains that the suspension was improperly based on union membership and activity, and the Employer created a hostile work environment by using threats, intimidation and harassment. Grievant has not briefed these issues, making it difficult to analyze his precise claims in this regard. Apparently, he is contending that he was discriminated against by being assigned to the control room, and receiving a three day suspension, because he generally asserted his rights and had prevailed in an earlier grievance in which the Board had reduced a written reprimand imposed against him to an oral reprimand.

Grievant has presented insufficient evidence to support his claims in this regard. Although the Employer obviously was aware of Grievant's protected

grievance activity, Grievant has not demonstrated that his protected conduct was a motivating factor in the Employer's treatment of him. Horn of the Moon Workers Union v. Horn of the Moon Cafe, 12 VLRB 110, 126-27 (1988). The management decision to assign Grievant to the control room stemmed from Grievant's physicians restricting Grievant to lifting not more than 75 pounds. Grievant's supervisors reasonably concluded that this restriction made the control room a better assignment for Grievant than returning him to his former duties as a correctional officer with inmate contact because Grievant would be unable to perform functions which may arise such as removing inmates in the event of a fire, stopping a suicide attempt, and using force during an inmate disturbance. Assignment to the control room presented an appropriate alternative allowing Grievant to return to full-time duties, and the evidence is insufficient to demonstrate that the Employer operated out of improper motive in making such an assignment.

Similarly, the three day suspension of Grievant was reasonable for the reasons discussed above, and Grievant has failed to present sufficient evidence demonstrating that his protected conduct was a motivating factor in the suspension. In sum, we conclude that just cause existed for the three day suspension of Grievant.

Docket No. 96-72

Grievant contends that his dismissal violated Articles 5 and 14 of the Contract because: 1) his dismissal was not based in fact or supported by just cause, 2) the Employer improperly bypassed progressive discipline, 3) the dismissal was

improperly based on union membership and activity, and 4) his dismissal constituted discrimination on the basis of disability.

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: 1) absence from work since April 24, 1996, without any authorization, beginning that absence by disappearing from his post without notification to appropriate personnel; 2) presence at a night club acting in a manner which was inconsistent with a virtually contemporaneous claim of sickness; 3) failing to report for work after having been repeatedly directed to do so; 4) failing to provide medical documentation for his continuing absences despite being repeatedly instructed to do so; and 5) making insubordinate and threatening statements to Superintendent Maranville, and refusing to talk with him and hanging up the phone.

We conclude that the Employer has proven the essence of these charges by a preponderance of the evidence. Grievant left his scheduled shift on April 24, 1996, without obtaining permission to leave from anyone with authority to allow him to leave. He did not return to work after that date, and never received authorization for his continued absences. Included among Grievant's absences was an occasion on

April 27, 1996, when he called the facility and advised the shift supervisor that he would not report to work that evening for his regularly assigned shift. This claimed inability to work the shift was inconsistent with Grievant being observed, shortly before calling the facility, at a local bar playing pool and drinking beer.

Over a period spanning more than the next two months, Grievant failed to report to work and failed to provide medical documentation for his continuing absences. Superintendent Maranville made it clear to Grievant that he expected Grievant to report for work, unless Grievant produced a physician's certificates to justify his absences. He did this through a May 3, 1996, letter; a May 13, 1996, meeting; a June 11, 1996, telephone conversation; and a June 20, 1996, telephone conversation and letter. Richard Turner, Director of Correctional Services for the Department of Corrections, made the same expectations known to Grievant through a June 6, 1996, letter, and a June 14, 1996, letter. Despite these repeated directions by management to Grievant that he needed to either report to work or produce a physician's certificate justifying his continuing absences, Grievant did neither. Finally, Grievant acted in an inappropriate manner towards Superintendent Maranville during a June 20, 1996, telephone conversation in which he refused to talk with Maranville about the failure to produce a physician's certificate, and hung up the telephone on him.

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, 2) the clarity with which the employee was on notice of the prohibited conduct, 3) the employee's past

disciplinary record, 4) mitigating circumstances surrounding the offenses, 5) the potential for Grievant's rehabilitation, and 6) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

Grievant's offenses were serious. Grievant's continuing failures to comply with repeated management directives to either report to work or produce a physician's certificate to justify his continuing absences demonstrated a disregard of legitimate management authority over the workforce. We recognize that Grievant claimed he was being harassed by management, but the circumstances of this case present no justification for Grievant taking it upon himself to disregard management directives. This case presents a classic example of an employee inappropriately disregarding the common principle for employees to "work now, grieve later". Also, Grievant's failures to comply with management directives had a detrimental effect on the staffing of the facility. Substitutes had to be found to replace him for the shifts he did not report to work, and substitutes normally received overtime compensation.

Grievant had explicit notice from Superintendent Maranville and Director Turner that he could be dismissed if he persisted in failing to comply with management directives to either report to work or produce a physician's certificate to justify his continuing absences. We also note that his disciplinary record was not unblemished. He had recently received a three day suspension for the April 11, 1996, control room incident.

Grievant contends that mitigating circumstances surrounding his offense warrant rescinding his dismissal. Specifically, Grievant maintains that the dismissal

was improperly based on union membership and activity, and his dismissal constituted discrimination on the basis of disability.

Again, as we concluded with respect to his three day suspension, Grievant has presented insufficient evidence to support his claims in this regard. Grievant has not demonstrated that his protected conduct was a motivating factor in the Employer's decision to dismiss him. Horn of the Moon Workers Union v. Horn of the Moon Cafe, 12 VLRB at 126-27. Grievant made a complaint that he was being harassed by various management officials at the facility due to his prevailing at the Labor Relations Board with respect to his grieving a written reprimand. As detailed in the Findings of Fact, we have found that Grievant has not demonstrated that management made the most salient statements alleged by Grievant to support his claim of harassment. The remaining evidence before us falls well short of demonstrating that Grievant's protected conduct was a motivating factor in the Employer's decision to dismiss him.

We also conclude that the evidence is insufficient to conclude that the Employer discriminated against Grievant due to a disability. Assigning Grievant to the control room represented an appropriate management action, given Grievant's medical restrictions, allowing Grievant to return to full-time duties after being out of work on workers' compensation. The evidence is insufficient to demonstrate that the Employer operated out of improper motive in making such an assignment. We are troubled by Security and Operations Supervisor Dineen telling Grievant, "we're not going to put a lot of money into an old truck". This was in reference to Grievant requesting permission to attend training sessions, and Dineen expressing reluctance

to do so given the amount of time Grievant was out of work on workers' compensation and the limited period of time Grievant had been back at work. Such a statement demonstrated insensitivity to an employee who had experienced serious health problems and was seeking to readjust to a changing workplace.

Nonetheless, this statement does not rise remotely close to the level of demonstrating that the dismissal of Grievant constituted discrimination against Grievant due to his disability. The Employer dismissed Grievant due to his continuing failures to comply with repeated management directives to either report to work or produce a physician's certificate to justify his continuing absences. The Employer reasonably accommodated Grievant's disability by assigning him to work in the control room, and cannot be faulted for dismissing Grievant when he failed to either report for work there or produce a doctor's certificate justifying why he could not work there.

The remaining Colleran and Britt factors to examine to determine whether the proven charges against Grievant justify his dismissal are the potential for Grievant's rehabilitation, and the adequacy and effectiveness of alternative sanctions. Grievant has not demonstrated a strong potential for rehabilitation. He exhibited a pattern over a lengthy period of time of not taking seriously his obligations to comply with management directives to either report to work or produce a physician's certificate to justify his continuing absences. The evidence before us does not suggest that Grievant recognizes his failings in this regard so that he would correct them in the future.

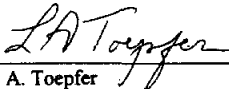
We also conclude that the Employer reasonably concluded that alternative sanctions would be neither adequate nor effective. Grievant persisted in not complying with repeated management directives to either report to work or produce a physician's certificate to justify his continuing absences. Under such circumstances, it was reasonable for the Employer to conclude that even a lengthy suspension would have been inadequate and ineffective. Further, a lengthy suspension would have done nothing to alleviate a staffing problem at the facility caused by Grievant's continued absences. We conclude that the Employer acted reasonably in dismissing Grievant.

ORDER

NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the Grievances of Thomas Porwitzky in Docket Nos. 96-72 and 96-79 are DISMISSED.

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

VERMONT LABOR RELATIONS BOARD



Louis A. Toepfer



Leslie G. Seaver



Richard W. Park