VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 96-35
RUPERT PETTY	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On April 23, 1996, the Vermont State Employees' Association, Inc. ("VSEA") filed a grievance on behalf of Rupert Petty ("Grievant") against the State of Vermont, Agency of Human Services, Department of Corrections ("Employer"), alleging that the Employer had violated the collective bargaining agreement between the State and the Corrections Bargaining Unit, effective for the period July 1, 1994 to June 30, 1996 ("Contract"). Specifically, Grievant alleged that the Employer violated Article 14 of the Contract by suspending him without pay for 30 days in that there was no just cause for such suspension and progressive discipline was inappropriately bypassed. Grievant filed a motion to amend his grievance on September 20, 1996, to further allege that the Employer violated Article 14 because it failed to apply discipline with a view toward uniformity and consistency. The Board requested the Employer to file a response to Grievant's motion to amend his grievance by October 3, 1996. The Employer did not comply with that request.

A hearing was held on January 2, 1997, in the Vermont Labor Relations Board hearing room in Montpelier before Board Members Louis Toepfer, Acting Chairperson; Leslie Seaver and Richard Park. Assistant Attorney General David Herlihy represented the Employer. VSEA Legal Counsel Samuel Palmisano represented Grievant. At the January 2 hearing, the Employer objected to Grievant's

September 20, 1996, Motion to Amend his grievance; the Board granted Grievant's motion. The parties filed post hearing briefs on January 16, 1997.

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 . . .

8. The appointing authority or authorized designee may suspend an employee without pay for reasons for a period not to exceed thirty (30) workdays . . .

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. During all relevant time periods, Grievant was a correctional officer assigned to the Marble Valley Regional Correctional Facility ("MVRCF") in Rutland, Vermont, and supervised inmates incarcerated in the facility. Grievant maintained satisfactory performance evaluations throughout his employment and, prior to the suspension at issue in this matter, had never received disciplinary action (Grievant's Exhibit 12).

3. During all relevant time periods, Grievant worked the second shift from 3:30 p.m. - 11:30 p.m. Many of the inmates in MVRCF whom Grievant supervised were incarcerated because they were convicted for assaultive behavior.

4. On August 8, 1995, Grievant's wife, Traci Petty, filed a Complaint For Relief From Abuse with the Rutland County District Court, and requested a Temporary Order for Relief From Abuse. The Complaint was accompanied by an affidavit by Mrs. Petty. The affidavit set forth certain actions by Grievant which Mrs. Petty believed to be physically and verbally abusive behavior against her, their children and a neighbor's nephew (State's Exhibit 6).

5. The Court granted the Temporary Order for Relief From Abuse without a hearing the day the complaint was filed. This order remained in effect for 10 days pending a hearing on the matter. Mrs. Petty prevailed at the hearing and the judge issued a Final Order For Relief From Abuse on August 18, 1995 (State's Exhibit 6).

6. The Temporary and Final Orders for Relief From Abuse are routinely issued on preprinted forms which provide a number of restrictions and conditions

from which the judge may choose. The judge also may add additional conditions or restrictions appropriate to the facts of the particular case. The pre-printed restrictions and conditions include: defendant shall refrain from abusing the plaintiff and/or the plaintiff's children and from interfering with his/her/their personal liberty; defendant shall vacate the household; plaintiff shall have custody of minor children; and the defendant may have contact with the children under certain conditions (State's Exhibit 6; Grievant's Exhibits 2, 3, 4).

7. The August 18, 1995, final order included all the restrictions and conditions set forth in Finding of Fact No.6. The judge also ordered the additional condition that Grievant not contact his wife in person between 10:00 p.m. and 8:00 a.m. Grievant was permitted to have contact with his children as agreed upon by the parties. This abuse prevention order remained in effect for a year, until August 18, 1996 (State's Exhibit 6).

8. On October 8, 1995, Grievant was arrested for violating the abuse prevention order by entering Mrs. Petty's home at 4:30 a.m. The arresting officer's affidavit set forth his belief that Grievant had entered the home of Mrs. Petty and committed the offense of burglary by "forcing entry into" the house "with the intent to assault" Robert Johnson, a house guest of Mrs. Petty; and that Grievant committed the offense of simple assault by grabbing Johnson "by the throat, throwing him to the floor and then repeatedly punching him". The arresting officer cited Grievant for burglary, simple assault, and violating a Final Order of Relief From Abuse. He transported Grievant to MVRCF with the intent to lodge him until he could be arraigned (State's Exhibit 5).

9. A MVRCF correctional officer immediately called MVRCF Superintendent Keith Tallon and apprised him of the situation. Tallon made arrangements for Grievant to be transferred to the Woodstock correctional facility so that he would not be lodged with inmates whom he supervised at the Rutland facility.

10. The next day, October 9, 1995, Tallon sent Grievant a letter informing him that he was being relieved from duty with pay, pending an investigation into the charges and whether Grievant violated Department of Corrections Work Rule #10 (State's Exhibit 1).

11. Department of Corrections Work Rule # 10 provides:

> No employee, whether on or off duty, shall violate any law or ordinance. Any conduct constituting a felony or misdemeanor can be the basis for disciplinary action whether or not prosecution or conviction results. A formal adjudication of felonious or misdemeanant behavior is not necessary before a decision to discipline is made.

Grievant certified on May 9, 1995, that he had read and understood Department of Corrections Work Rules (State's Exhibit 7).

12. Tallon asked MVRCF Chief of Security Robert Wallet to investigate the criminal charges against Grievant. Wallet gathered relevant documents from the Rutland Police Department, including copies of the Temporary and Final Orders of Relief From Abuse and the October 8, 1995, affidavit of the arresting officer. He also met with Mrs. Petty and discussed the allegations against Grievant. Mrs. Petty corroborated the information in the arresting officer's affidavit. She also informed Wallet that her October 8th house guest was not available for an interview because he lived out of state and did not have a telephone (State's Exhibits 4, 5).

13. At some point, the daily newspaper *The Rutland Herald*, reported Grievant's arrest.

14. Tallon reviewed the documents and information gathered by Wallet. On November 2, 1995, Tallon sent Grievant a Loudermill letter informing Grievant that Tallon was contemplating dismissing him. The letter stated in pertinent part:

> The reasons that your dismissal is contemplated is as follows;
>
> > On October 8, 1995 Rutland City Police Officer James Tarbell signed an affidavit indicating that on that date at approximately 0430 hours, you entered the home of Traci Petty in violation of a final relief from abuse order, and that you committed the offense of burglary by "forcing entry into the residence of Traci Petty with the intent to assault an occupant in the house." The sworn affidavit further states that you committed the offense of simple assault by "grabbing Robert Johnson by the throat, throwing him to the floor and then repeatedly punching him."
>
> Information indicates that you were arrested and lodged for the following violations of Vermont Statute:
>
> Title 13 VSA 1201 BURGLARY, a felony
>
> Title 13 VSA 1023 SIMPLE ASSAULT
>
> Title 13 VSA 1030 VIOLATION OF FINAL ORDER OF RELIEF FROM ABUSE
>
> Documentation also indicates that on May 9, 1995, you certified that you had received, read, and understood the Department of Corrections Work Rules.
>
> Your dismissal is being contemplated due to your violation of rule # 10:
>
> > No employee, whether on or off duty, shall violate any law or ordinance. Any conduct constituting a felony or misdemeanor can be the basis for disciplinary action whether or not prosecution or conviction results. A formal adjudication of felonious or misdemeanant behavior is not necessary before a decision to discipline is made.
>
> . . .
>
> (State's Exhibit 2)

15. Tallon gave Grievant an opportunity to meet with him prior to deciding whether to dismiss him. The meeting occurred on December 6, 1995. Grievant attended the meeting with his VSEA representative, Laurie Webster. Grievant had been advised by his attorney not to discuss the facts of the criminal charges prior to trial. At the meeting, Grievant did not deny the facts leading to his arrest. Grievant informed Tallon that his attorney had told him that there was a possibility that his criminal charges may result in his participation in the "diversion" program.

16. Tallon contacted the state's attorney handling the matter and inquired about the possibility of diversion for Grievant. The state's attorney advised Tallon that he had not offered diversion and that he had not spoken with Grievant's attorney about the possibility of diversion.

17. Tallon met with Mrs. Petty to assess the probability of similar events which had led to Grievant's arrest reoccurring. Mrs. Petty indicated that she and Grievant were working on their marital difficulties and that Grievant had volunteered to go to counseling. She expressed concerns about the hardship it would cause her and her family if Grievant lost his job or was assigned to a different shift.

18. Tallon decided to not dismiss Grievant. He sent Grievant a letter on December 18, 1995, which stated in pertinent part:

> After careful consideration of the facts it is my decision that you be retained as a correctional officer but that you be suspended without pay for period of thirty (30) work days. . .
>
> The reasons supporting this decision were provided to you in my November 2, 1995 letter which is incorporated herein for reference. In summary, you are suspended because on October 8, 1995, you violated the

criminal statutes cited in the November 2, 1995, letter. It is recognized that you have not been convicted of those offenses. However, any violation of the criminal law by a correctional officer is inconsistent with the Department's expectation that you act a role model for the offenders under our supervision, brings the Department's reputation into disrepute, risks the Department's working relationship with other law enforcement agencies, and could impair your ability to perform the duties of your position.

Your actions were particularly serious because they involved violent and assaultive behavior, which involved both an assault on another person and damage to property. Violence and assaultive behavior by an officer is of special concern, because the Department must ensure that such behavior is never exhibited toward offenders except as is authorized by the use of force policy.

In deciding against dismissing you, I have taken into consideration that: (1) Your behavior was off duty; (2) You were highly intoxicated on October 8, 1995, and you are voluntarily undergoing treatment; (3) You have never been under the influence or had the odor of alcohol on your breath at work; (4) You have never been violent or assaultive on the job; (5) Professionals indicate that your behavior was not part of a pattern; (6) You are undergoing counseling and treatment for anger management; and (7) You have not received prior discipline . . . (State's Exhibit 3).

19. To date, the October 8, 1995, charges against Grievant have not been heard by the Rutland District Court.

20. We find by a preponderance of the evidence that, on October 8, 1995, Grievant forced entry into the home occupied by his wife, and grabbed Robert Johnson by the throat, threw him to the floor and repeatedly punched him.

21. Since 1992, Michael O'Malley has held the position of Director of Supervision and Security for the Department of Corrections and is assigned to the Department's central office in Waterbury. O'Malley worked as a probation and parole supervisor for the Department from 1990 to 1992. Prior to that, he was the superintendent of MVRCF from 1982 to 1990. Richard Wright succeeded O'Malley as Superintendent, and Tallon then succeeded Wright as Superintendent. O'Malley

has never worked under the supervision of Tallon.

22. O'Malley and his former wife experienced martial difficulties in 1992 and 1993. On March 29, 1993, Mrs. O'Malley filed a complaint and request for a Temporary Order For Relief From Abuse with the Rutland County District Court. The Complaint was accompanied by affidavit by Mrs. O'Malley which referenced an earlier restraining order. The Court granted the Temporary Order for Relief From Abuse without hearing the day the complaint was filed and it remained in effect for 10 days pending a hearing on the matter. Mrs. O'Malley prevailed at the hearing and the Court issued a Final Order For Relief From Abuse on April 9, 1993, which would remain in effect until April 9, 1994. The Court's Temporary and Final Orders were issued on the same pre-printed form referenced in Finding of Fact No. 6. The judge ordered the restrictions and conditions on the pre-printed form referenced in Finding of Fact No. 6 with additional provisions on parent/child contact and personal property (Grievant's Exhibits 2, 3).

23. In March, 1994, prior to the expiration of the abuse prevention order, O'Malley went to his wife's home to reclaim property that belonged to his sister. He was subsequently arrested and charged with three violations of the April 9, 1993, abuse prevention order, all misdemeanors. He was charged with: 1) banging on his wife's door and shouting at her; 2) entering her home without her permission, forcing his way through her residence, pushing her and taking a video recorder; and 3) following her in his car, causing her to have to hide from him. These charges were made as a result of his wife's statements. He was not incarcerated as a result of these alleged actions. O'Malley was arraigned on March 29, 1994, pleaded innocent and

was released on certain conditions (Grievant's Exhibits 5, 6, 7, 8, 9).

24. O'Malley immediately informed his two supervisors in Waterbury of his arrest. Both supervisors told him to "clear it up as fast as possible", or words to that effect. He did not receive disciplinary action as a result of his arrest. The Department did not conduct an investigation of the charges.

25. On at least two occasions, the Rutland Herald publicized the circumstances of O'Malley's arrest.

26. The charges against O'Malley were not adjudicated. Two of the charges against O'Malley were dropped and he was referred to the diversion program. He completed the diversion program and the Court disposed of his case on July 11, 1994 (Grievant's Exhibit 9).

27. At the hearing before the Board in this matter, O'Malley denied his wife's version of events concerning the March, 1994, incidents. His wife did not testify at the hearing.

OPINION

Before addressing the merits, we first discuss a preliminary issue raised by the Employer. The Employer requests that the Board reconsider its decision to grant Grievant's September 20, 1996, Motion to Amend his grievance. At the January 2, 1997, hearing, the Employer objected to Grievant's amendment in that it was untimely filed.

Section 12.7 of the Board Rules of Practice permits amendments of grievances as the Board "deems proper". In deciding whether to permit amendment of grievances, the Board examines whether amendment would prejudice the

employer or be disruptive to the orderly and efficient processing of cases by the Board. Grievance of Barnard, 17 VLRB 203, 225 (1994).

We decline to change our ruling granting Grievant's motion to amend. Grievant's motion was filed on September 20, 1996, more than three months prior to the January 2 Board hearing, and the Employer neglected to comply with a Board request to respond to the motion by October 3, 1996. Under these circumstances, we conclude that any detrimental effect on the Employer's preparation of the case and presentation of evidence, and any disruption in the orderly processing of cases, was caused by the Employer failing to timely respond to the motion, and was not caused by the motion itself.

We turn to addressing the merits. Grievant contends that the Employer violated Article 14 in suspending him for 30 days because; 1) there was no just cause for such discipline, 2) the suspension bypassed progressive discipline, and 3) the Employer failed to apply discipline with a view toward uniformity and consistency.

To establish just cause for discipline, it is necessary for the Employer to show that disciplining the employee for certain conduct is reasonable; and the employee had fair notice, express or implied, that such conduct would be grounds for discipline. In re Grievance of Brooks, 135 Vt. 563, 568 (1977). Grievance of Porwitzky, 18 VLRB 530, 535-536. 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 violating Work Rule # 10 due to his October 8, 1995, off duty conduct which resulted in his arrest for burglary, simple assault and violating an abuse prevention order. Work Rule # 10 provides that no off duty employee "shall violate any law or ordinance" and that a "formal adjudication of felonious or misdemeanant behavior is not necessary before a decision to discipline is made".

In applying Work Rule #10, the Employer must determine misconduct has been committed, not just alleged, prior to imposing discipline. Grievance of VSEA and the Corrections Bargaining Unit, 19 VLRB 357, 366 (1996). This does not mean management is required to await the outcome of a criminal proceeding prior to imposing discipline. An employer may proceed with its own investigation to determine whether the allegations are substantiated, and decide whether just cause exists to impose discipline at the conclusion of the investigation. Id. Also, if the Employer imposes disciplinary action because an off duty employee violated a local law or ordinance, or criminal statute, the Employer has to establish the requisite nexus between the off duty conduct and employment in justifying the disciplinary action before the Board. Id. at 365-66.

We conclude that the Employer has met its burden with respect to proving the charges against Grievant. The Employer's investigation of the charges revealed, and we have found by a preponderance of the evidence, that on October 8, 1995, Grievant

forced entry into the home occupied by his wife, and grabbed his wife's house guest by the throat, threw him to the floor and repeatedly punched him. Under these circumstances, the Employer reasonably determined that the allegations against Grievant of violation of an abuse prevention order, burglary and simple assault were substantiated.

We also conclude that the Employer established the requisite nexus between such misconduct and Grievant's duties as a correctional officer. In a previous case, the Board decided that there was a nexus between off duty conduct by a correctional officer, resulting in four misdemeanor convictions and incarceration, and his duties involving the custody, treatment and training of inmates who had violated the law. Grievance of Boyde, 13 VLRB 209, 227 (1990). The Board determined that the officer's offenses of careless and negligent driving, attempting to elude a police officer and giving false statements to police demonstrated a disregard for the law and a disrespect for, and dishonesty to, law enforcement officers sufficient for the Employer to reasonably draw a connection between the off duty conduct and the officer's ability to supervise individuals incarcerated because they have violated the law. Id. Similarly, here Grievant's off duty conduct of violating an abuse prevention order, breaking into his wife's home, and assaulting his wife's guest; resulting in Grievant being lodged in a correctional facility; demonstrated a disregard for the law and violent behavior sufficient for the Employer to reasonably draw a connection between the off duty conduct and Grievant's ability to supervise individuals imprisoned because they have violated the law.

The charges 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 charges justify a thirty day suspension. 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 notoriety of the offenses and the impact upon the reputation of the Employer, 3) the effect of the offenses upon supervisors' confidence in Grievant's ability to perform assigned duties, 4) the clarity with which Grievant was on notice of the prohibited conduct, 5) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future, and 6) the consistency of the penalty with those imposed upon other employees for similar offenses.

Grievant's offenses were serious. His off duty conduct demonstrated a disregard for the law and violent behavior pertinent to his duties as a correctional officer. Disregard for the law and inappropriate violent behavior are characteristics contrary to those needed by correctional officers to adequately perform their duties. Given these exhibited characteristics by Grievant, Superintendent Tallon understandably lost some confidence in Grievant's ability to responsibly perform his assigned duties in a correctional facility. Boyde, 13 VLRB at 228-29.

The fact that Grievant was lodged in a correctional facility, and his arrest was publicized in the newspaper, exacerbates the seriousness of his offenses. As a correctional officer, Grievant had the responsibility to serve as a role model to further the Employer's goal of rehabilitating inmates. Id. at 229. Grievance of Smith, 11 VLRB 35, 46 (1990). Through his misconduct and confinement in the correctional facility, Grievant served as a poor role model. Also, the notoriety of Grievant's offenses generated by the newspaper coverage discredited the Employer's reputation.

Grievant had fair notice that his off duty conduct was, or should have been, known to him to be prohibited by the Employer. He had been provided with a copy of the Employer's Work Rules containing the pertinent Rule #10 provision on off duty violation of laws and ordinances. He should have known that the off duty disregard of laws and violent behavior which he exhibited could result in the Employer imposing disciplinary action against him.

We further conclude that the Employer acted reasonably in bypassing progressive discipline and imposing the maximum penalty short of dismissal, a 30 day suspension, on Grievant. A lengthy suspension was an adequate and effective sanction to impose on Grievant to deter similar disregard of the law and violent behavior by him or others in the future. The lengthy suspension also ameliorated the negative publicity for the Employer generated by Grievant's off duty misconduct, and demonstrated to inmates that Grievant's offenses were not condoned by the Employer. It was reasonable for the Employer to conclude under the circumstances that a lesser penalty would have been insufficient given the seriousness of the offenses.

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 that another Department employee, Michael O'Malley, engaged in similar behavior and received no discipline. Grievant points out that both employees had Final Orders for Relief From Abuse issued against them, both employees were charged with violating such court orders in similar ways, and both cases were publicized in the local newspaper.

Although we are troubled by the disparity in treatment between Grievant and O'Malley with respect to the Department's failure to conduct an investigation of the charges made against O'Malley, there are significant differences between the two cases. First, the charges against Grievant have been proven by a preponderance of the evidence through this case, while the charges against O'Malley were never proven. We realize that part of the reason for the lack of proven charges stems from the Employer's failure to conduct an investigation of the charges against O'Malley, but nonetheless the state of the evidence before us precludes us from deciding the charges were established. This is because O'Malley denies the charges, his wife did not testify at the Board proceeding, and the criminal charges against O'Malley were not adjudicated. Further, O'Malley was not working at a correctional facility at the time charges were made against him, and thus he and Grievant had different chains of command and differing circumstances with respect to work environments. Under these circumstances, we conclude that no meaningful comparison can be drawn between the two cases, and we conclude that the Employer did not violate the contractual requirement to impose discipline with a view towards uniformity and consistency.

In sum, we conclude that just cause existed for the 30 day suspension of Grievant.

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