VERMONT LABOR RELATIONS BOARD

GRIEVANCES OF:	)	
	)	DOCKET NOS. 99-4, 99-17
KEVIN SCOTT	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On February 18, 1999, the Vermont State Employees' Association ("VSEA") filed a grievance, Docket No. 99-4, on behalf of Vermont State Police Senior Trooper Kevin Scott ("Grievant"). Therein, Grievant alleged that the Vermont Department of Public Safety ("Employer") violated Articles 5, 14 and 15 of the collective bargaining agreement between the State of Vermont and the Vermont State Employees' Association ("VSEA") for the State Police Unit, effective July 1, 1997 – June 30, 1999 ("Contract"), by disciplining Grievant through the loss of four days of annual leave because Grievant failed one portion of the Employer's physical fitness exam. Grievant contends that the Employer violated Article 5 of the Contract by discriminating against him based on his age and gender. Grievant alleges that the Employer violated Article 14 because: 1) he was disciplined without just cause, 2) discipline was not imposed with a view towards uniformity and consistency, 3) the internal investigation was not completed within 30 work days, 4) he was not notified of the disposition of the matter within 30 work days after completion of the investigation, and 5) disciplinary proceedings were not instituted within a reasonable time after the alleged violation of the Code of Conduct occurred. Grievant claims Article 15 of the Contract was violated because the Employer imposed discipline and conducted its physical fitness program in a discriminatory manner.

On March 23, 1999, VSEA filed a second grievance, Docket No. 99-17, on behalf of Grievant. Therein, Grievant contests a 5 day suspension imposed on him for failing one portion of the Employer's physical fitness exam. Grievant alleges the same violations of the Contract as he does in Docket No. 99-4.

Docket Nos. 99-4 and 99-17 were consolidated for hearing. A hearing was held before Board Members Catherine Frank, Chairperson; John Zampieri and Edward Zuccaro on August 26, 1999. Assistant Attorney General William Reynolds represented the Employer. Samuel Palmisano, VSEA General Counsel, represented Grievant. The parties filed post-hearing briefs on September 10, 1999.

FINDINGS OF FACT

1. The Contract provides in pertinent part as follows:

> **ARTICLE 5 – NO DISCRIMINATION OR HARASSMENT; and AFFIRMATIVE ACTION**
>
> **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 . . . any employee because of . . . sex . . . age . . .
>
> **2. AFFIRMATIVE ACTIONS PROGRAMS:**
> It shall be a goal and an objective of the State to develop and implement positive and aggressive affirmative action programs to redress the effects of any discrimination and to prevent future discrimination in personnel actions which affect bargaining unit personnel . . .
>
> . . .
>
> **ARTICLE 14 – DISCIPLINARY AND CORRECTIVE ACTION**
>
> **1. DEFINITIONS**
> (a) "Disciplinary Action" is any action taken by the Commissioner as a result of an employee's violation of the Code of Conduct. Forms of disciplinary action include written reprimand, transfer, reassignment, suspension without pay, forfeiture of pay and/or other rights, demotion, dismissal, or a combination thereof.
>
> . . .

2. DISCIPLINARY ACTION

(a) No disciplinary action shall be taken without just cause.

(b) Disciplinary proceedings shall be instituted within a reasonable time after a violation of the Code of Conduct occurred or was discovered and disciplinary action shall be taken within a reasonable time after disciplinary charges have been proved or admitted. Non-criminal internal investigations should normally be completed within 30 work days, and notice of disposition should normally be given within 30 work days after completion of the investigation.

(c) Disciplinary action will be applied with a view toward uniformity and consistency.

. . .

ARTICLE 15 – GRIEVANCE PROCEDURE

. . .

2. DEFINITION

. . .

(b) "Grievance" is an employee's, group of employees' or the employees' collective bargaining representative's expressed dissatisfaction, presented in writing, with aspects of employment or working conditions under a collective bargaining agreement or the discriminatory application of a rule or regulation.

. . .

ARTICLE 51 – PHYSICAL FITNESS PROGRAMS AND ASSESSMENT

1. Employees hired into the Department on or after July 1, 1986, shall be required to fully participate in the Department's physical fitness program (presently set out in Section V, Chapter 11, Articles I, II and III) as a condition of employment. Failure to meet the physical fitness standards established for each age group by sex may lead to appropriate discipline as provided in the above referenced sections.

. . .

2. Section V, Chapter 11 of the Employer's Policies and Procedures, referenced in Article 51 of the Contract, sets forth the Employer's physical fitness program. It provides in pertinent part as follows:

ARTICLE I Physical Fitness Program

1.0 PURPOSE

1.1 To build and maintain a high level of physical fitness through health education and participation in a fitness assessment program, with members motivated through awards and competition.

1.2 It is the Department's philosophy that physical fitness is *vital to satisfactory job performance. Physical fitness* activities also have a significant impact upon personal and family satisfaction by improving the health of an individual.

1.3 To determine each member's current level of health and fitness by a periodic fitness assessment and to make each member aware of coronary risk factors and the importance of fitness as it relates to police work.

2.0 POLICY

2.1 Twice a year all members shall be required to participate in a physical assessment consisting of:

(A) blood pressure and pulse checks
(B) *skinfold fat measurements*
(C) height and weight determinations
(D) coronary risk assessment

2.2 Members hired into the Department on or after July 1, 1986, shall be required to fully participate in the Department's physical fitness program as set out in Article II and III of this Chapter as a condition of employment. Failure to meet the physical fitness standards established for each age group by sex may lead to appropriate discipline as provided in the above referenced sections.

2.3 *Effective July 1, 1989, members who on July 1, 1988,* had not attained an age of 45 shall be required as a condition of employment to participate in all phases of the fall physical assessment program as described in section 2.1 above, in addition to the following:

(A) 1.5 mile run
(B) agility run
(C) sit-ups
(D) push-ups
(E) bench press
(F) sit and reach

. . .

3.0 PROCEDURE

. . .

3.6 The testing procedure for each fitness test is as follows:

. . .

(D) 1.5 Mile Run – The best field test of cardiovascular-respiratory function is the 1.5 mile run. The test is designed to estimate the subject's maximum oxygen uptake. A measured distance will be used and the subject exerts a maximum effort for the entire 1.5 mile distance.

. . .

3.7 Alternate testing procedures that accurately and validly correlate to the established norms may be substituted. Any such request for alternate testing procedures must be submitted to the Director of State Police . . .

. . .

ARTICLE II Physical Fitness Standards for Newly Employed State Police Members

1.0 PURPOSE

1.1 To establish minimum physical fitness standards for members employed after July 1, 1986.

. . .

2.0 POLICY

. . .

2.3 All members employed after July 1, 1986, will achieve and maintain the minimum physical fitness standards for his/her age and sex as set forth herein. Failure to achieve and maintain one or more fitness standards may result in disciplinary action.

. . .

3.0 PROCEDURE

. . .

3.4 Physical fitness standards for each age group by sex represent the fiftieth percentile of the average person's fitness level as determined from the database of the Institute for Aerobics Research, Dallas, Texas. The standards (for the 1.5 Mile Run in minutes and seconds) shall be as follows:

Males 20-29 . . . 12:18 . . .
Males 30-39 . . . 12.51 . . .
Males 40-49 . . . 13:53 . . .
Males 50-55 . . . 14:55 . . .
Females 20-29 . . . 14:55 . . .
Females 30-39 . . . 15:26 . . .
Females 40-49 . . . 16:27
Females 50-55 . . . 17:24

. . .

3.6 Physical fitness assessments will occur at the initial date of employment. After the initial fitness assessment, members will be assessed on the regular fitness assessment dates in the Spring and Fall.

. . .

3.8 If a member fails to achieve the physical fitness standards in one or more tests . . . (t)he member will . . . be retested . . . on the failed portions . . .

. . .

3.16 If a member fails a retest on Retest Date #1, 2, or 3, the Director of Internal Affairs will be notified for an investigation for possible disciplinary action. Disciplinary action shall be no greater than a letter of reprimand for failing Retest Date #1. Disciplinary action for failure of Retest Date #2 shall be no greater than a ten (10) day suspension. Failure of Retest Date #3 may result in disciplinary action up to dismissal from employment.

. . .

(State's Exhibit 33)

3. The goal of the Employer's physical fitness program is to improve the overall physical fitness level of employees engaging in law enforcement activities. A study was done subsequent to 1991 comparing fitness levels and workers compensation claims between two different five-year time periods. The first period examined was 1982-1986, the period immediately preceding the Employer instituting the mandatory physical fitness assessment program. The second period examined was 1987-1991, which immediately followed the Employer's adoption of the mandatory fitness program. The study demonstrated that the number of incidents resulting in lost work days due to workers' compensation claims decreased during the 1987-1991 period, as did the total number of work days lost. The study also demonstrated that employees' fitness levels steadily improved during the 1987-1991 period (State's Exhibit 31).

4. Grievant was hired by the Employer as a Trooper in 1988. He was 26 years old when he was hired, and is now 37 years old. On July 11, 1988, Grievant signed an "Employment Agreement" in which he agreed "as one · ·n of my employment to maintain the minimum physical fitness standards" set forth in the Employment Agreement. Among the minimum physical standards are times of 12 minutes, 18 seconds for males in the 20-29 age group, and 12 minutes, 51 seconds for males in the 30-39 age group, in the 1.5 mile run (State's Exhibit 27).

5. During the early years of his employment, Grievant was successful in meeting all of the minimum physical fitness standards.

6. On October 10, 1996, Grievant participated in the Fall physical fitness assessment test. He completed the 1.5 mile run in 16 minutes. His time failed to meet the minimum standard for the 1.5 mile run of 12 minutes, 51 seconds for males in the 30-39 age group (State's Exhibit 1).

7. On April 7, 1998, Grievant participated in the Spring physical fitness assessment test. This was counted as re-test #1 of Grievant's failure of the October 1996 test. Grievant completed the 1.5 mile run in 14 minutes and 55 seconds, which again failed to meet the minimum standard for males in his age group (State's Exhibit 5).

8. By memorandum dated April 8, 1998, Sergeant Robert Casey, Fitness Coordinator for the Employer, informed Grievant that he had failed to meet the minimum standards for the 1.5 mile run. Casey informed Grievant that he would be taking retest #2 on June 29, 1998. Casey advised Grievant: "To prepare for this retest you should exercise twenty to thirty minutes, three times per week, at approximately 60% to 80% of your maximum heart rate." (State's Exhibit 6).

9. On April 8, 1998, State Police Director John Sinclair sent Grievant a memorandum that provided in pertinent part: "Disciplinary action shall begin with a letter of reprimand for failing retest #1 and will be followed by progressive discipline as successive retests are required and failed" (State's Exhibit 7).

10. On April 21, 1998, Lieutenant James Dimmick, Grievant's Station Commander at the Williston Barracks, sent Grievant a memorandum that provided in pertinent part:

> I have been informed by Sergeant Casey that you have failed the PT Cardiovascular portion of your test . . .
>
> *This is a serious matter for two reasons;*
>
> - Your health – This is an indicator that some work needs to occur on your part to improve your cardiovascular performance. This is my most important concern and I am willing (As Stated) to work with you on it.
>
> - Your job – You are a "Contract" employee and thus you are required to maintain a certain level, Kevin. This is serious business and you have to take a serious look and make some serious adjustments.
>
> We will work with you, but you have to show you are interested in the assist . . . You can lose time over this matter and could without adjustments, lose your job. Because this is so serious, I, Your Supervisors, your fellow Troopers will work with you to help in this situation.
>
> I have offered you time "On the Clock" working around your Lunch Break to do some cardiovascular work. (Running, Biking) we will cover the shift while you do this work.
>
> Meet with Sgt. Winn and work out the details and work hard to meet the goal of 12:51 on 06-29-98.
>
> (State's Exhibit 8)

11. Shortly after receiving this memorandum from Lieutenant Dimmick, Grievant had a discussion with Sergeant Winn of the Williston Barracks. Winn told Grievant to let him know what exercise he wanted to do during the work day.

Subsequently, Grievant did not develop an exercise plan. There were a few occasions when he came into work with the intention of exercising around his lunch breaks, but did not exercise due to work needs.

12. On July 15, 1998, Grievant participated in what constituted retest #2 of the October 1996 failure of the 1.5 mile run portion of the fitness test. Grievant completed the run in 14 minutes and 29 seconds, thus failing to meet the minimum standard of 12 minutes and 51 seconds (State's Exhibit 17).

13. On September 29, 1998, Grievant participated in the regular Fall physical fitness assessment. This served as retest #3 of the October 1996 failure in the 1.5 mile run, and retest #1 of the Spring 1998 failure. Grievant completed the run in 15 minutes and 58 seconds, again failing to meet the minimum standard (State's Exhibit 13).

14. After the test, Grievant had a conversation with Sergeant Casey during which Grievant informed Casey that he had done no running or bicycling to prepare for the 1.5 mile run.

15. After Grievant's failure of the September 29, 1998, test, Lieutenant Dimmick secured permission through the chain of command for Grievant to use a Schwinn Airdyne bicycle as a substitute for the 1.5 mile run to assist Grievant in passing the cardiovascular portion of the fitness test. Dimmick informed Grievant of this in late October 1998.

16. On October 26, 1998, Sergeant Casey sent Grievant a memorandum informing him that another retest of the 1.5 mile run would be held on December 15, 1998. The memorandum further provided in pertinent part as follows:

> To prepare for this retest, you should begin a cardiovascular workout, such as a running program, that increases your pulse rate for a minimum of 30

minutes, at a rate of 60 – 80% of your maximum heart rate . . . three times a week.

If you are interested in formulating an individual exercise program and need assistance, please contact me at the above number.
(State's Exhibit 13)

17. During the Fall of 1998, Grievant did not attempt to take advantage of the offer to exercise on work time. He did not contact Sergeant Casey to request assistance in formulating an individual exercise program. He did not attempt to use the Schwinn Airdyne bicycle. He did not engage in any running or bicycling to attempt to improve his cardiovascular fitness.

18. According to Department procedures, Sergeant Casey was responsible for making an internal investigation complaint and submitting a report regarding Grievant's September 29, 1998 failure of retest #3. The investigation he needed to do was simple and did not require the interviewing of any witnesses. On or about November 2, 1998, Sergeant Casey submitted an internal investigation complaint and report on Grievant's failure to Lieutenant Timothy Bombardier, Director of the Employer's Internal Affairs Unit (State's Exhibit 17).

19. On or about November 17, 1998, Lieutenant Bombardier sent the internal investigation report from Casey to Grievant's chain of command for review. An internal affairs investigation is considered completed when it is sent out for chain of command review. The internal affairs investigation was completed 33 work days, excluding State holidays, after Grievant's September 29, 1998, failure of retest #3 (State's Exhibit 17).

20. Chain of command review allows each person in an employee's chain of command to read the investigation report and to make recommendations as to whether

disciplinary charges should be filed and, if so, to make recommendations on the discipline to be imposed. These recommendations are recorded on a form called the chain of command review sheet. The chain of command review in Grievant's case was completed on December 7, 1998 (Grievant's Exhibit 3, pp. 5-7; State's Exhibit 22).

21. As a result of the investigation and recommendations from Grievant's chain of command, Commissioner James Walton issued a preferral of charges against Grievant by memorandum dated December 28, 1998, for failing retest #3 on September 29, 1998. Grievant was served with the Preferral of Charges on January 5, 1999. Grievant received notice of the preferral of charges 31 work days, excluding State holidays, after completion of the investigation (State's Exhibit 18).

22. By letter dated January 21, 1999, Commissioner Walton imposed a disciplinary action of loss of four days of annual leave on Grievant for failing retest #3 on September 29, 1998. Commissioner Walton indicated that Grievant had violated Part B, Section 20.1 of the Employer's Code of Conduct (State's Exhibit 21).

23. Part B of the Employer's Code of Conduct provides in pertinent part as follows:

> 20.0 VIOLATION OF RULES
>
> 20.1 Members shall not commit or deliberately omit any act which constitutes a violation of any Department General or Special Order, Rule or Regulation, Policy or Procedure, or other directive.

(Grievant's Exhibit 5, p. 7)

24. The Code of Conduct provides the following disciplinary guidelines for a violation of Part B, Section 20, of the Code: 4 – 8 day suspension for the first offense, and 8 days – dismissal for subsequent offenses (Grievant's Exhibit 5, pp. 25, 27).

25. On December 15, 1998, Grievant participated in retest #4 of the October 1996 failure in the 1.5 mile run, and retest #2 of the Spring 1998 failure. Grievant completed the run in 15 minutes and 37 seconds, again failing to meet the minimum standard of 12 minutes and 51 seconds.

26. Sergeant Casey submitted an internal investigation complaint and prepared a report on Grievant's failure of retest #4. He submitted the complaint and report to Lieutenant Bombardier on January 5, 1999, and Bombardier sent the internal investigation report from Casey to Grievant's chain of command for review on the same day. The internal affairs investigation was completed 13 work days, excluding State holidays, after Grievant's failure of retest #4 on December 15, 1998 (State's Exhibit 23).

27. As a result of the investigation and recommendations from Grievant's chain of command, Commissioner James Walton issued a preferral of charges against Grievant by memorandum dated January 29, 1999, for failing retest #4 on December 15, 1998. Grievant was served with the preferral of charges on March 1, 1999. Grievant received notice of the preferral of charges 37 work days, excluding State holidays, after completion of the investigation (State's Exhibit 24).

28. By letter dated March 10, 1999, Commissioner Walton imposed a disciplinary action of a five day suspension on Grievant for failing retest #4 on December 15, 1998. Commissioner Walton indicated that Grievant had violated Part B, Section 20.1 of the Employer's Code of Conduct (State's Exhibits 24, 26).

29. During his career with the State Police, all of Grievant's performance evaluations have contained overall ratings of satisfactory or better. The number of arrests

made by Grievant in recent years has been on par with those of his peers. During his career, Grievant has received several letters of commendation (Grievant's Exhibit 1).

30. When Grievant was first hired by the Employer in 1988, he weighed approximately 170-175 pounds. Subsequently, Grievant has engaged in intensive weight training. He generally lifts weights five days a week, for approximately one and one-half to two hours per workout. As a result of his weight training, Grievant has gained approximately 50 pounds since 1988 and currently weighs approximately 225 pounds.

31. Grievant has never been advised by a supervisor that he failed to perform any aspect of his job due to lack of physical conditioning. Due to his strength and size, Grievant is well-regarded and trusted by fellow troopers in situations where "backup" assistance is needed.

32. During his years of employment as a trooper, Grievant has been required to chase criminal suspects on foot approximately 6 to 8 times. The longest such pursuit was approximately 100 yards. In each instance, Grievant successfully caught the suspect.

33. The age and gender standards used by the Employer in its physical assessment testing were developed by the Cooper Institute for Aerobics Research. The Cooper Institute tested a sample group of individuals in each of the physical assessment categories, determined age and gender based average scores, and established percentile rankings for each test based on the results of the group tested. The Cooper Institute testing is a professionally accepted measure of general physical conditioning (Grievant's Exhibit 8).

34. For a period of time, the Cooper Institute recommended that its age and gender standards be used by law enforcement agencies in connection with mandatory

physical fitness testing. Recently, the Institute has recommended against the use of such standards in mandatory physical fitness programs. The Institute views such standards as in violation of the Civil Rights Act of 1991. The Institute also takes the position that one's percentile rank on age and gender based norms is not predictive of the ability to perform physical tasks. The Institute currently recommends that law enforcement agencies with mandatory physical fitness programs use a single standard for all individuals tested, regardless of age and gender. The Employer has chosen not to follow the Institute's recommendations (Grievant's Exhibit 8).

35. The Employer's physical fitness assessment testing does not measure the ability of troopers to perform specific tasks. Instead, it measures overall physical fitness. Given that the minimum standards used represent the 50th percentile of a representative sample of the population tested by the Cooper Institute, and given that the general population is fairly unfit in that 85% of the population does not exercise twice a week, the standards used by the Department are not difficult to meet.

36. The 1.5 mile run is designed to test cardiovascular fitness. The gender standards used by the Employer hold males and females to the same level of fitness based on their aerobic capacity. This translates into discrepancies in time standards for the 1.5 mile run because on average males will run faster than females when performing at the same percentage of aerobic capacity. Similarly, the age standards used by the Employer hold older persons to the same level of fitness as younger persons based on their aerobic capacity. This translates into discrepancies in time standards for the 1.5 mile run because persons decline physically after 25 to 30 years of age, and on average older persons do not have the physiological capability of younger persons.

37. There are many benefits to cardiovascular fitness: greater emotional stability, decreased absenteeism, decreased health problems, improved pulmonary function, decreased lower back pain, and lower incidence of the common cold.

38. In physical fitness assessment testing done by the Employer from Spring 1997 through Spring 1999, the evidence does not establish that male troopers who signed an employment agreement to meet minimum fitness standards had a higher percentage of test failures than woman troopers who signed such employment agreements (State's Exhibit 32).

OPINION

Grievant has presented alternative theories to support his contention that disciplinary actions imposed on him of the loss of four days of annual leave and a five day suspension should be rescinded. He contends that the Employer's failure to follow the timelines established by the Contract for non-criminal internal investigations, and notice of the disposition of such investigations, should result in both grievances being sustained. He also contends that the discipline imposed on him in both cases should not be upheld because the manner in which the Employer currently conducts its physical fitness assessments impermissibly discriminates against troopers on the basis of age and gender. He further contended in his grievance that he was disciplined without just cause. We address each of these issues in turn.

Timelines of Investigations

Article 14 of the Contract provides that "non-criminal internal investigations should normally be completed within 30 work days, and notice of disposition should

normally be given within 30 work days after completion of the investigation". In Docket No. 99-4, the investigation of Grievant's failure to meet the standard for running 1.5 miles was completed 33 work days after Grievant's September 29, 1998, failure of retest #3 of the run, and Grievant was notified of the disposition of the investigation 31 work days after the completion of the investigation when he was served with preferral of charges against him by Commissioner Walton. The 30 work day timeline concerning notice of disposition also was not met in Docket No. 99-17 because Grievant was notified of preferral of charges 37 work days after the completion of the investigation.

The Employer has not presented persuasive evidence justifying failure to adhere to the normal 30 work day timelines of the Contract. The Employer offers as mitigating circumstances for its failure in Docket No. 99-4 to timely complete the investigation that the fitness coordinator responsible for completing the investigation report was busy testing troopers throughout the State during the time the investigation was to be completed. Such an explanation is not compelling given that the investigation of Grievant's failures to meet the 1.5 mile run standard was simple and did not require the interviewing of witnesses. Similarly, the Employer has not presented evidence of unusual circumstances justifying failures in Docket Nos. 99-4 and 99-17 to notify Grievant of the disposition of the charges within 30 work days of the completion of the investigations.

The Employer has demonstrated a disregard for negotiated contractual provisions by failing to adhere to the normal timelines set forth in Article 14 of the Contract. We do not condone the Employer's actions in this regard, but we do not believe it would be appropriate to sustain these grievances based on the Employer's failures. Grievant has not demonstrated any prejudice to him due to the Employer exceeding contractual timelines

by a small number of days. Absent demonstrated prejudice, we are not inclined to rescind Grievant's suspensions.

Discrimination Based on Age and Gender

Grievant contends that the age and gender based cutoff standards used by the Employer for its physical assessment tests discriminate against him in violation of Article 5 of the Contract because he is held to a higher standard than women and older troopers who are required to perform the same job duties. Specifically, Grievant contests the requirement that he be required to run 1.5 miles in 12 minutes and 51 seconds as a male in the 30-39 age group, whereas the standards for women and older troopers allow for slower times.

Grievant first contends in this regard that the following provision of the federal Civil Rights Act of 1991, found at 42 U.S.C. 2000e-2(l), makes the gender based standards used by the Employer illegal:

> It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex or national origin.

We have looked to precedents under the federal Civil Rights Act when analyzing past sex discrimination cases. Grievance of Butler, 17 VLRB 247 (1994); *Affirmed*, 166 Vt. 423 (1994). Grievance of Lowell, 15 VLRB 291 (1992). Grievance of Smith, 12 VLRB 44 (1983). Grievance of Rogers, 11 VLRB 101 (1988). However, the provision of the Civil Rights Act cited by Grievant does not aid in the resolution of this case. The provision is limited to situations where the "selection or referral of applicants or

candidates for employment or promotion" is at issue. In the case before us, Grievant is not an applicant or candidate for employment or promotion.

The provision cited by Grievant was designed to eliminate the practice of "race norming" and other practices of some employers to modify their scoring processes, on tests used to select or promote employees, to generate higher minority test scores and therefore more minority hires and promotions. Barbara Lindemann & Paul Grossman, *Employment Discrimination Law* 121-22 (3rd Edition 1996). 137 Cong. Rec. S15483–15485 (daily ed. October 30, 1991)(Sponsors' Interpretative Memorandum). 137 Cong. Rec. H9526, 9529, 9542, 9543, 9547 (daily ed. November 7, 1991) (Remarks of Reps. Edwards and Hyde). There is no indication that the provision was intended to address a situation such as is involved in this case where maintenance of physical fitness for existing employees, rather than selection of an applicant or candidate for a position, is at issue. Id.[1]

Grievant also cites a number of cases that have been decided under the disparate *impact theory developed in discrimination cases to support his contention that he was* subject to impermissible discrimination. Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975). Guardian's Association of New York City Police Dept. v. Civil Service Commission, 630 F.2d 79, 88-106 (2nd Cir. 1980). Lanning v. Southeast Pennsylvania Transportation Authority, 181 F.3d 478 (3rd Cir. 1999). Under the disparate impact theory, an employer's facially neutral employment practice may be deemed in violation of non-discrimination requirements, without evidence of the employer's subjective intent

[1] We note that our decision should not be construed as making any judgment as to the applicability of Section 2000e-2(l) to the Employer's physical fitness assessment *standards in cases where hiring or promotion decisions are involved.*

to discriminate, if it has an adverse impact on a protected group. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). Grievance of B.M., et al, 16 VLRB 207, 216 (1993). The use of employment tests that are discriminatory in effect are prohibited unless the employer meets the burden of showing that any given requirement has a manifest relationship to the employment in question. Griggs, 401 U.S. at 432. However, this burden arises only after the complaining party has made out a prima facie case of discrimination, i.e., that the test in question causes a significant adverse impact upon a protected group of which the complaining party is a member. Albemarle Paper Co., 422 U.S. at 425. Grievance of B.M. et al, 16 VLRB at 216.

Under these standards, the disparate impact cases cited by Grievant provide no support for his claims. First, a disparate impact analysis is not applicable in this case because a facially neutral policy is not involved. In the cases cited by Grievant, a uniform "facially neutral" standard was applied to all employees. For example, in the Lanning case, the female complainants claimed an adverse impact on them because they had to complete a 1.5 mile run in the same time, 12 minutes, as males. In the case before us, on the other hand, Grievant contests the fact that he has to meet a different standard in the 1.5 mile run than female employees and older employees.

Further, even assuming that a disparate impact analysis is applicable, Grievant's disparate impact claims would fail because he has not set forth a prima facie case of discrimination. In order to do so, Grievant would have to demonstrate that the test in question – the application of the 1.5 mile run standards - causes a significant adverse impact upon males compared to females, or upon younger employees compared to older employees . He has not done so. The evidence does not establish that male troopers who

signed an employment agreement to meet minimum fitness standards had a higher percentage of test failures than woman troopers who signed such employment agreements. Grievant also has not presented evidence demonstrating that younger employees had a higher percentage of test failures than older employees.

Nonetheless, Grievant relies on the current recommendation of the Cooper Institute for Aerobics Research, which developed the age and gender standards used by the Employer. The Cooper Institute now recommends that law enforcement agencies with mandatory physical fitness programs use a single standard for all individuals tested, regardless of age and gender. The Institute's recommendation is based on the stated belief that age and gender standards violate the Civil Rights Act of 1991 and are not predictive of the ability to perform physical tasks. The Cooper Institute position apparently is at odds with the view of the Justice Department, which is reported to take the position that physiological differences between men and women require the use of different standards to obtain comparability of scores across the sexes. Lindemann & Grossman, *Employment Discrimination Law* at 121, n.25.

The only court decision of which we are aware in which males have contested different gender-based standards on physical fitness tests is Powell v. Reno, Civil Action No. 96-2743 (NHJ) (July 24, 1997). There, Judge Norma Holloway Johnson of the District Court of the District of Columbia upheld Federal Bureau of Investigation physical fitness tests holding female trainees to less stringent standards than male trainees. Judge Johnson concluded that the FBI's physical fitness standards appropriately accounted for the physiological differences between men and women and did not constitute discrimination against men in violation of Title VII of the Civil Rights Act. Id.

We ultimately conclude that, once the underlying purpose of the Employer's physical fitness program is examined, the Employer's different standards for men and women, and for younger employees and older employees, in the 1.5 mile run do not constitute impermissible age and sex discrimination. The goal of the Employer's physical fitness program is to improve the overall physical fitness level of employees engaging in law enforcement activities. The Employer's physical fitness assessment testing is not intended to measure the ability of employees to perform specific tasks. Instead, it is intended to measure overall physical fitness.

Once the underlying purpose of promoting physical fitness is considered, the legitimate, non-discriminatory nature of the 1.5 mile run standards becomes apparent. The 1.5 mile run is designed to test cardiovascular fitness, not to measure the ability of employee to perform a specific task required on the job. The specific standards used by the Employer are derived from Cooper Institute testing which is a professionally accepted measure of general physical conditioning. U.S. v. City of Wichita Falls, 704 F.Supp. 709, 714 (N.D.Tex. 1988). The gender standards used by the Employer hold males and females to the same level of fitness based on their aerobic capacity. This translates into discrepancies in time standards for the 1.5 mile run because on average males will run faster than females when performing at the same percentage of aerobic capacity. Similarly, the age standards used by the Employer hold older persons to the same level of fitness as younger persons based on their aerobic capacity. This translates into discrepancies in time standards for the 1.5 mile run because persons decline physically after 25 to 30 years of age, and on average older persons do not have the physiological

capabilities of younger persons. Thus, physiological differences explain the different standards, not impermissible discrimination.

The legitimate, non-discriminatory nature of the Employer's physical fitness program is further evident when the positive, non-discriminatory results of the program are examined. Subsequent to the Employer adopting its mandatory physical fitness program for employees, the number of incidents resulting in lost work days due to workers' compensation claims decreased, as did the total number of work days lost. Also, employees' fitness levels steadily improved. The importance of improved fitness to address legitimate employer concerns of employee productivity and morale is illustrated by the many benefits of cardiovascular fitness: greater emotional stability, decreased absenteeism, decreased health problems, improved pulmonary function, decreased lower back pain, and lower incidence of the common cold.

Just Cause for Discipline

Once the non-discriminatory nature of the Employer's physical fitness assessment testing for the 1.5 mile run is established, the disciplinary actions imposed on Grievant of four days loss of annual leave and a five day suspension for not meeting the 1.5 mile run standard are readily justifiable. Grievant's offenses are serious. When he was hired in 1988, he signed an employment agreement in which he agreed as a condition of employment to maintain the minimum fitness standards of the Employer's physical fitness program. Among the standards was a time of 12 minutes, 51 seconds for males in the 30-39 age group. The requirement to adhere to physical fitness standards is codified in Article 51 of the Contract which provides that an employee may be disciplined for "(f)ailure to meet the physical fitness standards established for each age group". Once

Grievant initially failed to meet the minimum standard in the 1.5 mile run, he was given notice that he would be disciplined if he failed to meet the minimum standard when he was retested. He then was given several opportunities through retests to meet the minimum standard.

Despite the requirements of the individual employment agreement and the collective bargaining contract, and despite the notice and the opportunities he was given, Grievant demonstrated a paucity of effort to attempt to meet the minimum standard in the 1.5 mile run. Although the Employer offered him the opportunities to exercise during the work day and to use a bicycle as a substitute for the 1.5 mile run, Grievant never developed a plan to exercise during the work day and never attempted to use the bicycle. During the Summer and Fall of 1998, when he needed to prepare for retests in the 1.5 mile run to meet the minimum standard to avoid being disciplined, Grievant did not engage in any running or bicycling to attempt to improve his cardiovascular fitness. Instead, Grievant devoted his energies to continuing an extensive weight training program that did not contribute to meeting the minimum standard in the 1.5 mile run. Grievant's lack of effort to attempt to meet the minimum standard in the run is perplexing given the consequences to him of being disciplined. His ongoing failure to meet required and agreed upon physical fitness standards warranted serious disciplinary action. The disciplinary actions imposed on him fall well within disciplinary guidelines established by the Employer and were reasonable given Grievant's continuing deficiencies.

ORDER

NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the Grievances of Kevin Scott in Docket Nos. 99-4 and 99-17 are DISMISSED.

Dated this 21st day of October, 1999, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Catherine L. Frank

John J. Zampieri

Edward R. Zuccaro