

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 99-1
GEOFFREY PRETTY)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On January 12, 1999, Attorney Richard A. Gadbois filed a grievance on behalf of Geoffrey S. Pretty ("Grievant") against the State of Vermont, Department of Corrections ("Employer"). Grievant alleged that the Employer violated Article 14 of the collective bargaining agreement between the State of Vermont and the Vermont State Employees' Association for the Corrections Bargaining Unit, effective for the period July 1, 1997 to June 30, 1999 ("Contract"), by dismissing him without just cause.

Hearings were held in the Vermont Labor Relations Board hearing room in Montpelier before Board Members Catherine Frank, Chairperson; Carroll Comstock and John Zampieri on July 7 and 28, 1999. Attorney Richard Gadbois represented Grievant. Assistant Attorney General William Reynolds represented the Employer. The Employer filed a post hearing brief on August 13, 1999. Grievant did not file a post-hearing brief.

FINDINGS OF FACT

1. Grievant began working for the Employer as a correctional officer in 1992 at the Northwest State Correctional Facility ("NWSCF").

2. Sometime in 1993, an inmate of NWSCF, Brian Barcomb, accused Grievant of making a sexual advance towards him. The superintendent of NWSCF initiated an investigation. Grievant admitted making an inappropriate sexual comment towards Barcomb and his roommate, Donald Blodgett. Grievant was not formally

disciplined for his conduct, but was warned not to make sexual comments again towards inmates. The Vermont State Police conducted an investigation of the matter but did not pursue criminal charges against Grievant. Barcomb and Blodgett filed a civil law suit against the State. The case did not go to trial because an agreement was made to settle the matter by paying Barcomb and Blodgett \$1200.

3. On May 15, 1995, Grievant received a copy of the Department of Corrections Work Rules. Works Rules 5, 9 and 13 state in pertinent part:

5. Employees shall cooperate fully with any inquiry or investigation, whether formal or informal, conducted by the Department. This shall include answering fully and truthfully any questions related to their employment.

...

9. No employee, whether on or off duty, shall comport himself or herself in a manner that reflects discredit upon the Department.

...

13. Romantic and/or sexual relationships between employees and offenders under any type of Department control or supervision are strictly prohibited. Actions are also prohibited which, in the opinion of the appointing authority, give the appearance of an improper relationship between an employee and an offender. These include, but are not limited to: hugging, hand-holding, and unofficial correspondence. Employees, while on duty, on State property or while otherwise associated with State business, shall conduct themselves in a professional manner in their interactions with co-workers (State Exhibit 24).

4. In July 1996 Grievant began working as a Cook C and remained working in that capacity until his dismissal on December 11, 1998.

5. Joseph Beh is an inmate at NWSCF and has been incarcerated at the facility for approximately three years. He started working in the NWSCF kitchen in October 1996 performing such duties as washing dishes and working on the middle line, the deli and in the dining room. Grievant was Beh's supervisor and had regular contact

with him. There were opportunities for Grievant to be alone with Beh for short periods of time either in the bathroom or in the warehouse.

6. Grievant had the authority when appropriate to write a disciplinary report ("DR") on Beh which could result in the termination of his kitchen job or result in disciplinary action, such as a loss of certain privileges. There is no record that Grievant disciplined Beh or gave him a DR. Grievant and the other NWSCF cook, Polly Ferrari, were responsible for rating Beh's performance. They both gave Beh satisfactory ratings.

7. During August 1997 Grievant made a sexual overture towards Beh. Grievant said, "If I had a chance with you, you would not want anyone else," or words to that effect. Beh understood this remark to be sexual in nature and was uncomfortable with the remark. Beh did not complain to Ferrari, or to anyone else in the facility.

8. Beh sometimes had problems controlling his anger. Grievant would rub Beh's shoulder to calm him down. He did this at least six to nine times.

9. On Saturday, November 22, 1997, Beh walked into the kitchen bathroom to wash his hands because there was a line at the kitchen sink. Grievant was masturbating while standing in front of a urinal. He said to Beh, "If you aren't going to do this for me, I'm going to have to do it myself", or words to that effect. Beh did not report the incident because he was afraid that he would not be believed.

10. The following Saturday, November 29, 1997, Beh was given a list of items to retrieve from the warehouse. Grievant went with Beh and unlocked the doors between the kitchen and the warehouse for him. After arriving in the warehouse, Grievant exposed himself to Beh and started masturbating. He then reached into Beh's trousers and took out Beh's penis. He leaned over and started sucking on Beh's penis for

approximately 5 minutes. He stopped because there was a noise and it sounded like someone was coming. Grievant quickly put Beh's penis back into his pants and put his own penis back into his pants. Grievant told Beh not to say anything about the incident to anyone because Grievant would lose his job.

11. Michael Philbin is a correctional officer at NWSCF and worked third shift on December 9 and 10, 1997. He unlocked Beh's door at approximately 10:30 p.m. to let him go to the bathroom. Beh acted in a manner that was uncharacteristic of him; his head was down and he seemed to be mumbling. Beh hesitated at the door when he returned from the bathroom and Philbin asked him if he had a problem. Beh stated that he had a problem and did not know how to handle it. Beh then told Philbin that he was being physically and sexually harassed by someone on staff. Philbin could not talk further with Beh because other inmates were waiting to go to the bathroom. Philbin told Beh that he would speak to him later (State Exhibit 1).

12. Philbin later talked to Beh. Beh told Philbin that he would give him a written report of the incidents and the dates they occurred. Beh tried to write a report, but his hands were so shaky that he discarded his own written report and asked his roommate to write the report for him. Such report set forth the details of the August and November 22 and 29 incidents. He identified Grievant and stated that Grievant "on several occasions made obscene statements regarding his sexual preference, and what he can - would do if given the chance." Beh stated that Grievant made him "feel highly uncomfortable with his comments and behaviors" and that he was at his "wits end" with this problem. Beh offered to give up his position in the kitchen. Beh gave the report to Philbin (State Exhibit 2).

13. Beh's allegations were reported to NWSCF Superintendent Steven Maranville. On December 11, 1997, Maranville contacted the Vermont State Police.

14. On December 12, 1997, Sergeant Warren Whitney interviewed Beh. Beh told Whitney about the November 22 and 29 incidents and also that Grievant had indicated a sexual interest in Beh prior to these incidents (State Exhibits 4, 5, 6).

15. On December 13, 1997, inmates who had knowledge of the incidents between Beh and Grievant teased Beh while he was standing in the cafeteria line. Beh became angry and started to leave. Someone asked what was wrong with Beh. An inmate who was knowledgeable about the situation said that he knew the reason. Beh was upset and "it was not pretty", at which point some of the inmates looked at Grievant and laughed. Beh's face turned red and he walked out of the cafeteria.

16. Correctional officer Angela Freemantle Pacquette observed this exchange and Beh's demeanor. She followed him out of the cafeteria and asked him what was wrong. He told her about Grievant's conduct towards him. Pacquette asked Beh to write a statement about what had just happened in the cafeteria. Both Beh and Pacquette wrote a statement about what they had observed (State Exhibits 3, 4).

17. On December 17, 1997, Whitney interviewed Grievant. Grievant denied that he had made any sexual advances towards Beh. Grievant told Whitney that he had written several DR's on Beh. Grievant acknowledged that he had rubbed Beh's shoulders or back several times when Beh lost his temper and indicated that he had done this approximately 6 to 9 times. Grievant also told Whitney that Beh had given him backrubs. Whitney checked Beh's employment record and did not find any DR's. Grievant agreed

to take a polygraph test. The next day, he informed Whitney that his attorney advised him not to take the polygraph test (State Exhibit 5).

18. On December 17, 1997, Maranville sent Grievant a letter temporarily relieving him from duty with pay to allow the Department an opportunity to conduct an investigation into the allegation that he had "improper physical contact with an inmate" (State Exhibit 20).

19. Whitney scheduled a polygraph test for February 4, 1998 for Beh. The matter was referred to the Franklin County State's Attorney's Office.

20. Maranville also initiated an internal investigation. Probation and Parole Officer Dyanne Lertola was assigned the case and attempted to meet with Grievant. On May 26, 1998, Lertola sent Grievant a letter informing him that she would meet with him on June 2, 1998 at the NWSCF. Lertola arrived at the site and Grievant did not show up.

21. On July 1, 1998, Lertola sent Grievant a second letter seeking his input on a time and date for meeting. She enclosed a letter from the Franklin County State's Attorney indicating that he was not pursuing criminal charges. She called Grievant's attorney the day before the proposed meeting and he informed her that neither he nor Grievant would be coming to the interview. Lertola reminded Grievant's attorney that there could be possible ramifications of Grievant's failure to cooperate in the investigation in light of the State's Attorney decision not to prosecute (State Exhibits 14, 15).

22. Maranville conducted his own investigation of Beh's allegations and interviewed Beh and Grievant separately on August 26, 1998. Grievant denied Beh's allegations. He admitted rubbing Beh's shoulders one time and stated that such incident

consisted of a few pats on the back. Beh told Maranville about the events that had occurred the previous year as set forth in Findings of Fact No. 7, 9, 10 (State Exhibit 18).

23. Maranville consulted with Sgt. Whitney and with the polygraph examiner. He concluded that Grievant had lied to him and had engaged in misconduct.

24. On November 24, 1998, Maranville sent Grievant a *Loudermill* letter which advised him that the Department was considering disciplinary action against him, up to and including dismissal. Maranville invited Grievant to meet with him on December 2, 1998, to respond to the following charges:

1. On or about November 22, 1997, at some time between 1500 and 1530 hours, in the bathroom that is connected to the break room in the Northwest Facility, you exposed yourself and masturbated in front of Offender Beh, and said to him, words to the effect of, "seeing as you're not going to help me I am going to have to do this myself."

2. On or about November 29, 1997, at some time between 1530 and 1630 hours, in the Northwest Facility warehouse, you masturbated in front of Offender Beh, then masturbated Beh, and then performed oral sex on Beh.

3. You had previously made a statement to Offender Beh, while standing outside the kitchen office, to the effect of, "if I ever got the chance to be with you, you'd never want anyone else".

4. You have also engaged in inappropriate interactions with Offender Beh by giving him between 6 and 9 shoulder rubs or massages, and receiving shoulder (rubs) or massages from Beh. You made these admissions to Sgt. Whitney of the Vermont State Police on or about 12/17/97.

These behaviors appear to reflect that you had an unprofessional and/or inappropriate romantic or sexual relationship with Offender Beh, in violation of DOC Work rule #13, and that you committed misconduct that reflected discredit on the DOC, in violation of Work Rule # 9.

5. In your interview with me on August 26, 1998, you indicated that you had touched Offender Beh one time only when you patted him on both shoulders. This information directly contradicts your above-

referenced admissions to Sgt. Whitney that you gave Offender Beh between 6 and 9 shoulder rubs.

It appears you violated DOC Work Rule # 5 by not answering fully and truthfully questions related to your employment in your interview with me.

6. In your 12/17/97 interview with Sgt. Whitney, you stated or implied that Offender Beh may have falsified his allegations concerning your misconduct because you made numerous entries indicating inappropriate behavior by him when he lost his temper. When Sgt. Whitney reviewed Beh's file, and found no record of such actions by you, you admitted that you may have only made a single daily log entry on him.

It appears that you acted in such a way as to reflect discredit on the DOC, in violation of DOC Work Rule # 9, by providing a representative of another law enforcement agency false, misleading, and/or deceptive information on a work-related matter.

7. During the investigation of your actions by Diane Lertola, you twice refused to answer any questions regarding Offender Beh's allegations. On the second occasion, you were given a letter from the State's Attorney advising of his decision not to prosecute you for a crime, but still refused to cooperate with the investigation. Your attorney indicated you were aware of the possible ramifications of these actions.

It appears that you violated DOC Work Rule # 5, by failing to cooperate fully with an investigation, and that you committed a further misconduct offense by failing to obey a lawful and reasonable order by Ms. Lertola to answer her questions (State Exhibit 21).

25. Grievant's attorney notified Maranville that Grievant would not attend the proposed December 2, 1998, meeting. On December 11, 1998, Maranville sent Grievant a letter notifying him that he was dismissed for the reasons set forth in his letter of November 24, 1998 (State Exhibit 22).

OPINION

Grievant contends that the Employer violated Article 14 of the Contract by dismissing him without just cause. The ultimate criterion of just cause is whether an employer acted reasonably in discharging an employee for misconduct. In re Grievance of Brooks, 135 Vt. 563, 568 (1977). There are two requisite elements which establish just cause for dismissal: 1) it is reasonable to discharge an employee because of certain conduct, and 2) the employee had fair notice, express or fairly implied, that such conduct would be grounds for discharge. Id. In re Grievance of Yashko, 138 Vt. 364 (1980).

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 Rules # 9 and 13 because Grievant engaged in unprofessional and/or inappropriate romantic or sexual relations with an inmate by making sexually suggestive comments towards him, giving and receiving shoulder rubs and by engaging in specific sexual acts on November 22 and 29, 1997. The Employer also charged Grievant with violating Work Rule # 5 because he was untruthful in answering questions during the Department's investigation of these allegations and because he failed to fully cooperate with the Employer's investigation by refusing to answer the questions of Dyanne Lertola.

Work Rule # 9 provides that no employee "shall comport himself in a manner that reflects discredit upon the Department". Work Rule # 13 prohibits romantic and/or sexual

relationships between employees and offenders. We conclude that the Employer has met its burden with respect to proving by a preponderance of the evidence that Grievant made sexual advances towards inmate Beh by making sexually suggestive comments towards him, massaging his shoulders on many occasions, masturbating in front of him on November 22 and 29, 1997, and performing oral sex on Beh on November 29, 1997.

Work Rule # 5 provides that employees "shall cooperate fully with any inquiry or investigation" conducted by the Employer and such cooperation "shall include answering fully and truthfully any questions related to their employment". We conclude that the Employer has met its burden by proving by a preponderance of the evidence that Grievant was uncooperative with the Employer's investigation because he refused to meet with Lertola. Further, Grievant was dishonest when he told Sgt. Whitney that he had made several DR's against Beh and when he told Superintendent Maranville that he only massaged Beh's shoulder one time.

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 dismissal. The pertinent factors here are: 1) the nature and seriousness of the offenses and their relation to the employee's duties and position, 2) the effect of the offenses upon supervisors' confidence in Grievant's ability to perform assigned duties, 3) the clarity with which Grievant was on notice of the prohibited conduct, and 4) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

Grievant's offenses were serious. The Department is responsible for ensuring the safe keeping of inmates within its custody. Grievant acted contrary to this duty to keep inmates safe from harassment while within the custody of the Department by abusing his

power and making sexual advances towards an inmate. Such actions obviously have an adverse effect on supervisors' confidence in Grievant's ability to work with and supervise inmates. Grievant exacerbated the misconduct by being uncooperative and dishonest during the Employer's investigation of the charges against him. Grievance of Johnson, 9 VLRB 94 (1986). *Affirmed*, Sup. Ct. Docket No. 86-300 (December 20, 1989). He had clear notice through his receipt of the Department Work Rules that the misconduct he engaged in would result in disciplinary action. We conclude under the circumstances that the Employer acted reasonably by concluding there was no alternative sanction which would be effective. In sum, just cause existed for Grievant's dismissal.

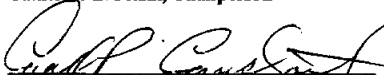
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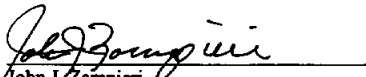
NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the Grievance of Geoffrey Pretty is DISMISSED.

Dated this 7th of October, 1999, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Catherine L. Frank, Chairperson


Carroll P. Comstock


John J. Zampieri