VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 99-2
GARY PAOLILLO	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On January 22, 1999, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Gary Paolillo ("Grievant"). Therein, Grievant alleged that the State of Vermont Department of Corrections ("Employer") violated Article 14 of the collective bargaining agreement between the State and the VSEA for the Corrections Bargaining Unit effective July 1, 1997 – June 30, 1999 ("Contract") by involuntarily demoting Grievant from Correctional Officer II to Correctional Officer I. Grievant contended that: 1) his demotion was not based in fact or supported by just cause, 2) the Employer improperly bypassed progressive discipline, 3) the Employer failed to apply discipline with a view toward uniformity and consistency, and 4) Grievant's due process rights were violated during the course of the Employer's investigation.

A hearing was held on July 15, 1999, in the Labor Relations Board hearing room in Montpelier before Board Members Catherine Frank, Chairperson; Carroll Comstock and Richard Park. Department of Personnel Legal Counsel David Herlihy represented the Employer. VSEA General Counsel Samuel Palmisano represented Grievant.

Grievant filed a post-hearing brief on July 27, 1999. The Employer filed a brief on July 29, 1999.

FINDINGS OF FACT

1. Article 14 of the Contract, entitled "Disciplinary Action", provides in pertinent part as follows:

> 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 toward uniformity and consistency;
> (c) impose a procedure of progressive discipline . . .
> (d) In misconduct cases, the order of progressive discipline shall be:
>
> (1) oral reprimand;
> (2) written reprimand;
> (3) suspension without pay;
> (4) dismissal.
>
> . . .
>
> (f) The parties agree that there are appropriate cases that may warrant the State:
>
> (1) bypassing progressive discipline . . .
>
> . . .
>
> (g) The forms of discipline herein listed shall not preclude the parties from agreeing to utilize alternative forms of discipline, including demotion, or combination of forms of discipline in lieu of suspension or dismissal, or as a settlement to any of these actions. Nothing in this Agreement shall be construed to limit the State's authority or ability to demote an employee under section 1, d . . of this section, for just cause resulting from misconduct . . but the State shall not be required to do so in any case. The VLRB may not impose demotion under this Article.
>
> . . .

2. Grievant began working for the Employer in 1988 when he was hired as a temporary correctional officer with the Marble Valley Regional Correctional Facility ("MVRCF") in Rutland. Grievant became a permanent Correctional Officer I at MVRCF in February of 1989. In the mid-1990's, Grievant was promoted to the position of Correctional Officer II.

3. Most Correctional Officer II's at MVRCF serve as acting shift supervisors at times. Two of the 13 Correctional Officer II's at the facility do not serve as acting shift supervisors.

4. During his ten years of employment at MVRCF, Grievant has always received evaluations that rated his overall performance as satisfactory or better. Grievant received a few evaluations in which his overall performance was rated excellent.

5. Prior to the incident that is the subject of this grievance, Grievant had no disciplinary action of record during his employment.

6. Keith Tallon has been MVRCF Superintendent for approximately six years. By letter dated June 24, 1998, Tallon gave Grievant supervisory feedback. The supervisory feedback did not constitute disciplinary action. The letter provided as follows:

> This letter will confirm my conversation with you on June 17, 1998 at which time I indicated that you were to receive supervisory feedback concerning your actions on Wednesday June 17, 1998.
>
> On June 17, 1998 you did enter my office to report a conversation with Department Director Richard Turner. During the conversation I attempted to express myself repeatedly and each time you talked over me which prevented me from expressing my opinion. Your manner became rude and disrespectful.
>
> The focus of the conversation became your involvement in an organized effort at the facility on Tuesday, June 16, 1998 at which time you solicited staff to call the Governor's hot line requesting the termination of both Commissioner Gorczyk and Director Turner.
>
> I told you it was inappropriate to solicit such phone calls while you were on duty. Your manner became belligerent and I did order you not to solicit other employees during your work hours.
>
> Due to your overt behavior on June 17, 1998 you were administratively placed on a one day relief from duty.

> You are a Correctional Officer II. You are fully aware of both Department work rules and our Professional Principles. Your actions on June 16 and 17, 1998, were not appropriate and not in keeping with our Department Values.
>
> Further replications of the aforementioned behavior or actions will result in further disciplinary action up to and including dismissal.
>
> If you are not satisfied with my decision to issue this letter of supervisory feedback, you may appeal by following the procedure as outlined in the agreements between the State of Vermont and the Vermont State Employees' Association.
>
> (State's Exhibit 12)

7. In the event of smoke or fire at state correctional facilities, correctional officers are required, if necessary, to use emergency breathing apparatus to allow officers to maintain security and safely evacuate themselves and inmates. The breathing apparatus has an attached mask that requires a tight seal for proper operation.

8. For several years, the Employer studied the effectiveness of the emergency breathing apparatus, particularly the ability of a user with facial hair to form a proper seal. On June 22, 1998, Richard Turner, Director of Correctional Services for the Employer, sent a memorandum to all Department staff announcing a new directive on the breathing apparatus. The memorandum provided in pertinent part as follows:

> A new directive has been written, reviewed and approved regarding self contained Breathing Apparatus. This new directive has a requirement that any Vermont Department of Corrections employee, whose job may require the use of this equipment, may not have facial hair, except for mustaches, which may not extend beyond the upper lip. This will not be a popular requirement, since many of our employees who fall into this category have beards.
>
> The reason for this requirement is that a self contained breathing apparatus must seal tightly to the face, if the equipment is to provide the protection for which it is designed. A beard may preclude an employee from getting the proper seal of the mask to the face, thus rendering the equipment ineffective and placing the employee in danger.

> Other factors must be taken into account when considering the issue of facial hair and the use of self contained breathing apparatus. The inability for an employee with facial hair to use this equipment properly places not only the employee in danger, but also places other staff and inmates in danger. The inability to use the equipment in an emergency situation may mean the employee cannot aid or assist another employee or inmate in escaping from a dangerous environment, including removing an injured employee or inmate from danger.
>
> . . . This requirement will become effective on July 15, 1998.
>
> (State's Exhibit 10)

9. Jacqueline Kotkin is Assistant Director of Correctional Services. She reports to Turner, who reports to John Gorczyk, the Commissioner of Corrections. On July 9, 1998, Kotkin was working at the Waterbury central office of the Employer. She observed a group of employees discussing an e-mail message. The employees asked Kotkin if she had seen the message and asked what she was going to do about it. Kotkin had not seen the e-mail message. She then opened her e-mail to review the e-mail message the employees were discussing.

10. The e-mail message in question provided:

> From: trouble maker <kaos50@hotmail.com>
> To: doc@doc.state.vt.us
> Subject: facial hair
> Date: Wed, 08 Jul 1998 08:33:57 PDT
>
> Along with my eyelashes and eyebrows that I will have removed through electrolosis (sic), I am having my ass shaved too, just for you, Dicky poo. So it tickles when you kiss me there . . .
> Is Lickwar going to shave? No!
> Is Turner going to shave? No!
> Is Gorczyk going to shave? No! (has he reached pu[illegible]y yet? Only Dr. Dean knows for s
> Am I going to shave? Hell no!

When you stop running this Department like Bert and Ernie's camp for deprived kiddies, then maybe people will begin to take these foolish directives seriously. And central office too . . .

Those of you that disagree with this foolish edict from on high, need to rise up out of your trenches and say WE HAD ENOUGH AND ARE NOT GOING TO TAKE IT ANYMORE! But you must say it publicly and loud enough for those in power to hear it. A little revolution every now and then is a good thing. For if you don't, we all will be wearing blazers and slacks next! Even you people in the field will be wearing them, so get on board or you will be on the next train all by yourselves. And won't we all look so pretty . . . Of I forgot, revolution isn't one of their professional principles . . . Damn! Oh well, they don't follow them anyway so . . . they pick and choose as they go along. "Humh, this one sounds good for this. . . no we can't have honesty here, we may look foolish."

For if it wasn't for a revolution, we'd all be speaking English now . . . wouldn't we. Please pass the fish and chips. Damn, if it wasn't for this fog maybe they'd see the writing on the wall left by the last guy who was here that saw the light and it was an oncoming train . . .

time to go boys and girls . . . increase the hate!
And keep your facial hair if you have it. If you don't, grow some . . . today! After all, it was given to you by God. And even Jesus H. Christ had a beard . . . Abe Lincoln, Moses, Confusius (sic), and if it was good enough for my mother well it has to be good enough for the DOC.

Gimmie a face with hair, long beautiful hair

Gotta love it!

(State's Exhibit 5)

11. The reference to "Lithwar" in the e-mail message is John Lithwar, the Training Coordinator for the Employer. Lithwar has a long beard.

12. The e-mail message addressed to "doc@doc.state.vt.us" went to every employee of the Department of Corrections who has an e-mail account. There were approximately 800 Department employees who were sent the e-mail message.

13. No one at the Employer's central office knew who sent the e-mail message. The use of the alias "trouble maker", and the "hotmail" address, hid the sender's identity. Computer specialists for the Employer were able to identify the service provider through which the message had been sent, but the provider would not reveal the user's identity until the Employer used the subpoena power of the Commissioner of Corrections to obtain the identity of the person who sent the message (State's Exhibit 7).

14. The service provider revealed that Grievant had sent the e-mail message. Tallon had a meeting with Grievant and told him that he had been identified as the sender of the e-mail message. Grievant admitted that he had sent the e-mail. Grievant had e-mail capability on an already-established personal e-mail account, but he opened a "hotmail" account to send the anonymous message.

15. At the time Grievant sent the e-mail message, he did not have a beard. He had a moustache. Grievant believed that the new directive on facial hair did not require him to shave. Grievant sent his e-mail message after discovering many employees had used the Employer's e-mail system to comment on the facial hair directive.

16. Evidence was introduced on e-mail messages sent by seven Department employees in reply to the anonymous e-mail sent by Grievant. The replies were critical of the e-mail message, including the fact that it was sent anonymously. In addition, many employees commented to Kotkin about the e-mail message. Most of the comments were critical of the author of the e-mail. A number of employees discussed the e-mail message with Tallon. Many employees also spoke to Grievant or sent him e-mails concerning his e-mail. Their reactions to the e-mail message were mixed (State' s Exhibit 13, pp. 1-7).

17. After the identity of the author of the e-mail message was determined, Kotkin and Tallon took the lead on determining the disciplinary action to be imposed. Richard Turner and Commissioner Gorczyk were not actively involved in the disciplinary process because the Employer wanted to ensure there was no appearance that disciplinary action was being taken because they were annoyed over Grievant's comments about them in the e-mail message.

18. The Employer requested that Grievant write a letter of apology concerning the e-mail message. Grievant offered to write a letter of apology. Grievant drafted a letter addressed to all Department staff. The draft of the letter, which he presented to Tallon, provided as follows:

> To begin with, I would like to offer an apology to Director Turner and Commissioner Gorczyk and all staff that found my e mail to be offensive. I am the person who wrote the e mail using the alias Trouble Maker.
>
> Why did I do it? I started it with the intent of being humorous. I thought everyone could use a good laugh over a "red herring" issue, especially with all the bad press the DOC has been receiving lately. When I returned to work from my vacation, no less than 10 people came up to me complaining about the facial hair issue. Considering all that has been going on in the press, I thought the whole thing was pretty funny and poor timing on the part of Central Office.
>
> I knew that this was coming down from Central well in advance of the directive. What surprised me was all the e mail that was sent out regarding this issue and that staff were expressing their opinions over the department's system and going public with their feelings.
>
> I wanted it to be something that people would laugh at and not take at all seriously. That is why I used an alias. Nobody takes mail from aliases seriously. And since there was so much commotion over the issue, I though I'd make light of it. Yes, it was poor judgment on my part.
>
> I've been employed by the DOC for almost 10 years. I have received excellent evaluations over the past few years. I do my duties to the best of my abilities. There have been times where I have not agreed

> with an assignment but have carried out that assignment. I have questioned decisions made by superiors concerning inmates, employees, policies, directives, and procedures but have always carried out my duties without fail. I have been loyal to this facility and have always desired only the best for the inmates, employees, the facility and the department as a whole.
>
> I take full responsibility for my actions and I am sorry if people were offended, for that was not my intention.
>
> I would like to note that state time was not used and state equipment was not utilized. I did this from my home in my off duty hours.
>
> (Grievant's Exhibit 8)

19. When Tallon received the draft of this letter from Grievant, he sent it to the Employer's central office for review. Kotkin and Turner, among others, reviewed the draft. The Employer decided not to accept Grievant's letter of apology on the grounds that it did not reflect Grievant taking full responsibility for his actions and did not indicate sufficient awareness of the disruption caused or the feelings of the involved persons. There were no further attempts to draft an acceptable letter of apology, and Grievant never sent such a letter.

20. On or about July 30, 1998, VSEA filed a grievance "on behalf of itself and any and all similarly affected employees of the Department of Corrections in the Supervisory Unit" over the implementation of the facial hair directive. The grievance requested that the directive be rescinded (Grievant's Exhibit 3).

21. On September 27, 1998, Tallon sent Grievant a letter of discipline. The letter provided in pertinent part as follows:

> You are hereby notified of your demotion from Correctional Officer II to Correctional Officer I, effective September 27, 1998 . . . The reasons for this action are as follows:

> On July 8, 1998, you wrote an E-Mail note addressed to all DOC E-Mail addresses which criticized the recent DOC Directive regarding air packs and facial hair, and, also, specific DOC managers. Your E-Mail note was inappropriate, disruptive and insulting in tone, language and message. You also attempted to hide your identity by using the name "troublemaker" as the sender of the note. Your actions violated DOC Directive 76.04 on Electronic Mail, and DOC Work Rules #1, 6, and 9.
>
> You will be subject to disciplinary action up to and including dismissal for future violations of the DOC Electronic Mail Directive, DOC Work Rules #1, 6, and 9 and all other State policies or rules relating to E-Mail.
>
> . . .
>
> (State's Exhibit 2)

22. DOC Directive 76.04 on "Electronic Mail", referenced in the letter of discipline, provides in pertinent part as follows:

> . . .
>
> This directive applies to all Department of Corrections employees . . .
>
> ***B. Use of E-mail***
>
> . . . Staff may use e-mail to communicate informally with others in the Department so long as the communication meets professional standards of conduct . . . Staff will not use e-mail for illegal, disruptive, unethical or unprofessional activities, or for personal gain, or for any purpose that would jeopardize the legitimate interests of the State.
>
> . . .
>
> ***F. Roles and Responsibilities***
>
> . . .
>
> **Prohibited Uses**
>
> E-mail shall not be used to . . . send any material that could be offensive or insulting to other persons. Since e-mail messages can be forwarded, no material that could be considered offensive or insulting to any person should be communicated by e-mail . . .
>
> (E-mail shall not be used to) send material that could be disruptive in nature to other persons. This applies to the entire department and not just the recipient of the message . . .
>
> (State's Exhibit 15)

23. The Department of Corrections Work Rules referenced in the letter of discipline provide as follows:

> 1. No employee shall violate any provision of the collective bargaining agreement or and (sic) State or Department work rule, policy, procedure, directive, local work rule or post order.
>
> . . .
>
> 6. No employee shall, while on duty or engaged in an activity associated with the Department of Corrections, engage in verbal or physical behavior towards employees, volunteers or members of the public, which is malicious, demeaning, harassing or insulting. Such behaviors include, but are not limited to: profane, indecent or vulgar language or gestures, actions or inactions which are rude (such as ignoring a visitor who attempts to gain entrance to the building) or treating inmates in a demeaning manner with no legitimate rehabilitative justification. No employee shall exhibit behaviors which are physically or mentally abusive towards offenders.
>
> . . .
>
> 9. No employee, whether on or off duty, shall comport himself or herself in a manner that reflects discredit upon the Department.
>
> . . .
>
> (State's Exhibit 16)

24. Grievant had notice of the e-mail directive and the Work Rules (State's Exhibit 16).

25. In deciding the appropriate discipline for Grievant, Tallon and Kotkin determined that the disruptive and disrespectful behavior demonstrated by Grievant, and the lack of leadership he displayed in sending the e-mail message compromised his ability to serve as acting shift supervisor and to serve as a role model for Correctional Officer I's and offenders. Grievant's action adversely affected Tallon's confidence that Grievant would adhere to the values and principles held by MVRCF management. Tallon does not view the demotion of Grievant as a permanent demotion, and will consider Grievant for future Correctional Officer II openings.

26. In September of 1998, Grievant was diagnosed with depression. There is no evidence that Grievant made the Employer aware of this diagnosis.

27. Upon being demoted, Grievant's hourly rate of pay was reduced from $14.06 to $13.11. Subsequent to Grievant's demotion, Correctional Officer II's were upgraded and received an increase in pay. Correctional Officer I's also were upgraded and had their wages increased. Grievant received less money than other Correctional Officer I's due to the upgrade. This was because the upgrade resulted from a classification action initiated before Grievant became a Correctional Officer I, and only Correctional Officer I's employed at the time the classification action was initiated received a retroactive wage increase (State's Exhibit 2).

28. In an agreement dated January 22, 1999, VSEA and the Employer resolved the grievance over the facial hair directive that had been filed in July 1998. The parties agreed that any employees who had a beard or mustache prior to August 10, 1998, would not be required to shave the beard or mustache so long as they could obtain a proper seal with their masks. Grievant was among the 61 listed employees allowed to maintain their beard or mustache under this agreement (Grievant's Exhibit 4).

29. For approximately two years prior to the hearing in this matter, the following message was posted on a bulletin board hanging behind the desk of the secretary to Tallon:

> Grant me the serenity to accept the things I cannot change, the courage to change the things I can, and the wisdom to hide the bodies of those people I had to kill today because they pissed me off. Also, help me to be careful of the toes I step on today, as they may be connected to the ass that I may have to kiss tomorrow.
>
> (Grievant's Exhibit 9)

30. Tallon was not aware of this until the week before the hearing in this matter when his wife pointed it out to him. Tallon had taken no action by the time of the hearing to remove it or investigate how this had come to be placed on the bulletin board. His secretary was on vacation from the time he discovered it through the date of the hearing.

OPINION

Grievant contends that his demotion for sending the July 8, 1998 e-mail message was an inappropriate bypass of progressive discipline given his offense was not particularly serious, and given his work history, acceptance of responsibility and potential for rehabilitation. In addition, Grievant contends the discipline imposed on him was inconsistent because no one was disciplined for a message on the bulletin board over the desk of the Superintendent Tallon's secretary which contained inappropriate comments strikingly similar to Grievant's e-mail message.[1]

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 fairly implied, that such conduct would be grounds for discipline. In re Grievance of Brooks, 135 Vt. 563, 568 (1977). 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, 164 Vt. 145 (1995).

We first discuss whether the Employer has established the charge made against Grievant in demoting him. The burden of proof on all issues of fact required to establish

[1] In addition to these allegations, in the grievance filed with the Board Grievant claimed his demotion was not based in fact and his due process rights were violated during the course of the Employer's investigation. Grievant did not pursue these claims during the hearing and in his post-hearing brief, and we consider these claims waived by Grievant.

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). The Employer charged Grievant with writing an e-mail message on July 8, 1998 addressed to all Department of Corrections e-mail addresses which criticized a recent directive of the employer regarding emergency breathing apparatus and facial hair, and also was critical of specific managers. It is undisputed that Grievant sent the July 8, 1998 e-mail message. The contents of the e-mail were accurately characterized in the disciplinary letter. Thus, we conclude that the Employer has established the charge against Grievant.

The charge against Grievant having been proven, we must determine whether the discipline imposed by the Employer is reasonable given the proven facts. Id. at 266. We look to the factors articulated in Colleran and Britt, 6 VLRB at 268-69, to determine whether the proven charge justifies a demotion from Correctional Officer II to Correctional Officer I. The pertinent factors here are: 1) the nature and seriousness of the offense and its relation to Grievant's duties and position, 2) the employee's job level including supervisory role, 3) the effect of the offense on supervisors' confidence in Grievant performing his duties, 4) the clarity with which Grievant was on notice that such conduct could lead to discipline, 5) the employee's past work record and disciplinary record, 6) the consistency of the penalty with those imposed upon other employees for similar offenses, 7) mitigating circumstances, and 8) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

Grievant contends that he did not have fair notice that he could be disciplined for sending e-mail to other employees from his home. We disagree. At the very least, Grievant should have known that sending an anonymous message containing insults and

personal attacks on senior management, and a call for refusal to obey management directives, to the hundreds of Department of employees with an e-mail account could result in his being disciplined. The fact Grievant took deliberate steps to hide his identity when sending the e-mail provides evidence of his knowledge that his conduct was wrong.

Also, Grievant was on notice that his conduct violated a Department directive on e-mail and Department Work Rules. Grievant claims that these directives do not regulate the use of e-mail by an employee at home on a personal computer. If we were to accept Grievant's contention, this would mean that an employee could easily shield oneself from the reach of Department directives simply by choosing to send anonymous work-related messages to other Department employees from home. We cannot construe the directives to lead to such a result. This is particularly so given the facts in this case. Grievant sent a message that all Department employees with an e-mail account would receive at work, and the message dealt solely with a recent directive issued by Department management.

The e-mail directive placed Grievant on notice that he was prohibited from sending an e-mail message to other Department employees that was disruptive, and was offensive and insulting to other persons, and did not meet professional standards of conduct. The e-mail message Grievant sent contained all of these prohibited characteristics.

Rules 1, 6 and 9 of the Department Work Rules also placed Grievant on notice that he could be disciplined for sending the e-mail message at issue. Rule 1 prohibits employees from violating Department directives and work rules. Rule 6 prohibits engaging in verbal behavior towards employees which is malicious, demeaning or insulting. Rule 9 prohibits employees from comporting themselves in a manner which

reflects discredit upon the Department. Grievant's e-mail message violated each of these rules.

Further, the supervisory feedback which Grievant received two weeks prior to sending the e-mail message provided notice to him that rude and disrespectful behavior towards superiors could result in his discipline. He demonstrated such behavior in sending the e-mail message. In sum, Grievant had ample notice that sending an offensive e-mail message to other Department employees could lead to his discipline, and the e-mail message he sent specifically violated the Department's e-mail directive and Work Rules.

Grievant's offense was serious when considered in relation to his job duties and job level. As a Correctional Officer II, Grievant served as a role model for offenders and lower-level Correctional Officer I's. At times, he assumed significant supervisory responsibilities as an acting shift supervisor. He acted contrary to his responsibilities and role in sending an e-mail message that encouraged disrespect for his superiors and defiance of their directives. He engaged in personal attacks questioning his superiors' honesty and competence, suggesting that a superior would "kiss" his "ass", and making a crude reference to the Commissioner's sexual development. He suggested it was time for a "revolution" and recommended that employees "increase the hate". Such an offensive and disruptive e-mail constitutes serious misconduct warranting a severe disciplinary response.

Grievant attempts to minimize the seriousness of his behavior by indicating his e-mail message was an attempt at humor. Some parts of the message may be considered humorous. However, the bulk of the message is far from humorous but instead reflects a

discontented employee lashing out at management in an inappropriate manner. There is nothing humorous about crude statements about superiors, questioning superiors' honesty, and encouraging employees to disregard management directives and "increase the hate".

Given the content of Grievant's e-mail message, it was reasonable for Superintendent Tallon to lose confidence that Grievant could fulfill his responsibilities as a Correctional Officer II. The Employer determined that Grievant's ability to serve as acting shift supervisor and as a role model for Correctional Officer I's had been compromised. Grievant contends that the Board should not be persuaded by the Employer's concerns about Grievant serving as an acting shift supervisor since serving in such capacity is not required of all Correctional Officer II's. Grievant maintains that the Employer could have addressed its concerns by retaining him as a Correctional Officer II, but not assigning him to serve as an acting shift supervisor, and imposing some other form of discipline.

It is true that not all Correctional Officer II's serve in the role of acting shift supervisor, but most of them do. It was reasonable for the Employer to demote Grievant and ensure there were enough Correctional Officer II's to serve in the acting shift supervisor role, rather than not demote him and reduce the available pool of acting shift supervisors. Further, it was reasonable for the Employer to consider Grievant's responsibilities as a role model in deciding it was not appropriate to retain him in the higher level position.

Grievant contends the discipline imposed on him was inconsistent because no one was disciplined for a message on the bulletin board over the desk of Superintendent

Tallon's secretary which also contained inappropriate comments. We do not believe the situations are comparable. That message was not sent to every employee in the Department with an e-mail account. That message does not contain personal attacks. That statement does not urge non-compliance with directives of the Employer.

Also, it is premature to conclude no disciplinary action resulted from the bulletin board message. Superintendent Tallon became aware of the message shortly before the hearing in this matter, and had not had an opportunity to question the secretary over whose desk the message was displayed.

Grievant offers as a mitigating circumstance that he was suffering from depression at the time he sent the e-mail message. We cannot give significant weight to this claim for several reasons. The first problem is timeliness. The evidence indicated that Grievant was diagnosed as depressed in September, 1998, which was two months after he sent the e-mail message at issue. It would be a matter of speculation to conclude he was depressed two months before such a diagnosis was made. Additionally, there is no evidence that the Employer was made aware of Grievant's mental health problems prior to disciplining him. Due to the above, we do not need to address whether a claim of depression would be a mitigating circumstance.

Grievant also claims his acceptance of responsibility for his actions and offer to write a letter of apology should serve as a mitigating circumstance. Upon review of the draft of Grievant's letter of apology, we are not persuaded that he has accepted full responsibility for his actions. In the draft, although he does offer to apologize, he continues to be critical of the Employer's motivation in issuing the facial hair directive, and he justifies his anonymous e-mail message in part as an attempt at humor which

would not be taken seriously because it was anonymous. The Employer reasonably concluded that the draft did not reflect Grievant taking full responsibility for his actions and did not indicate sufficient awareness of the disruption caused or the feelings of the involved persons.

Grievant also relies on his prior work record and absence of any discipline of record during his employment to support his contention that demotion constituted an inappropriate bypass of progressive discipline. Grievant submits that a reprimand or short suspension would have served as an adequate sanction in this case. Grievant relies on the Board decision in Grievance of Nunes, 20 VLRB 282 (1997), to contend a lesser penalty would have been appropriate. In Nunes, the Board determined that the employer was not justified in demoting a Correctional Officer II, whom had a good work record and had not been previously disciplined, due to one occasion in which the employee engaged in misconduct.

This case is not comparable to the Nunes case. There, the Board determined that an employee overreacted to a situation and used poor judgment in not accepting a post assignment. However, the Board determined that some of the charges against the employee were not established, and concluded that mitigating circumstances provided some justification for some of the employee's actions. 20 VLRB at 294. Here, the charge against Grievant has been established in its entirety, the misconduct engaged in by Grievant was more serious, and mitigating circumstances did not provide any justification for Grievant's actions.

We are somewhat troubled by the severity of the discipline in this case given Grievant's good prior work record. Ultimately, however, we are persuaded that the

Employer's reasons for deciding to demote Grievant were reasonable. The Employer determined that the disruptive and disrespectful behavior demonstrated by Grievant, and the lack of leadership he displayed, in sending the e-mail message compromised his ability to continue to serve as acting shift supervisor and serve as a role model for Correctional Officer I's and offenders. This was a reasonable conclusion, and it was thus appropriate for the Employer to bypass progressive discipline and demote Grievant. We are heartened that Superintendent Tallon does not view the demotion of Grievant as a permanent demotion, and will consider Grievant for future Correctional Officer II openings.

ORDER

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

Dated this 23rd day of September, 1999, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Catherine L. Frank, Chairperson

Carroll P. Comstock

Richard W. Park