

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 98-23
MATTHEW GREENIA)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On April 20, 1998, the Vermont State Employees' Association, Inc. ("Association") filed a grievance on behalf of Matthew Greenia ("Grievant") against the State of Vermont, Agency of Human Services, 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 Richard Park, Acting Chairperson; Carroll Comstock and John Zampieri on October 15 and 29, and November 6, 1998. Special Assistant Attorney General George Gay represented the Employer. VSEA General Counsel Samuel Palmisano represented Grievant.

On October 12, 1998, three days prior to the first scheduled hearing in the case, Grievant filed a motion to amend his grievance. On October 22, 1998, the Employer filed a memorandum in opposition to Grievant's motion to amend. On October 29, 1998, the Board denied Grievant's Motion to Amend. At the beginning of the November 6 hearing, the Employer raised objections to an evidentiary ruling

the Board had made during the October 15 hearing and requested that the Board reconsider its earlier ruling. The Board denied the Employer's request for reconsideration and upheld its earlier evidentiary ruling, stating that it would set forth the basis for such decision in its written opinion. Grievant filed a post hearing brief on November 25, 1998; the Employer filed a post hearing brief on November 30, 1998.

FINDINGS OF FACT

1. Chittenden Regional Correctional Facility ("CRCF") lodges both male and female inmates. Inmates are assigned to, and reside in, living units. Each living unit consists of assigned rooms for sleeping, a common bathroom and a common room, called a day room. Within a unit, inmates are allowed to walk about freely, except during certain hours during the night. There are numerous living units throughout the facility (State Exhibit 2).

2. During all relevant time periods, female inmates were in the WB and MA units, unless they were assigned temporarily to a special unit for disciplinary problems. The WB and MA units are adjacent to each other. The remaining living units are all male units, including the MC unit which is in the same wing as the WB and MA units and directly adjacent to MA (State Exhibit 2).

3. All of the living units are filled beyond their intended capacity. The facility was designed to house 88 inmates. During all relevant time periods, between 230 and 250 inmates were housed at the facility. The WB unit was intended to house 22 inmates and the MA unit was intended to house 16; there frequently are between 40 and 50 female inmates incarcerated in each of these units. Each assigned room

contains one or two bunk beds for two to four inmates. If there are more female inmates incarcerated than the unit's capacity, some of the inmates are assigned to sleep in the unit's day room. Day rooms were initially intended to be used for daytime socializing. However, they now contain bunk beds so they can be used for bedrooms as well (State Exhibit 2).

4. Both male and female inmates leave their living units daily to go to such destinations as the cafeteria, gym, classrooms, or infirmary. It is not unusual for inmates to be called to the booking room to pick up packages or to take trash to the trash room. Inmates also may work at facility jobs such as in the facility laundry. Female and male inmates may occasionally interact when they are outside of their living units (State Exhibit 2).

5. Correctional officers generally work one of three shifts: first shift from 7:30 a.m. - 3:30 p.m., second shift from 3:30 p.m. - 11:30 p.m., or third shift from 11:30 p.m. - 7:30 a.m. First shift is generally the busiest shift. There is only one supervisor on duty on second and third shift and such supervisor patrols the entire facility on a regular basis. The WB and MA units each have one unit officer on duty during second and third shift. For short breaks, the WB and MA unit officers can be relieved by the "float" officer or by the supervisor or acting supervisor on duty. A float officer is not assigned to any specific unit or duty but fills in where he or she is needed.

6. Inmates are free to visit and congregate in their respective living units, except during headcount. Inmates must return to their assigned rooms for each headcount. The last head count of the day is at 11:00 p.m., called "lock down", after

which time inmates are required to remain in their assigned rooms for the remainder of the night unless they ask and receive permission to go to the bathroom. The WB and MA rooms are not locked at "lock down" and it would be possible for female inmates to leave their rooms and go to the bathroom or the day room without the permission or assistance of an officer.

7. *An inmate loses privacy upon incarceration at CRCF. They share rooms, meals, bathrooms and day rooms. They travel in a line to the cafeteria, a classroom or to the gym under the observation of one or two correctional officers. They are either escorted by, or are under the observation of, a correctional officer when they leave their living unit. All doors, including the bathroom doors, have windows. Anyone walking down the hallway can look into the inmates' rooms or the bathroom. A thin sheet usually covers each toilet stall and shower.*

8. *Inmates have much idle time. It is not uncommon for them to make up stories about each other or to spread rumors throughout the facility. Such stories and rumors may be about relationships between inmates and correctional officers or about relationships between inmates. It is not uncommon for female and male inmates to form relationships through their limited daily contact. Many officers, as well as inmates, have been the target of such stories and rumors.*

9. *Inmates often are facing months and years of incarceration with little privacy and limited freedom and power. It is not uncommon for inmates to attempt to manipulate each other and correctional officers for special favors, more freedom, or more control over their lives. Inmates sometimes form alliances and plot against other inmates or correctional officers.*

10. Grievant began working for CRCF in March, 1992, as a temporary correctional officer. He became a permanent status Correctional Officer I ("CO I") approximately six months later. In March 1997, Grievant was promoted to the position of Correctional Officer II ("CO II"). Grievant hoped to become a shift supervisor and during the Summer months of 1997 was given the opportunity to perform the duties of an acting shift supervisor. He generally worked second or third shift as an acting shift supervisor, a float officer or as the unit officer on the MC unit during this time period.

11. Grievant was known by his supervisors to hold inmates accountable for their actions and to be fair in his dealings with inmates. Throughout his tenure, Grievant received "satisfactory" performance evaluations, including his final evaluation issued in June 1997, covering the period May 7, 1996, through May 7, 1997 (Grievant Exhibits 1, 2, 3).

12. During the Summer 1997, Grievant often worked on the women's units in his capacity as a float officer or as an acting shift supervisor. He came to know inmate Tara Byrd. Byrd became incarcerated in June 1997 as the result of a conviction for aggravated assault and was sentenced to serve from two to eight years in prison (Grievant Exhibit 17).

13. During the relevant time period, Courtney Gourley was a correctional officer at CRCF. Gourley generally worked second shift on the women's units. She frequently interacted with Grievant when he relieved her in his capacity as acting shift supervisor or as a float officer. Gourley observed flirtation between Byrd and Grievant and their engaging in conversations that appeared inappropriate between a

female inmate and a male correctional officer. It was Gourley's observation that Byrd wore her sports bra around the unit when Grievant was working. She also observed Byrd leaning over Grievant's desk and chatting like they were long lost friends. Gourley was concerned that Grievant responded to Byrd's flirtation and acted too friendly toward her. Gourley also was concerned that Grievant spent too much time patrolling the hall and spending time in Byrd's room when he was working on the women's unit. Gourley never heard Grievant make comments of a sexual nature to Byrd or to any other female inmate (State Exhibit 12).

14. Gourley and Grievant had a amicable working relationship and Gourley felt that she should warn Grievant that he should stop acting so friendly towards Byrd. She mentioned her concerns to him one or two times during July or August 1997 in the employee parking lot after second shift. Grievant said that he would keep her concerns in mind and thanked her for warning him.

15. During the same time period, approximately July and August 1997, there were rumors around the facility that there were some letters circulating between Byrd and Grievant. Correctional Officer Teresa Mueller heard the rumors and spoke to Gourley about such letters and asked her to keep her eyes out for them.

16. Gourley was working in the women's unit on August 8, 1997, when her supervisor requested that she move an inmate out of the day room into Byrd's room. This inmate, Donna or Dawn Wixson, had previously attempted suicide and none of the inmates, including Byrd, wanted her in their room. At some point Grievant, who was acting shift supervisor, relieved Gourley's supervisor and came into the women's unit to relieve Gourley. Byrd was vocal in her opposition to

Wixson rooming with her. Byrd also was known to have engaged in violent behavior and Grievant was concerned that she may direct her anger towards Wixson. Byrd met with Grievant in the office and after such meeting Grievant changed the room assignments and moved Wixson out of Byrd's room and into another inmate's room. The next day Wixson told Gourley that she had overheard a conversation in the bathroom in which Byrd told inmate Melissa Hickok that she could get anything she wanted if she wore her sports bra and unzipped it a little. Gourley wrote an incident report to Grievant in which she told Grievant about Wixson's allegations (State Exhibit 6).

17. During this same period, Gourley came to believe that Byrd's roommate at the time, inmate Cindy Abbot, had the letters rumored to be circulating and referenced in Finding of Fact No. 15. On or about August 18, 1997, Gourley asked inmate Lois Stevens Pratt if she could find these letters. Pratt pulled a letter out of her shoe and gave it to Gourley. The letter was dated August 11, 1997, was not signed and was not addressed to anyone. The writer, or writers, referred to "enjoying" last night and looking forward to engaging in a sexual act with the intended receiver in the future. The writer, or writers, also referenced a vacation which the intended receiver was on at the time. Because of the above-referenced rumors and the fact that Grievant started a vacation on August 11, 1997, this letter appeared to be written by Byrd for Grievant. Grievant's vacation days had been posted on a monthly calendar to which both inmates and correctional officers had access (State Exhibits 7, 8, 9, 13).

18. Gourley told her supervisor, Jeff Smialek, about the rumors involving

Grievant and Byrd and gave him the letter that appeared to be from Byrd to Grievant. Smialek gave the unsigned handwritten letter to Chief of Security Wally Mariani with a memorandum dated August 19, 1997, which set forth Gourley's concerns. Smialek also stated his own concern to Mariani that Grievant was "a target in this" (State Exhibit 7).

19. *Mariani brought the matter to CRCF Superintendent John Murphy's* attention. Murphy requested an investigation of possible misconduct on the part of Grievant. Murphy also temporarily prohibited Grievant from working on the women's units until an investigation had been completed (State Exhibits 9, 10, 11).

20. As part of the investigation of Grievant's alleged misconduct with Byrd, Murphy interviewed Mueller and Gourley. Gourley was a reluctant witness at her August 26, 1997, interview and had a VSEA representative with her during the interview. Gourley told Murphy during this interview about situations she had personally observed between Grievant and Byrd and about the rumors and complaints that she had heard from some of the female inmates regarding Grievant and Byrd (State Exhibit 12).

21. Gourley relayed her concerns to Murphy about Grievant spending too much time with Byrd and told him that she had warned him one or two times in the parking lot about his interactions with Byrd. Gourley told Murphy about the rumors she had heard from inmates that Grievant and Byrd were passing letters back and forth. She also told Murphy she had heard inmates complain that Grievant spent too much time walking up and down the hallway in the women's unit, looking into their rooms. Gourley relayed the August 8, 1997, incident set forth in Finding of Fact

No.16 involving inmate Wixson's allegations (State Exhibits 6, 12).

22. Murphy compared the handwriting of the letter which Gourley had obtained from Pratt to a sample of Byrd's handwriting on file and concluded that Byrd had not written it. He did not seek the services of a handwriting specialist, nor did he have it examined for fingerprints. It is not known who wrote this letter or for what purpose.

23. Murphy requested that Casework Supervisor Theresa Jean interview Pratt, the inmate who had given Gourley the letter; Hickok, the inmate to whom Byrd was alleged to have made a remark about getting what she wanted with Grievant if she unzipped her sports bra; Wixson, the inmate whom Grievant had removed from Byrd's room and who claimed to have overheard the conversation between Byrd and Hickok; and Byrd. Jean interviewed these women on or about August 27, 1997 (State Exhibit 13).

24. Pratt told Jean that she obtained the letter from Byrd's roommate, Cindy Abbott, who had told Pratt that Byrd was trying to get Grievant in trouble with these letters. Pratt told Jean that she believed this to be true because she had overheard Byrd and Abbott talking about this. Pratt is the mother of another inmate, Tess Devino (State's Exhibits 13, 14).

25. Hickok told Jean that she had heard rumors that Byrd was bragging that she could get Grievant to do anything she wanted by flashing her breasts (State Exhibit 13, 14).

26. Wixson told Jean that on the night of her room change Byrd had spent time in the office with Grievant and had come out of the office saying that it did not

take much to "show a little titty to get your way" or words to that effect. This account differed from that which she had told Gourley the day after the room change and set forth in Finding of Fact No. 16. Wixson told Jean that Byrd's roommate, Abbott, was trying to blackmail Byrd with the letters, implying that Byrd had written letters to Grievant. Wixson complained that Grievant treated younger female inmates more favorably than older inmates and complained that he constantly walked up and down the halls and walked into the bathroom of the women's unit (State Exhibits 13, 14).

27. Wixson later claimed that she and inmates Karen Dolan and Tess Devino had seen Byrd show Grievant her breasts by opening up her bathrobe while walking down the hall. Although this incident had occurred prior to her meeting with Jean, Wixson did not tell Jean about it during this August 27, 1997 interview (State Exhibits 13, 14).

28. Byrd told Jean that she did not show her chest to Grievant to get a room change, did not write a letter to Grievant, had not discussed trying to get Grievant out of the unit with Abbott and did not really know Grievant. By the time these interviews took place, Byrd and Abbott were no longer roommates (State Exhibits 13, 14).

29. Byrd later contended that she had written the August 11 letter to Grievant and that she did show him her breasts, but she did not provide this information to Jean on August 27, 1997 (State Exhibits 13, 14).

30. Jean was confused by the conflicting information Pratt, Hickok, Wixson and Byrd gave her. She also was concerned that inmates may be trying to

"set up" Grievant, but she did not investigate her concern.

31. Jean wrote a memorandum to Murphy summarizing her interviews which consisted of the conflicting opinions, rumors and observations set forth in Findings of Fact 24, 25, 26 and 28. Murphy reviewed Jean's report, but did not request that she investigate the allegations of Pratt that inmates were trying to set up Grievant. Murphy continued to investigate allegations of misconduct by Grievant (State Exhibits 13, 14).

32. On September 15, 1997, Murphy interviewed Grievant in his office. Murphy asked Grievant if Gourley had ever approached him in the parking lot and told him that she had concerns regarding his behavior with Byrd. Grievant denied that any such conversation had ever taken place. Murphy asked, "If you had such a conversation would you remember it?" and Grievant responded, "Definitely would remember that, yes, hundred percent". Grievant also denied that he knew Byrd and stated that he only recalled one conversation with her in a hallway (State Exhibit 15).

33. Sometime during the Fall 1997, Grievant had an opportunity to bid on available posts in the facility. His first choice was working in the booking room, his second choice was working in the control room and his third choice was working in MC, the men's unit near the women's units. He was not given his first and second choices and was assigned to MC. There were occasions in which he met with the WB and MA unit officers at the change of shift in the women's unit offices and times that he interacted with female inmates, but he was never again assigned to work in the women's unit.

34. Inmates Karen Dolan and Byrd had been childhood friends prior to

their incarceration. They often had open disagreements and arguments while incarcerated together at CRCF. On October 22, 1997, Byrd filed a grievance against Dolan, stating that Dolan constantly called her vulgar names and spread stories about her performing sexual acts with correctional officers. As a result of this grievance, Murphy assigned CO II JoAnn Kenyon to investigate the matter. Kenyon interviewed both Byrd and Dolan and concluded that both Dolan and Byrd were involved in name calling and harassing each other. She advised them to try to avoid each other. The grievance did not advance beyond this level (State Exhibits 16, 17).

35. On November 26, 1997, Dolan filed a grievance against Grievant alleging that he had yelled "you shut your fucking mouth" and "at ease" at her. Murphy assigned Jean to investigate. Grievant acknowledged saying "at ease" but denied the other charge and no further investigation ensued (State Exhibit 19).

36. Melissa Crepeau is a correctional officer at CRCF and primarily worked the second shift in the women's units from August 1997 through January 1998. Sometime in early December 1997, inmate Dolan told Crepeau that she was "going to get that fucker", referring to Grievant. On December 9, 1997, Dolan showed officer Crepeau a letter she claimed to have written about Grievant and Byrd to get Grievant in trouble. During this same time period, CO II Mueller also told Crepeau that she had overheard some of the female inmates saying that Dolan had planted a letter and was trying to get Grievant in trouble. Crepeau wrote a memorandum to Mariani in which she set forth this information. She also warned Grievant that some inmates may be trying to get him in trouble (State Exhibit 21).

37. On December 9, 1997, Grievant wrote Mariani a memorandum

expressing his fears regarding the rumors circulating around the facility about him and Byrd. He indicated that he believed that the rumors were coming from Dolan, Devino and two other female inmates. He indicated that officer Crepeau had told him that inmate Dolan was going to try and get him in trouble. He also stated that he believed that these four inmates disliked Byrd and were trying to cause trouble (State Exhibit 20).

38. On December 10, 1997, inmate Devino gave Shift Supervisor Scott Camley the letter referenced in Finding of Fact No. 36, claiming that she found the letter on the floor. The typewritten letter was addressed to Grievant and generally stated that the sender was "distressed and violated over" Grievant's actions. It referenced EEOC guidelines regarding sexual harassment. Camley forwarded the letter to Mariani with a memorandum which also stated that "I believe the women have found a way, in their minds, to try and get to [Grievant]. To my knowledge, [Grievant] has not worked at all in these units so I don't know how they can say these things are happening" (State Exhibit 22).

39. At no time did Mariani or Murphy order an investigation to determine whether Grievant was being set up by the inmates despite the fact that such concerns had been articulated since August 1997 by inmates and correctional officers, including shift supervisors Smialek and Camley and officer Crepeau. Jean also had concerns that inmates were trying to set up Grievant after her August 27 interviews with inmates Pratt, Hickok, Wixson and Byrd (State Exhibits 7, 13, 14, 20, 21).

40. On December 10, 1997, two correctional officers found a container of home brew in the MC unit. CO II Cota wrote an incident report to Shift Supervisor

Smialek regarding the incident and informed Smialek in such memorandum that inmates had told him that Grievant was always out in the hallway talking to the female inmates during his shift, which was referred to as "party time" (State Exhibit 25).

41. Byrd filed a grievance on December 11, 1997, complaining that there were rumors circulating about her and Grievant, her and Crepeau, and her and two male inmates. She stated that Dolan had a "big grudge" against her and that she and Devino were responsible for these rumors (State Exhibit 23).

42. Murphy assigned Jean and Mariani to investigate Byrd's complaint. Jean met with Byrd and Byrd immediately complained that Devino was always spreading rumors about her. Jean then requested that Devino join the interview and interviewed both women together. Devino kept insisting that Byrd and Grievant were involved in a relationship. At some point in this interview, Devino stated that Grievant had propositioned both of them in the day room of the women's unit one night when Devino was assigned to sleep there. Byrd eventually agreed that this event had transpired. Both women stated that it had occurred the night before inmate Jackie Lipscomb was released from CRCF. They remembered this fact because the next day Lipscomb's bed became available and Devino was able to move out of the day room. Jean did not separate the women during this interview. Jean wrote a memorandum to Murphy recounting this interview, which was dated December 12, 1997 (State Exhibit 26).

43. Murphy reviewed Jean's memorandum and requested further investigation of Grievant's alleged actions. Neither he, Mariani, nor Jean checked the

facility's logs to determine what day Lipscomb left the facility or when Devino had been assigned to sleep in the day room. Neither he, nor Mariani nor Jean checked the facility logs to determine whether Grievant worked the day before Lipscomb left CRCF. Lipscomb was released on the morning of November 20, 1997. Grievant's time sheet indicated that he did not work the previous day, November 19, 1997 (State Exhibit 26; Grievant Exhibit 27).

44. On December 13, 1997, inmate Shannon Brown wrote a letter to Mariani complaining about the false rumors circulating in the women's units regarding Byrd and Crepeau and Byrd and Grievant. She stated that she believed the letter given to Camley, referenced in Findings of Fact No. 36 and 38, was "sent in revenge between inmates" against the guards, but did not identify which inmates or which guards. Jean and Mariani met with Brown. No further investigation of these allegations of revenge ensued (State Exhibit 27).

45. As part of the investigation of Grievant's actions, inmates Byrd, Devino and Dolan wrote affidavits which Mariani notarized (State Exhibits 28 - 30, 32).

46. Byrd set forth in her affidavit details of the alleged incident in the day room with Devino which she and Devino had previously related to Jean. She stated that she told Grievant that she and Devino were not going to do anything in front of him; he left the day room and when he returned asked them again and Grievant finally left after he realized that they were not going to do anything in front of him. She also stated in her affidavit that, at the end of November, Grievant had showed her special favors by giving her gum and soda and on November 28, 1997, she had

received disciplinary action for having such gum. Byrd stated in her affidavit that Grievant had told her that he left her a cigarette lighter in her room in the MA unit, not knowing at the time that she had changed rooms. Byrd stated that Grievant had asked her to have sex with him in the booking room at the beginning of November 1997. Byrd submitted a subsequent affidavit in which she stated that Grievant stared at her when she was in the WB unit while she was taking a shower and while she was changing in her room; Byrd had been in the WB unit during her first four months of incarceration. She also indicated that Grievant made her feel uncomfortable (State Exhibits 28, 32).

47. Devino stated in her affidavit that she and inmate Hickok had seen Byrd open up her bathrobe and show Grievant her breasts in order to get a room change. Devino also set forth her version of the alleged incident in the day room. Devino contended that Byrd was flirting with Grievant and Devino left the room to go to the bathroom. Devino indicated that, when she returned, Byrd and Grievant were engaged in sexual banter and talking about having a sexual threesome. At a certain point, Devino contended that Grievant asked Byrd to touch Devino, and Byrd said "let's just do it and fuck with him" and Byrd touched her breast. Devino further stated in her affidavit that Byrd told her that Grievant had given her gum and soda in the booking room. Devino offered to provide the Employer with a date in which Byrd was alone with Grievant in the booking room. Devino also complained in her affidavit that Byrd made advances towards her when she was her roommate, which advances resulted in a change of roommates for Devino. Devino further indicated that, after the roommate change, Byrd told Devino that Grievant had left a lighter for

her in her old room. Devino stated that this lighter was a gift from Grievant after he had propositioned them in the day room (State Exhibit 29).

48. Dolan stated various things in her affidavit, including seeing Grievant give Byrd money and Byrd give Grievant letters. She stated that Byrd had showed Grievant her breasts to move Wixson out of her room; she later claimed that this happened in Byrd's room in Dolan's presence. She stated that she heard Grievant and Byrd tell each other how much they would miss each other while Grievant was on vacation. She did not offer specific dates other than events occurring "a few months ago" and "3 - 4 months ago". Dolan stated in her affidavit that she saw Devino write the letter referenced in Findings of Fact No. 36 and No. 38. She also indicated that Devino and inmate Brown were going to use the letter to bribe Grievant. This is the same letter that Dolan had earlier told officer Crepeau that she had written and which Brown had indicated in a letter to Mariani was sent "in revenge between inmates" (State Exhibits 27, 30).

49. Devino later claimed that she, Dolan, Byrd, inmate Jayna Montandon and another female inmate all wrote this letter together. It is not known who wrote this letter or for what purpose (State Exhibits 27, 30).

50. With the exception of officer Gourley during the summer months of 1997, no correctional officer observed Grievant acting in a manner around female inmates which could be perceived as being inappropriate. All reports and statements of this nature came from inmates. No correctional officer observed a female inmate exposing herself to Grievant or observed Grievant giving female inmates special favors.

51. Murphy reviewed the information gathered in the investigation, including the inmate affidavits. He did not follow through on information which could have provided specific dates for some of the allegations against Grievant. On December 17, 1997, Murphy gave Grievant a memorandum restricting him from working in any women's unit or supervising any female inmates. Such memorandum also stated in pertinent part:

These limitations on your duty assignments have been brought about by the following allegations: That you have asked female inmates to expose themselves to you, in exchange for special treatment, on numerous occasions; that you have asked female inmates to engage in sexual behavior between themselves so that you could view them so engaged; that you have arranged to have female inmates come to booking where you have proposition(ed) them and that you have engaged in acts of retaliation against female inmates

...

(State Exhibit 33).

52. On January 9, 1998, Murphy interviewed Grievant with his VSEA representative present. He asked Grievant if he had ever engaged in any of the behaviors set forth in the inmates' affidavits and Grievant denied such allegations (State Exhibit 35).

53. On February 13, 1998, Murphy gave Grievant a letter, which stated in pertinent part:

Pursuant to Article 14, sec. 9, of the Agreement between the State and VSEA, you are being temporarily relieved from duty, with pay, pending the completion of an investigation into the following allegation:

That you have engaged in unprofessional conduct with one or more female inmates while you have been employed as a Correctional Officer.

...

(State Exhibit 36).

54. On March 16, 1996, Murphy sent Grievant a Loudermill letter notifying him that he was contemplating his dismissal for gross misconduct. Such letter stated in pertinent part:

The reason your dismissal for Gross Misconduct is being contemplated is as follows:

That you engaged in an inappropriate course of conduct with female offenders while on duty as a correctional officer. This course of conduct included requesting sexual contact with inmate T.B.; Requesting that female inmates T.B. and T.D. engage in sex so that you might watch them; giving special treatment to female inmates who had exposed themselves to you. Each of these offenses provides just cause for your immediate suspension.

Furthermore, you were dishonest with the department by adamantly denying during an investigatory meeting on 9/9/97, that a conversation with a co-worker, C.G., regarding your behavior with female inmate T.B., had ever taken place. This behavior further supports your dismissal . . . (State Exhibit 37).

55. On March 24, 1998, Grievant and his VSEA representative met with Murphy. At the meeting, Grievant denied the allegations against him, although he acknowledged that he and Gourley may have had a brief conversation about Byrd in the parking lot, although he could not recall such conversation.

56. Mariani had participated in some of the inmate interviews with Jean and had notarized Byrd, Devino and Dolan's affidavits. He also reviewed the affidavits. Based upon his knowledge of the facts, Mariani did not believe there was sufficient evidence to dismiss Grievant.

57. Murphy determined that there was sufficient evidence to support Grievant's dismissal. On March 27, 1998, Murphy notified Grievant that he was dismissed from his CO II position for gross misconduct for the reasons contained in

the March 16, 1998, Loudermill letter (State Exhibit 38).

58. Article 14 of the Contract provides in pertinent part:

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:

...

(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) discharge

...

(f) The parties agree that there are appropriate cases that may warrant the State:

- (1) bypassing progressive discipline . . .

59. Department of Corrections Work Rules # 1, # 4, and #5, which

Grievant received on May 15, 1995, provide in pertinent part:

1. No employee shall violate any provision of the . . . Department work rule . . .
4. Employees shall be honest and complete in their descriptions, whether given orally or in writing, to events occurring in the work place and in all other circumstances related to their employment.
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 (State Exhibit 3).

OPINION

Grievant contends that the Employer violated Article 14 of the Contract by dismissing him without just cause. The Employer raised an evidentiary issue on November 6, 1998, which we will address after addressing the merits of this case.

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 engaging in an inappropriate course of conduct with female offenders while on duty as a correctional officer, such course of conduct specifically included 1) requesting sexual contact with inmate Tara Byrd; 2) requesting that female inmates Byrd and Tess Devino engage in sex so that Grievant could watch them; 3) giving special treatment to female inmates who had exposed themselves to him. The Employer also charged Grievant with being dishonest by "adamantly denying during an investigatory meeting" in September 1997 that he had a conversation about Byrd with officer Courtney Gourley.

We first consider the three charges against Grievant which the Employer claims constitute an inappropriate course of conduct with female inmates. We conclude that the Employer has not established these three charges by a preponderance of the evidence.

The evidence the Employer relied upon to establish these charges rests on the

word of witnesses who made inconsistent, contradictory and conflicting statements: inmates Byrd, Wixson, Dolan and Devino. These witnesses changed their stories over time, contradicted themselves, contradicted each other, and gave inconsistent accounts of events in which they claimed to have witnessed or participated.

The unreliability of the Employer's witnesses can best be illustrated by the following example. The Employer charged that Grievant gave special treatment to female inmates who had exposed themselves to him. This allegation originated with inmate Wixson after Grievant moved her out of Byrd's room in early August 1997. Wixson initially "told" Courtney Gourley that she had overheard a conversation in the bathroom after the move in which Byrd was alleged to have stated that she could get anything she wanted if she wore her sports bra and unzipped it a little. Two weeks later, Wixson told caseworker Teresa Jean that on the night of the room change she saw Byrd leave Grievant's office and state as she left that it did not take much to get her own way by showing "a little titty". Although both of these accounts are not necessarily contradictory, such accounts also must be weighed against later claims made by Wixson. At no time did Wixson tell Jean that she actually had seen Byrd show her chest to Grievant; yet a year later, Wixson claimed at hearing to have seen Byrd open up her bathrobe in the hallway to show Grievant her breasts in the presence of herself and at least two other female inmates. It is not known whether this was supposed to have occurred on the night of the room change or on some other night. However, Wixson claimed that it had occurred prior to the time she met with Jean. It strains credulity that Wixson would not have mentioned such a notable event to Jean when Jean interviewed her on August 27, 1997, and casts doubt on Wixson's

credibility as a witness.

Similarly, we found the testimony of Byrd, Dolan and Devino could not be relied upon. We did not find Byrd, Wixson, Dolan and Devino to be untrustworthy witnesses because they were incarcerated for committing criminal acts, but because their accounts of various incidents changed, were inconsistent, contradictory and unsupported by corroborating evidence.

We recognize that there are power relationships which exist in correctional facilities between officers and inmates. We also recognize that there are power relationships among inmates; the evidence was clear that during the relevant time period there were shifting alliances among the involved female inmates residing at CRCF. Given such power relationships and shifting alliances, it is plausible that the inmates' accounts of various incidents changed over time because of fear of retaliation from each other or from correctional officers. However, such fear of retaliation does not explain why Byrd's account of the alleged incident in the day room is at variance with Devino's at a time when they appeared to be aligned together against Grievant. Such differences include the fact that Byrd claimed that she and Devino declined to touch each other when asked to by Grievant and he ultimately left the unit when he realized that they were not going to do anything. Devino claimed that Byrd was flirting with Grievant and engaging in sexual banter with him when he asked her to touch Devino. Devino claimed that Byrd said "let's just do it and fuck with him" and touched Devino's breast. Byrd claimed that Grievant left the room; Devino claimed that she left the room. Further, there is no explanation for the fact that Grievant was not even working on the night in which this

incident was alleged to have occurred. In short, although it may be plausible that inmates would contradict themselves and each other, it is difficult, without more evidence, to determine the true facts from the inmates' varying accounts.

No reliable witness, including officer Gourley, claimed to have heard Grievant make inappropriate sexual remarks to Byrd. No reliable witness, including officer Gourley, claimed to have seen a female inmate expose her breasts to him. No reliable witness, including officer Gourley, claimed that Grievant gave special treatment to female inmates. Although Gourley warned Grievant during the Summer 1997 about acting too friendly towards Byrd, she possessed no first hand knowledge that Byrd had exposed herself to Grievant and relied upon information from Wixson that Byrd had manipulated Grievant into transferring her from Byrd's room by offering Grievant a view of her chest.

Other evidence which could have corroborated the plausibility of a sexual relationship between Grievant and Byrd was similarly unconvincing. An August 11, 1997, letter, and a letter given to supervisor Smialek on or about December 10, 1997, were claimed to be written by various individuals and for various purposes. It is not known who wrote these letters or for what objective. Given that Byrd, Dolan and Devino's accounts of such letters varied over time, these letters merely cast additional doubt on their reliability as witnesses.

The Employer offered no dates when Grievant engaged in misconduct, no evidence that Grievant worked on such dates, no reliable witnesses to such misconduct and no corroborating evidence. In sum, we conclude that the Employer failed to prove by a preponderance of the evidence the first three charges against

Grievant that he engaged in an inappropriate course of conduct with female offenders while on duty as a correctional officer.

We turn to the fourth charge against Grievant, that he lied during an investigatory interview on September 9, 1997, with Superintendent Murphy. We conclude that the Employer has shown by a preponderance of the evidence that Grievant did not tell the truth during this interview and that officer Gourley did warn him about the appearance of his actions with Byrd.

The fact that some of the charges against Grievant have not been proven does not necessarily mean that his dismissal lacked just cause. Failure of an employer to prove by a preponderance of the evidence all the particulars of a dismissal letter does not require reversal of a dismissal action. Grievance of McCort, 16 VLRB 70, 121 (1993). In such cases, the Board must determine whether the remaining proven charges justify the penalty. *Id.*

We look to the factors articulated in Colleran and Britt, 6 VLRB at 268-69 (1983), to determine whether the proven charge justifies dismissal. The pertinent factors here are: 1) the nature and seriousness of the offense and its relation to the employee's duties and position, 2) the employee's past disciplinary record, 3) the effect of the offense upon supervisors' confidence in Grievant's ability to perform assigned duties, 5) the clarity with which Grievant was on notice of the prohibited conduct, and 6) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

Grievant's offense of lying to Superintendent Murphy was a serious offense. Grievant had fair notice, both implicit and explicit, that he could be disciplined for

such misconduct. Implicit notice existed because of the very nature of Grievant's duties as a correctional officer. Explicit notice existed in the Employer's work rules, specifically Work Rules #1, #4 and #5 which require employees to be honest in responding to questions related to their employment.

Nonetheless, we cannot sustain the Employer's decision to dismiss Grievant for his singular proven offense of lying. We look to the circumstances surrounding this disciplinary action. This incident occurred in September 1997. The Employer brought these charges against Grievant in March 1998. It conducted no further investigation of this charge between September 1997 and March 1998. The Employer only brought this charge against Grievant once the Employer decided to pursue the other charges. If the Employer viewed this issue as one warranting dismissal by itself, it is obvious the Employer would have taken action much sooner. Given the failure of the Employer to prove its other charges and its timing in bringing this charge, we conclude that dismissal is too severe a penalty for the proven offense.

Further, Grievant had no past disciplinary record and his immediate supervisors judged Grievant to be a satisfactory correctional officer. Given Grievant's overall work record and his supervisor's faith in his performance, we conclude that he has potential for rehabilitation. A suspension would have been an adequate and effective sanction to deter Grievant from engaging in dishonest behavior in the future. A suspension also would have served to demonstrate that the Employer viewed lying about circumstances related to his employment as a serious act of misconduct.

We conclude that the Employer would not have dismissed Grievant in the

absence of the other charges brought against him and that just cause did not exist for his dismissal. A penalty of a two weeks suspension would have been an appropriate penalty given Grievant's offense.

We now turn to discussing the evidentiary issue raised on the last day of hearing. On the third and last day of hearing, the Employer requested that we reconsider a decision we made on the first day of hearing to exclude certain evidence from the record. On the first day of hearing, the Employer sought to introduce testimony from inmate Tara Byrd regarding an incident between her and Grievant alleged to have occurred in the trash room. Grievant objected to the introduction of such testimony because the Employer had not charged Grievant with such alleged misconduct in its dismissal letter. The Employer acknowledged that it had not specifically charged Grievant with this allegation because it did not have knowledge of the allegations until three days before the hearing. It contended, however, that it had a right to present such testimony, not as a new charge against Grievant, but as additional evidence to support its charges that Grievant had engaged in an inappropriate course of conduct with female offenders.

The Contract requires the Employer to state the reasons for dismissal in the dismissal letter. Article 14, Section 2. The Board shall not look beyond the reasons given by the Employer in the dismissal letter for the action taken. McCort at 121.

The Board established the standard for the introduction of evidence gathered after a dismissal in Grievance of Boucher, 9 VLRB 50 (1985) in which the Employer sought to introduce evidence which was not known at the time of dismissal but was gathered after the dismissal in preparation for hearing. The Board drew a distinction

in Boucher between evidence gathered after discharge which supports the reasons given for discharge and evidence gathered after discharge which adds a new offense.

It concluded that the latter was clearly inappropriate. The Board stated:

... with regard to post-dismissal evidence supporting the stated reasons for disciplinary action, we believe the relevant consideration is really one of fairness and surprise. As a general rule, we believe an employer may investigate further to substantiate facts known to exist at the time of dismissal to support action already taken, as long as an entirely new charge is not added and the employee is given an adequate opportunity to contest it. Id at 57.

Boucher involved the dismissal of an employee for violating confidentiality laws of clients on welfare. The evidence the Board permitted to be heard was post dismissal evidence substantiating further the specific charge that the employee had divulged confidential information. This after-acquired evidence consisted of testimony of various State witnesses and a report of a handwriting analyst who analyzed the documents in question after the employee's dismissal. This evidence was permitted because it was offered to substantiate the stated charge against the employee.

Our ruling in Boucher is readily distinguishable from the matter at hand in which the Employer seeks not to substantiate the existing three specific charges against Grievant, but seeks to elicit testimony about an entirely separate offense of which Grievant had no notice in his dismissal letter. It would be patently unfair to Grievant to have to defend against this alleged offense given the lack of notice to him. If the Employer seeks to rely on an alleged offense such as this to support a dismissal, it must be stated as a reason in the dismissal letter. It is unfair and prejudicial to an employee for an employer to seek to offer evidence on such an

alleged offense in a backdoor approach of corroborating evidence as the Employer did in this case.

The Employer seeks to have evidence of this alleged offense admitted under the Vermont Rules of Evidence. The rules of evidence do not apply in grievances before the Board. 3 V.S.A Section 928 (b)(3). It would be fundamentally unfair and contrary to the Contract and Board precedent for the Board to allow the Employer to present testimony on this alleged offense. Further, it would not change the outcome of this case. It would not help corroborate the three stated charges against Grievant given the inadequacy of the evidence presented by the Employer on those three charges.

ORDER

Now, therefore, based upon the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED:

1. The grievance of Matthew Greenia ("Grievant") is SUSTAINED in part; and
2. Grievant shall be reinstated to his position at the Chittenden Regional Correctional Facility;
3. Grievant shall be awarded back pay and benefits from the date commencing 10 working days from the effective date of his dismissal until his reinstatement, for all hours of his regularly-assigned shift, minus any income (including unemployment compensation received and not paid back) received by Grievant in the interim;
4. The interest due Grievant on back pay shall be computed on gross pay and shall be at the rate of 12 percent per annum and shall run from the date each paycheck was due during the period commencing 10 days from Grievant's dismissal, and ending on the date of his reinstatement; such interest for each paycheck date shall be computed

from the amount of each paycheck minus income (including unemployment compensation) received by Grievant during the payroll period;

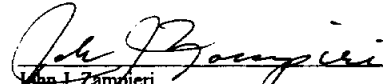
5. The parties shall submit to the Labor Relations Board by February 3, 1999, a proposed order indicating the specific amount of back pay and other benefits due Grievant; and if they are unable to agree on such proposed order, shall notify the Board in writing that date of specific facts agreed to by the parties, specific areas of factual disagreement and a statement of issues which need to be decided by the Board. A hearing on disputed issues, if any, shall be held on February 11, 1999, at 9:00 a.m. in the Labor Relations Board hearing room; and
6. The Employer shall remove all references to Grievant's dismissal from Grievant's personnel file and other official records and replace it with a reference to a 10 day suspension consistent with this decision.

Dated this 22nd day of January, 1999, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Richard W. Park, Acting Chair


Carroll P. Comstock


John J. Zampieri