

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 99-20
COURTNEY LILLY)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On April 9, 1999, Courtney Lilly ("Grievant") filed a grievance 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, Inc. ("VSEA") for the Corrections Bargaining Unit, effective for the period July 1, 1997 to June 30, 1999 ("Contract"). Specifically, Grievant alleged that he was dismissed without just cause, and such discipline inappropriately bypassed progressive discipline, was not imposed within a reasonable time of the offense and was not imposed with a view towards conformity and consistency.

Hearings were held in the Vermont Labor Relations Board hearing room in Montpelier before Board Members Edward Zucarro, Acting Chairperson; Carroll Comstock and John Zampieri on November 18 and 30, and December 14 and 16, 1999. Assistant Attorney General William Reynolds represented the Employer. Attorney Sten Lium represented Grievant. The Employer and Grievant filed post hearing briefs on January 11 and 12, 2000, respectively. On January 17, 2000, Grievant filed a reply brief. Grievant's reply brief has not been considered by the Board as it is the practice of the Board not to allow reply briefs.

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 . . .

...

2. The appointing authority or authorized representative . . . may dismiss an employee for just cause with two weeks’ notice or week’ pay in lieu of notice . . .

3. Notwithstanding the provisions of paragraph 2 above, the appointing authority or authorized representative . . . may dismiss an employee immediately without 2 weeks’ notice or 2 weeks’ pay in lieu of notice for any of the following reasons:

(a) gross neglect of duty;

...

(e) conduct which places in jeopardy the life or health of a co-worker or of a person under the employee’s care.

...

2. Department of Corrections Work Rules 1, 4, 5, 6 and 9 provide in pertinent part:

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.

...

4. Employees shall be honest and complete in their descriptions, whether given orally or in writing, to the employer of 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.

6. No employee shall, while on duty or engaged in any activity associated with the Department of Corrections, engage in verbal . . . behavior towards employees . . . which is malicious, demeaning, harassing of insulting . . .

...

9. No employee, whether on or off duty, shall comport himself or herself in a manner that reflects discredit upon the Department (State Exhibit 17).

3. Grievant began his employment with the State of Vermont in 1976, initially working at the Weeks School and later in the Employer's Probation and Parole division. He later became a correctional officer at the St. Johnsbury Correctional Facility. The Northern State Correctional Facility ("NSCF") opened in 1993 and Grievant transferred to that facility, initially holding the position of acting security and operations supervisor ("SOS") for four months. Prior to his dismissal, Grievant held the position of Correctional Officer I ("CO I") at NSCF.

4. Grievant received an "excellent" overall performance evaluation for the rating period March 1995 through March 1996, an "outstanding" rating for March 1996 through March 1997 and an "excellent" rating for March 1997 through March 1998 (Grievant Exhibits 301, 302, 303).

5. During all times relevant, Jay Simons held the position of training coordinator in Waterbury in the Employer's central office human resources division. Simons separated from his wife Kimber during 1997. Kimber Simons became romantically involved with NSCF correctional officer Joe Marcoux during 1998. Marcoux took some nude or partially nude pictures of Kimber Simons and showed these pictures around the facility during the Summer of 1998. On or about August 30, 1998, Simons became aware that Marcoux was showing the pictures of his estranged wife around the facility. Simons was concerned that inmates would see the pictures and later stalk his wife, who had custody of their young children.

6. Simons told Personnel Administrator Sue Blair and Director of Correctional Services Dick Turner about Marcoux showing these above-referenced pictures of his estranged wife around NSCF. Turner contacted the superintendent of the Northwest State Correctional Facility, Stephen Maranville, and asked him to investigate the matter. Maranville initiated the investigation in early September 1998. The Employer relieved Marcoux from duty with pay during the investigation.

7. Grievant was a shop steward for the VSEA during the time Maranville initiated his investigation of Marcoux. Grievant had not seen the photographs, but had heard of their existence.

8. Maranville learned in the course of his investigation that another correctional officer at NSCF also had shown pictures at the facility of two nude women together in a shower. It is not known if the other officer was suspended pending the outcome of an investigation or if he received disciplinary action, although Grievant believed that the Employer took neither action. Grievant was angry that Marcoux

appeared to have been singled out for potential discipline. Grievant also was unhappy about the situation because he had reported this other officer for allegedly smuggling drugs into NSCF and the Employer had not taken any apparent action against him for such alleged activities.

9. Simons was hoping to obtain custody of his children in 1998. He asked Grievant how he had successfully obtained custody of his children when Grievant and his wife divorced. Simons also spoke to Scott Morley, another NSCF employee, about obtaining custody of his children. Morley and Simons were friends and Morley's wife was the day care provider for the Simons' children.

10. Grievant made no secret of his displeasure with the Employer's actions in investigating Marcoux and told several people at NSCF about this displeasure. One evening in early September 1998, Grievant was talking at NSCF to Morley about personal matters. During this conversation, Grievant again expressed his unhappiness over the Marcoux investigation. At one point, Grievant stated that he would "rally the troops" behind Marcoux. Grievant did not tell Morley to pass his comments along to Simons. Morley did not think that Grievant was threatening Simons.

11. Approximately a week later, on September 9, 1998, Morley and Simons were conversing on the telephone about personal matters. At one point in the conversation, Morley told Simons about his conversation with Grievant, including Grievant's statement that he would "rally the troops" behind Marcoux.

12. The next morning, September 10, 1998, Simons called Maranville and told him about Grievant's conversation with Morley. Simons told Maranville that Grievant had told Morley to call Simons and tell him that, if Simons "didn't call off the dogs he

would come to central office and get him”, and that he was going to “rally the troops” against him. Maranville was interviewing employees at NSCF at the time he received this call. He later interviewed Morley regarding his conversation with Grievant.

13. Morley asked to have a VSEA representative with him during the interview and Maranville obliged. Morley denied that Grievant made the comment about “calling off the dogs”. He acknowledged Grievant had used the phrase “rally the troops”. Morley indicated that Grievant may have wanted this message to be passed on to Simons, although he had no recollection of Grievant explicitly stating this (State Exhibit 1).

14. Maranville interviewed Morley for a second time on September 15, 1998, and Morley once more had VSEA representation. Morley again told Maranville that he did not recall Grievant using the phrase “call off the dogs” (State Exhibit 1).

15. On October 2, 1998, Maranville interviewed Morley for the third time about the statements Grievant was alleged to have made. This time Maranville asked Simons to attend the interview. Morley asked to have a VSEA representative present again and Maranville refused to allow this on the grounds that the interview was not going to lead to disciplinary action against Morley. Simons spoke first and told Maranville and Morley his version of the September 9 conversation with Morley. Morley disagreed with Simons’ version of their conversation, as he had in his two previous discussions with Maranville (State Exhibit 1).

16. Despite the fact that Morley never agreed with Simons’ account in three separate interviews, Maranville concluded that Morley was being evasive. At no time did Maranville interview Grievant about what he had told Morley about the Marcoux investigation or about his alleged threats against Simons (State Exhibit 1).

17. Maranville interviewed 21 NSCF employees and completed his investigation on or about October 28, 1998. He wrote a 37 page report which included “findings” of his interviews with all 21 employees. The report summarized the three separate aspects of the Marcoux investigation as it had developed: 1) Marcoux showing nude or partially nude photographs of Kimber Simons to other staff at the facility; 2) another officer also showing nude photographs of females to other staff and at the facility; and 3) Grievant involving himself in Maranville’s investigation of Marcoux in order to stop the investigation (State Exhibit 1).

18. At some point after September 10, 1998, NSCF Superintendent Kathleen Lanman told Grievant that Maranville was investigating an allegation that he had improperly involved himself in the Marcoux investigation and that he could no longer act as a VSEA steward for NSCF employee Jason Kennedy in the Marcoux investigation. Grievant heard nothing more about this allegation until November 13, 1998.

19. On November 10, 1998, Grievant was working as the unit officer on first shift in the admissions control and segregation unit (“A/C Seg”) from 6:00 a.m. to 2:00 p.m. There was a lot of activity in the facility and in the admitting area that day. A number of inmates were being prepared for transport outside of the facility and Administrative Shift Supervisor Clint Glover was conducting several inmate disciplinary hearings. Glover completed a disciplinary hearing for inmate Josh Farrell which he had started the previous day.

20. Glover found Farrell guilty of a major infraction and recommended that he serve 15 days in segregation, formerly known as solitary confinement. He discussed his

recommendation with Lanman and she concurred with his recommendation. Lanman also agreed that Farrell should be put directly into segregation that day.

21. Glover called Grievant, informed him of the disposition of Farrell's disciplinary hearing and indicated that he would be bringing Farrell directly to his unit. Grievant noted in the Disciplinary Segregation Time Log that Farrell was assigned to the unit at 1:30 p.m. and was to remain there for 15 days. He also marked the event on a large board near the entrance of the unit that is used for such information (State Exhibit 8).

22. Grievant was just leaving his desk in the admitting area when Glover escorted Farrell in at approximately 1:30 p.m. Grievant asked if Farrell was "all set" and Glover indicated that he was and that he just needed to be strip searched. Grievant started walking with Farrell towards the segregation unit and told Glover that he was going to strip search Farrell in the segregation unit. Glover left the area.

23. It is NSCF policy for two officers to strip search inmates. However, this policy was disregarded approximately 30 percent of the time. It also is NSCF policy to strip search inmates in a designated strip search room which has no moveable furniture, although officers occasionally strip searched inmates in the segregation unit in their individual cells.

24. Grievant took Farrell to Cell 5. Glover left the segregation unit and told the operational shift supervisor, Hal Colleran, that he had found Farrell guilty of a major infraction and that he had just taken him to segregation where he would remain for 15 days.

25. Grievant smelled smoke while he was in the process of strip searching Farrell. He interrupted his strip search of Farrell, locked him in his cell, called an alert

and went in search of the source of the smoke. Colleran and Glover were engaged in a meeting when Grievant called the alert. They went directly to the segregation unit and found Grievant, who was standing outside of an inmate's cell. Glover left the unit and Colleran gave Grievant permission to enter the cell to search for the source of the smell. Grievant discovered a cigarette and lead, which the inmate had used to light the cigarette. Colleran left the unit at approximately 1:45 p.m. Grievant returned to Farrell's cell to complete Farrell's strip search.

26. Grievant's shift ended at 2:00, shortly after he completed Farrell's strip search. He reported Farrell's presence to the next shift unit officer, Todd Blanchard. Blanchard recorded Farrell's transfer to the segregation unit on a Special Observation Report (State Exhibit 6, 7).

27. Grievant should have recorded Farrell's transfer into the segregation unit on the Special Observation Report and also on another log, called the A/C-Seg Unit Travel Log, generally referred to as the unit travel log. He neglected to do these things because, from the time Farrell entered the unit until the end of Grievant's shift, Grievant was busy either strip searching Farrell or investigating the cause of smoke in the unit. The information to be recorded on the Special Observation Report and unit travel log is nearly the same as that which Grievant recorded on the Disciplinary Segregation Time Log and set forth in Finding of Fact No. 21 (State Exhibits 6- 8).

28. At approximately 2:30, Blanchard walked by Farrell's room and saw him hanging by a belt from the ceiling, slumped over. Blanchard called an alert and Farrell was transported to the hospital. Farrell recovered from the suicide attempt.

29. Grievant failed to notice Farrell's belt when he conducted his strip search. If Grievant had seen the belt, he would have removed it because it is considered contraband in the segregation unit. It is likely that Farrell hid the belt under his bed when Grievant left him and went in search of the source of smoke.

30. During all times relevant, Nurse Manager Paulette Simard worked for EMSA Corrective Care which provides medical care services to NSCF. Prior to November 10, 1998, Simard had made several attempts to make shift supervisors aware that medical staff needed to be notified before placing an inmate into segregation. On or about May 19, 1998, Simard placed the following message by the time clock:

ALL SECURITY STAFF

MEDICAL STAFF MUST BE NOTIFIED PRIOR TO INMATE PLACEMENT INTO SEGREGATION. AN ASSESSMENT MUST BE MADE ON THE INMATE'S MEDICAL AND MENTAL STATUS. THE NURSES HAVE INFORMED ME THAT THEY ARE NOT BEING INFORMED PRIOR TO PLACEMENT. PLEASE REVIEW THIS POLICY . . . (State Exhibit 19).

31. In addition to placing this notice by the time clock on May 19, 1998, Simard also brought this policy to the attention of an NSCF shift supervisor with a highlighted copy of an EMSA Corrective Care directive addressing this issue. The EMSA Corrective Care policy does not identify whose responsibility it is to notify medical staff (State Exhibit 18).

32. Section XIII of Work Site Procedure 403.00.01, ("A/C Seg unit officer post orders"), which were issued by Lanman on March 31, 1998, states "An offender housed in segregation will be screened by medical staff before being placed into segregation". This March 31, 1998, post order replaced a July 7, 1995 post order and may

not have been updated in all the procedure manuals in the facility on November 10, 1998, including the one in the segregation unit (State Exhibit 16).

33. Prior to November 10, 1998, there was confusion as to whose responsibility it was to notify medical staff when admitting an inmate into the segregation unit - the A/C Seg unit officer, the administrative shift supervisor or the operational shift supervisor. There were occasions when no one notified medical and this had been very frustrating for Simard. Prior to November 10, 1998, Grievant knew that medical staff were supposed to be notified and occasionally had notified medical staff when admitting an inmate into the segregation unit. However, in the case of Farrell, Grievant assumed that medical staff had been notified because Glover had told him that Farrell was all set and just needed to be strip searched. Neither Grievant nor anyone else notified medical staff that Farrell was being placed into segregation.

34. At the time that Blanchard saw Farrell and called the alert, the shift supervisors were attending a meeting with Lanman and SOS Russell Sumner. They discussed whose responsibility it was to notify medical staff when admitting an inmate into segregation, as there appeared to be no consistent policy. It was decided to put a conspicuous sign on the segregation unit door to remind staff to notify medical before admitting an inmate into the segregation unit. This sign was put up a few days after November 10, 1998.

35. Sumner asked Colleran to investigate the Farrell suicide attempt. Colleran interviewed Grievant, Glover and Farrell. He wrote a report dated November 11, 1998, summarizing the events leading up to the attempted suicide. Colleran concluded that “[s]taff acted appropriately”. Colleran recommended that all shift supervisors and hearing

officers be trained in the “mental health component” involved when placing an inmate into segregation. He also recommended that two officers should be involved in the movement and strip searching of an inmate when placing the inmate into segregation. He made no mention of the fact that Grievant had failed to make the appropriate entries in the A/C unit travel log or the Special Observation Report, and did not specifically discuss Grievant’s failure to contact medical staff when Farrell was placed in segregation (State Exhibit 3).

36. Glover wrote a report based on his involvement in the Farrell matter and gave it to his supervisor on November 12, 1998. He did not make any recommendations. Other officers on duty during the suicide attempt, including Blanchard, also wrote incident reports that day or the next, regarding the incident (State Exhibits 4, 9 -15).

37. Grievant was off duty for the next three days, but was told about the Farrell suicide attempt on November 11, 1998. On November 13, 1998, Lanman called Grievant at home and asked him to come to the facility. Grievant assumed that Lanman wanted him to come to the facility to discuss the Farrell suicide attempt. Grievant arrived at the facility and Lanman gave him a letter relieving him from duty with pay pending an investigation of his involvement in the Marcoux matter. Lanman’s letter stated that the nature of the investigation was “(w)hether [Grievant] violated Corrections Work Rule # 6 or committed other forms of workplace misconduct by attempting to interfere or actually interfering with the investigation concerning CO I Joseph Marcoux” (State Exhibit 22).

38. Lanman assigned this investigation to William Anderson. Anderson had many years of experience with the Employer and has worked as a hearing administrator for many years. Anderson interviewed Morley, Kimber Simons and Grievant, although

his report does not specifically state that he spoke to Kimber Simons. Anderson interviewed Grievant for approximately 10 minutes on December 16, 1998. Grievant denied telling Morley to give Simons any message or that it was his intention to threaten or intimidate Jay Simons.

39. Anderson wrote a report between December 28, 1998 and January 9, 1999, which he later described as less comprehensive than his usual reports. He concluded that Grievant attempted to interfere in the Employer's investigation of Marcoux by telling Morley to give a message to Simons that something "dire" would happen if Simons did not stop the investigation. There was no further investigation of the allegation that Grievant interfered in the Employer's investigation of Marcoux (State Exhibit 2).

40. Sometime in January or February 1999, Lanman reviewed Colleran's report regarding the Farrell suicide attempt. She determined that Colleran's report was insufficient and gave him "negative feedback" for what she found to be inadequate work. Colleran had not been told prior to this time that his report was inadequate. Lanman then asked Security and Operations Supervisor Russell Sumner to complete an investigation of the Farrell attempted suicide.

41. Sumner investigated the Farrell suicide attempt by reviewing all the statements written between November 10 and 12, 1998, by Colleran and others on duty at the time of the suicide attempt. He did not interview anyone. Sumner wrote a report to Lanman on January 28, 1999. He concluded that Grievant missed Farrell's belt in the strip search and failed to start the Special Observation Report. Sumner also noted that medical staff was not notified that Farrell was being placed in segregation. He

recommended that Grievant be charged with a violation of Work Rule #1 (State Exhibit 5).

42. On February 3, 1999, Lanman notified Grievant, Colleran and Glover that she was contemplating taking disciplinary actions against them for failure to notify medical staff when Farrell was admitted into the segregation unit.

43. February 3, 1999, was the first time that Grievant had been notified that he was being investigated for the November 10, 1998, Farrell suicide attempt. Lanman's letter stated, in pertinent part:

This letter is to inform you that you allegedly violated Department of Corrections Work Rule #1 and Local Work Site Procedure 403.00.01 which state:

"No employee shall violate any provision of the collective bargaining agreement or State or Department work rule, policy, procedure, directive, local work rule or post order."

and

"To make Observation checks within the maximum time allowed and in such a manner tht (sic) no pattern is discernable (sic). Observation checks will never be ignored, skipped or delayed."

"Each time an inmate enters the segregation unit he will be strip searched."

"It is required that segregation officers have a clear understanding of the following policies, procedures and practices."

"Officers will not have contact with offenders on segregation status unless two staff are present."

"Strip search procedure." (409.01.01)

"Cell items: Through positive behavior segregation inmates may retain the use of the following items;

- a. one book
- b. Personal clothes can be used when segregation attire is not available.

- c. Inmates should be allowed shower shoes, a shirt and a pair of pants.
- d. One sheet
- e. One mattress
- h. One pair of shower shoes
- i. Four pieces of paper
- j. One 3" pencil
- k. One pair prescription eye glasses
- l. One hygiene kit containing 1 bar soap, 1 shampoo, 1 toothbrush, 1 toothpaste, 1 stick deodorant, 1 shave cream, 1 disposable razor, (razor will only be issued for the first five minutes of the shower period then retrieved and accounted for by the officer), and 1 comb, (issued and used during recreation period or immediately following meals only.)

"Medical Service: . . . An offender housed in segregation will be screened by medical staff before being placed into segregation . . . (Grievant Exhibit 323).

44. Glover, Colleran and Grievant all met individually with Lanman, Sumner and Assistant Superintendent David Martinson on February 9, 1999. Lanman did not take disciplinary action against Glover or Colleran.

45. Grievant attended the meeting with his VSEA representative and discussed the events of November 10, 1998.

46. On or about March 3, 1999, Lanman sent Grievant a Loudermill letter which stated in pertinent part:

This letter is to advise you that, as a result of your actions described below, the Department of Corrections (DOC) is contemplating a serious disciplinary action against you up to your dismissal from employment. You have the right to respond to the specific allegations listed below, either orally or in writing, before a final decision is made. You have the right to be represented by VSEA during proceedings associated with this process.

As a result of an investigation into allegations of misconduct, the DOC is contemplating the following charges against you:

1. In early September, 1998, Stephen Maranville, Superintendent of the Northwest State Correctional Facility, began an investigation that CO Joe Marcoux had brought inappropriate pictures of his fiancé to the Newport Facility

and showed them to COs and/or inmates. Jay Simons, DOC Training Specialist, and the estranged husband of CO Marcoux's fiancé had made this allegation. On or about September 9, 1998, you spoke with CSS Scott Morley, a friend of Mr. Simons, and attempted to cause Morley to contact Simons and tell him to withdraw the allegations against CO Marcoux. Among other things, you told Morley that he should tell Simons to "call off the dogs" or you would "get" him (Simons) and that you would "rally the troops" against him, or words to that effect.

Your actions appear to have violated: (1) DOC Work Rule 5, which requires DOC employees to cooperate fully with any inquiry or investigation; (2) DOC Work Rule 6, with respect to your actions toward Morley and Simons, which prohibits engaging in malicious or harassing behavior toward other DOC employees; (3) DOC Work Rule 9, which prohibits behavior that reflects discredit on the DOC.

2. In November, 1998, William Anderson, DOC Hearing Administrator, was assigned to investigate your conduct discussed in Paragraph 1, above. On December 16, 1998, he interviewed you with your VSEA representative, Richard Lednický, present. In that interview, you denied making the comments Morley attributes to you, and denied telling Morley to give any kind of messages to Simons. You also denied that it was your intent to threaten or intimidate Jay Simons.

These actions appear to have violated; (1) DOC work Rule 4, which requires you to be honest and complete in your descriptions of events occurring in the work place and in all other circumstances related to your employment; (2) DOC Work Rule 5, which requires you to answer fully and truthfully any questions related to your employment; and (3) DOC Work Rule 9, which prohibits behavior that reflects discredit on the DOC.

3. On or about November 10, 1998, you worked as the Booking Officer on 1st shift. At about 1330 hours, you were assigned the task of placing Offender JF in segregation in the Booking Area. You knew Offender JF had just been found guilty of a Major A1 disciplinary violation and faced 15 days in segregation. You were responsible to conduct a thorough strip search of Offender JF that you did not accomplish. You were also responsible for initiating a Special Observation Sheet on Offender JF and for making appropriate entries in the Unit Travel Log and you did not. Procedure requires that two officers be present when contact is made with offenders on segregation but you did the strip search of Offender JF alone. You did not confiscate Offender JF's belt during your strip search. Medical staff must screen offenders before being placed into segregation but you did not ensure compliance with that procedure. Offender JF attempted to hang himself with a belt that you should have removed from the cell as part of the strip search.

Your actions appear to have violated DOC Work Rule 1, in that you failed to follow procedure with respect to the strip searches, you failed to initiate a Special Observation Sheet and Log Offender JF's segregation in the Unit Travel Log, and failed to ensure Offender JF was seen by a Health care professional in accordance with E.13, EMSA Correctional Care Policy Directive, VT DOC Health Evaluation of Inmates in Disciplinary Segregation; reference NCCHC P – 43. These actions also appear to have violated DOC Work Rule #9, which prohibits behavior that reflects discredit upon the DOC. You also appear to have been grossly neglectful of duty and to have placed in jeopardy the life or health of a person under your care. See Corrections Unit Bargaining Agreement, Article 14, Section 3(a) and (e) (immediate dismissal offenses).

These actions are all quite serious and would, in each case, provide just cause for bypassing progressive discipline and imposing a very serious disciplinary penalty. Allegation #3, taken alone, or in combination with the other allegations, appears to provide just cause of disciplinary action up to and including dismissal.

You must notify me within twenty-four (24) hours after receiving this letter whether you wish to respond to the above allegations. You must also then indicate whether you wish to respond in writing or orally in a meeting. If you do not respond within the time frame, a decision will be finalized based on the information available.

...

(State Exhibit 23).

47. Grievant and his VSEA representative Richard Lednicky met with Lanman shortly after receiving this letter. Lanman consulted with Turner, Blair, Martinson, Attorney Michael Seibert, Assistant Director of Correctional Services Jackie Kotkin and Deputy Commissioner Don Hartman. A decision was made to terminate Grievant. Lanman sent Grievant a letter of dismissal, dated March 18, 1999. The letter stated, in pertinent part:

This is to notify you of your dismissal from the position of Correctional Officer I, effective March 19, 1999. By letter dated March 3, 1999, I notified you that I was contemplating your dismissal from the position of Corrections officer, and gave you the opportunity to meet and discuss that action. On March 10, 1999, I met with you and VSEA Representative Richard Lednicky for purposes of that discussion. In

making my decision, I have considered all of the information you and Mr. Lednický brought to my attention.

The reasons for this action are those that are enumerated in my letter of March 3, 1999, which are incorporated herein by reference.

...

(State Exhibit 24).

48. There have been approximately 9 suicide attempts at NSCF since June 1996, including Farrell's attempt on November 10, 1998. These incidents varied from inmates attempting to take their lives while they were in open population, in a holding cell and or in segregation. Except for Grievant, no investigation was undertaken and no employee faced disciplinary action as a result of the attempted suicide. Six attempts, including Farrell's, occurred in segregation. Four of the six attempts did not involve an inmate using what is considered contraband, that is, something that is prohibited in the segregation unit; these four incidents involved inmates improperly using authorized items, such as sheets or underwear (Grievant Exhibits 304 – 311, 313, 314).

49. Two of the six suicide attempts which occurred in segregation involved inmates using contraband. Besides the Farrell suicide attempt in November 1998, the other attempted suicide using contraband occurred in June 1997. The inmate attempted to suffocate himself by placing a plastic bag over his head and tying shoelaces around his neck to keep the plastic bag tight on his head. Plastic bags and shoelaces are considered contraband in segregation. Lanman did not conduct an investigation to discover how the inmate had managed to bring these items into the segregation unit. She assumed that he had stuffed them up his rectum before being placed in segregation, an activity called "packing". The A/C Seg unit officer, Jeff Percy, found the inmate. Neither items were

discolored or showed evidence of “packing”. There was no evidence whether employees made appropriate log entries because no one investigated the matter at the time (Grievant Exhibit 314).

50. March 31, 1998, A/C Seg unit officer post order VIII(E) requires officers to write a report for the SOS at the end of each shift containing all pertinent information about the shift. This seldom is done and no one has been disciplined for disregarding this procedure (State Exhibit 16).

OPINION

Grievant contends that the Employer violated Article 14 of the Contract by dismissing him without just cause. He specifically contends that his dismissal inappropriately bypassed progressive discipline and was not imposed within a reasonable time of the offense and was not applied with a view towards conformity and consistency.

The ultimate criterion for determining 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 5, 6 and 9 by contacting Scott Morley and attempting to cause Morley to contact Jay Simons and tell Simons to withdraw the allegations against Marcoux. Specifically, the Employer charged that Grievant told Morley that he should tell Simons to “call off the dogs” or Grievant would “get” him (Simons) and that Grievant would “rally the troops” against him. The Employer also charged Grievant with violating Work Rules 4, 5 and 9 by lying about his conversation with Morley when Anderson interviewed him on December 16, 1998.

Additionally, the Employer charged Grievant with violating Work Rules 1 and 9 for his failure to conduct a thorough strip search of Farrell, failure to initiate a Special Observation Sheet on Farrell and making appropriate entries in the A/C Seg unit travel log, failure to request another officer to be present when conducting the strip search on Farrell, and failure to contact medical staff before placing Farrell into segregation. We will address these two separate events in turn.

Interfering with the Marcoux Investigation

Work Rule # 4 provides that employees “shall be honest and complete in their descriptions . . . of events occurring in the work place and in all other circumstances related to their employment”. Work Rule # 5 provides that employees “shall cooperate fully with any inquiry or investigation” and shall answer “fully and truthfully any questions related to their employment. Work Rule # 6 provides that employees shall not engage in verbal behavior towards employees which is “malicious or harassing”. Work Rule # 9 provides that employees comport themselves in a manner that does not “reflect discredit upon the Department”. We conclude that the Employer has not met its burden with respect to proving by a preponderance of the evidence that Grievant violated any of

these work rules with respect to interfering with the Employer's investigation of Marcoux for showing photographs of Kimber Simons around the facility. There was no credible evidence that Grievant made threats against Simons by contacting Morley and telling him to tell Simons to "call off the dogs" or he would "get" him and that he would "rally the troops" against Simons. The only reliable evidence before the Board is that Grievant was openly angry about the Employer investigating Marcoux, a sentiment which he openly expressed to several people at NSCF; he also told Morley that he would rally the troops behind Marcoux. Given this conclusion, it follows that Grievant did not lie when he denied making the statements attributed to him.

We would be remiss not to comment on the Maranville investigation which formed the basis of the charge against Grievant that he attempted to interfere in the Marcoux investigation. Morley and Grievant were the only two people who knew what Grievant said to Morley. Maranville did not interview Grievant but interviewed Morley three times, each time disregarding Morley's consistent account of the conversation that transpired between him and Grievant. We find it troubling that, with no credible evidence to support this charge, the Employer used the Marcoux matter as a basis for bypassing progressive discipline and imposing the most serious disciplinary penalty of dismissal.

Farrell attempted suicide

Work Rule # 1 provides that no "employee shall violate any provision of . . . the Department work rule, policy, procedure . . . or post order". The Employer also charged Grievant with violating Work Rule # 9, set forth above, by reflecting discredit upon the Employer. We conclude that the Employer has not met its burden with respect to proving by a preponderance of the evidence that Grievant violated a facility procedure by his

failure to contact medical staff before placing Farrell into segregation. We also conclude that the Employer has not met its burden with respect to proving by a preponderance of the evidence that Grievant violated a facility procedure by not requesting another officer to be present when conducting the strip search on Farrell.

Although the March 31, 1998, A/C Seg unit officer post order requires that medical staff be contacted when an inmate is placed into the segregation unit, on November 10, 1998, there was considerable confusion about this requirement with respect to whether it was the responsibility of the A/C Seg unit officer, the administrative shift supervisor or the operational shift supervisor. Confusion persisted three months later, as evidenced by Superintendent Lanman's February 3, 1999, notice to the two shift supervisors that she also was contemplating disciplining them for failing to contact medical when Farrell was admitted into the segregation unit. In addition, it also is unclear whether the March 31, 1998, post order requiring the A/C Seg unit officer to notify medical had been properly updated in the procedure manual located in the A/C Seg unit. In short, there was confusion as to whose responsibility it was to notify medical and Grievant had insufficient notice that this was an expected duty of the A/C Seg unit officer.

We now turn to the March 31, 1998, A/C Seg unit officer post order which required two officers to conduct a strip search. The evidence showed that this order similarly was not consistently followed. Administrative Shift Supervisor Glover left Farrell with Grievant knowing that he was intending to strip search Farrell by himself in the segregation unit. This practice of an officer conducting a strip search of an inmate alone occurred approximately 30 percent of the time. Although it is unlikely that Farrell

would have managed to conceal the belt he used to attempt suicide if Grievant had requested the assistance of another officer, Grievant did not violate an established practice that was consistently followed when he conducted the strip search by himself.

We conclude that the Employer has met its burden by a preponderance of the evidence that Grievant failed to conduct a thorough strip search of Farrell, failed to initiate a Special Observation Sheet on Farrell and failed to make appropriate entries in the A/C Seg unit travel log.

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 charges which have been proven 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 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 employee's past work record, 3) the effect of the offenses upon supervisors' confidence in Grievant's ability to perform assigned duties, 4) the consistency of the penalty with those imposed upon other employees for the same or similar offenses, 5) the clarity with which Grievant was on notice of the prohibited conduct, 6) the potential for the employee's rehabilitation, 7) mitigating circumstances surrounding the offense, and 8) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

Grievant's offense of failing to conduct a proper strip search was serious. The Department is responsible for ensuring the safe keeping of inmates within its custody. Grievance of Pretty, 22 VLRB 260, 269 (1999). Grievant acted contrary to this duty to keep inmates safe within the custody of the Department by failing to discover a belt which Farrell then used to attempt suicide. Such actions obviously have an adverse effect on supervisors' confidence in Grievant's ability to work with and properly supervise inmates. Grievant was clearly on notice that it was his obligation to carefully strip search Farrell and search for and remove any contraband.

We regard the other two offenses, Grievant's failure to log Farrell's placement in the segregation unit on two logs, as less serious and mitigated by the fact that Grievant made a third log entry, passed the pertinent information on to the second A/C Seg unit officer and had very little time to make these recordings due to the activity in the segregation unit after Farrell was admitted.

In considering the alternative sanctions for these offenses, we weigh Grievant's serious offense of failing to conduct a proper strip search against his long and good work record, his potential for rehabilitation and the fact that the Employer has not applied discipline in a uniform and consistent manner. The previous year an NSCF inmate in segregation also attempted to commit suicide by using two items of contraband, a plastic bag and a shoelace. No one was disciplined and the Employer did not even conduct an investigation to determine how such items of contraband escaped staff notice. Weighing all these factors, we conclude that dismissal was too harsh a punishment for the proven charges and that the Employer inappropriately bypassed progressive discipline. A penalty of a two weeks suspension would have been an appropriate penalty.

ORDER

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

1. The grievance of Courney Lilly ("Grievant") is SUSTAINED in part; and
2. Grievant shall be reinstated to his position at the Northern State 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 March 11, 2000, 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 March 16, 2000, at 8:30 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 ____ day of February, 2000, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Edward Zuccaro, Acting Chair

Carroll P. Comstock

John J. Zampieri