

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 99-28
JOHN NEWTON	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On April 23, 1999, John Newton ("Grievant") filed a grievance. Therein, Grievant alleged that the State of Vermont, Department of Corrections ("Employer") violated Articles 14 and 15 of the collective bargaining agreement between the State and the Vermont State Employees' Association for the Corrections Bargaining Unit, effective July 1, 1997 to June 30, 1999 ("Contract"), in dismissing Grievant from his position as a Correctional Officer I at the Marble Valley Regional Correctional Facility. Specifically, Grievant alleged that the Employer improperly bypassed progressive discipline, failed to apply discipline with a view toward uniformity and consistency, dismissed him without a basis in fact and without just cause, and violated certain procedural provisions of the Contract.

Hearings were held in the Labor Relations Board hearing room in Montpelier on February 3, 10, 18 and 24, 2000; March 3 and 30, 2000; and April 6, 2000; before Board Members Edward Zuccaro, Acting Chairperson; Carroll Comstock and Richard Park. Attorney A. Jeffry Taylor represented Grievant. David Herlihy, Legal Counsel for the State Department of Personnel, represented the Employer. The Employer and Grievant filed post-hearing briefs on May 4 and 5, 2000, respectively. On May 9, 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 to not 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:

(a) act promptly to impose discipline . . within a reasonable time of the offense;

(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 two weeks’ pay in lieu of notice . . . In the written dismissal notice, the appointing authority shall state the reason(s) for dismissal . . .

...

10. In any misconduct case involving a suspension or dismissal, should the Vermont Labor Relations Board find just cause for discipline, but determine that the penalty was unreasonable, the Vermont Labor Relations Board shall have the authority to impose a lesser form of discipline.

...

2. Department of Corrections Work Rules 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 an activity associated with the Department of Corrections, engage in verbal or physical behavior towards employees . . . which is malicious, demeaning, harassing or insulting. Such behaviors include, but are not limited to: profane, indecent or vulgar language or gestures, actions or inactions which are rude . . .

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

...

10. No employee, whether on or off duty, shall violate any law or ordinance . .

12. While engaged with an activity associated with the Department of Corrections, unless expressly approved by the Commissioner, the possession or use of firearms is prohibited.

...

(State's Exhibit 24)

3. Prior to his dismissal, Grievant was a Correctional Officer I for the Employer at the Marble Valley Regional Correctional Facility ("MVRCF") in Rutland, Vermont. He was originally hired in November, 1995, as a temporary correctional officer. He became a permanent correctional officer in 1996. In 1997, he left his correctional officer position to take a position with the State Department of Buildings and General Services as a Maintenance Mechanic at the MVRCF. In April 1998, Grievant returned to employment with the Employer as a Correctional Officer I and remained in that position until he was dismissed on March 30, 1999.

4. Grievant received no disciplinary action prior to his dismissal.

5. Grievant worked with Joan Imperato when he was working as a Maintenance Mechanic. At all times relevant to this grievance, Imperato was a Maintenance Mechanic employed by the State Department of Buildings and General Services primarily at the MVRCF. Grievant and Imperato were the only Maintenance

Mechanics assigned to the MVRCF. At all times relevant, the MVRCF Maintenance Mechanics reported to Brian Craig, District Facilities Manager, whose office is in Windsor.

6. Grievant and Imperato became friends during the period they worked together as Maintenance Mechanics. They sometimes socialized outside of work hours. Imperato employed Newton's sister to care for her son. Imperato knew Grievant's wife, Tracey Newton, who performed clerical and administrative work at MVRCF for EMSA, the contractor that provides inmate health services.

7. At the time Grievant left his Maintenance Mechanic position in the spring of 1998 to assume a Correctional Officer position, there was a party for him at MVRCF. Grievant, Tracey Newton, Imperato and several other persons were present at the party. Imperato gave Grievant a "gag" gift of an item or items of woman's underwear or skimpy clothing. When Imperato presented the gift, there was general laughter. Imperato also bought a cake for Grievant on which she inserted an off-color comment. Neither Grievant nor his wife appeared visibly upset by the gift or cake. Grievant's wife kept the gift Imperato gave to Grievant in her desk drawer. On several occasions after the party, she removed the gift from her desk to show people. She did not act upset when showing the gift. Grievant did not make a complaint about Imperato's actions at the party until approximately 10 months later, during the investigation that led to his dismissal.

8. When Grievant moved to the Correctional Officer I position in the spring of 1998, Dan Bride was hired to replace Grievant as Maintenance Mechanic. On the day Craig interviewed Bride for the position, Grievant made negative comments about Bride, and told Craig that he should hire someone else for the position.

9. At all times relevant, Keith Tallon was MVRCF Superintendent and Scott Baker was MVRCF Assistant Superintendent.

10. No MVRCF employee is authorized to carry a firearm on facility property. Among the security risks are that inmates can be outside the facility in the employee parking area. No one can bring a firearm into the facility. There is a gun locker in the facility's sallyport for law enforcement officials to deposit their firearms. Grievant was aware that he could be disciplined for bringing a firearm onto facility property.

11. During the spring or summer of 1998, Grievant and Bride were engaging in a conversation in the facility. Grievant asked Bride if he wanted to see a firearm that Grievant had purchased. Grievant and Bride went out to the employee parking area on facility grounds where Grievant's van was parked. Grievant opened his van, produced a handgun from the glove compartment, and showed it to Bride. Grievant showed Bride the handgun's magazine; the handgun was loaded. Bride did not report at that time that Grievant had showed him the gun.

12. On a different occasion during 1998, Grievant drove his van from a parking spot in the MVRCF parking area to Kentucky Fried Chicken to get lunch for his wife and other staff. Imperato rode with him. In the Kentucky Fried Chicken parking lot, Grievant removed a handgun from the van's glove compartment to show to Imperato. Grievant took the bullets out of the gun's magazine. Grievant returned the handgun to the glove compartment and drove back to the facility parking area. Grievant told Imperato that he carried the gun for protection because of problems he had with a former inmate, Eric Chambers. Imperato did not report at that time that Grievant had showed her the handgun.

13. The maintenance shop is located within the MVRCF building, but is outside of the secure perimeter of the inmate areas. It is located on the side of the facility near the employee parking area, adjacent to the garage from which one may enter the admission control area of the facility. The admission control area is accessed through two doors referred to as the S, or Sierra, 15 and 16 doors. These doors are heavy security doors operated from the main control room.

14. On the evening of August 12, 1998, Grievant reported to the facility to work overtime prior to his regularly scheduled third shift hours of 11:30 p.m. to 7:30 a.m. The Correctional Facility Shift Supervisor, David Buley, informed Grievant that he would be moved to a different post assignment within the facility that evening due to the planned removal of some inmates who were being transferred to out-of-state prisons. Buley wanted members of the Corrections Emergency Response Team in certain posts, resulting in some changes in post assignments. Grievant became angry at Buley and expressed his displeasure with the different post assignment. Grievant told Buley that he was ill and he was leaving work. Grievant was not ill. Grievant then left the facility, slamming the S15 and S16 doors as he was leaving. Imperato stopped by the facility to check on something that evening and heard the slamming of doors. She then saw an upset Grievant leave the facility (State's Exhibit 5).

15. The next day, Grievant saw Imperato by the maintenance shop in the garage area. He asked her to provide a written statement indicating that the S15 and S16 doors were malfunctioning, resulting in a loud noise when the doors closed. Imperato indicated that the doors were not malfunctioning, and that she was not going to write the

statement. Grievant said words to the effect of “fine fucking friend you are”. The S15 and S16 were operating properly when Grievant slammed them.

16. During late October and early November, 1998, Imperato on more than one occasion worked on a timer that controls lights in the medium security areas. The timer is located behind a panel on the wall underneath the medium security officer’s desk. She had to adjust the timer because of the change from daylight savings time on Sunday, October 25. She came in early one day, before the start of her scheduled shift at 7 a.m., in late October or early November to work on the timer because there was still a problem with the setting. The time was somewhere between 6 a.m. and 7 a.m. Officers Jason Manley and Ed Cole were working in the area. There was an inmate in the area. While Imperato was down on her knees working, Grievant, who was working third shift, walked towards Imperato. More than once, he said words to the effect of “I love a woman when she’s on her knees.” The last time he made the comment, he was standing immediately in front of Imperato. Imperato replied with a comment to the effect of “now is not the time” or “now is not the place”. Imperato understood Grievant’s comment to be a reference to oral sex. Imperato was upset by the comment, and gathered her tools and left the area. Manley heard Grievant say something about Imperato being on her knees; he understood the comment to be of a sexual nature and thought that it was a joke. Cole did not hear what Grievant said. The incident did not occur on November 5, 1998 (Grievant’s Exhibit 4; State’s Exhibits 23, 25).

17. Shortly after the incident, Imperato discussed what had occurred with Bride on a few occasions. Bride told Imperato that she should follow the chain of command if she wanted to do something about it. Imperato reported the incident to Craig

by December 11, 1998. Craig reported it to Keith Tallon via a letter that was dated December 11, 1998, but was not received by Tallon until December 17 or December 18. In his letter, Craig incorrectly indicated that the incident had occurred October 10, 1998 (State's Exhibit 3, page 38).

18. During 1998, Grievant regularly worked the third shift, from 11:30 p.m. to 7:30 a.m. Grievant's wife worked during the daytime, and Grievant at times was at the facility due to driving her to or from work, or bringing her lunch. Imperato and Bride worked a shift beginning at 7:00 a.m. Grievant regularly interacted with Imperato and Bride, most often at the end of his shift and the beginning of their shift. He also sometimes interacted with them due to driving his wife to and from work, or during their lunchtime.

19. By early December, 1998, Imperato and Bride were upset by comments Grievant had made to them and by reports from other persons about comments Grievant was making about them and the maintenance of the building. The comments made by Grievant were to the effect that Bride and Imperato were not doing their job, and that he had done a better job when he was Maintenance Mechanic. On one occasion, Grievant made disparaging remarks about Bride to Imperato. When Imperato told Grievant to talk to Bride if he had problems with him, Grievant kicked a trashcan and left the room. On another occasion, Bride overheard Grievant telling another employee that the maintenance staff was to blame for the improper functioning of the facility's camera system. Imperato and Bride also were upset by Grievant telling them that Craig was trying to get him to return to the maintenance staff. Craig told Bride that this was not true.



20. Bride and Imperato expressed their concerns to Craig about Grievant's disparaging comments. Craig relayed the concerns to Tallon, and a meeting was scheduled for December 15, 1998, to be attended by Craig, Tallon and Grievant. Tallon did not intend the meeting as a meeting that could lead to discipline being imposed on Grievant, but as an effort to engage in conflict resolution between Grievant and the maintenance employees. Tallon informed Grievant by memorandum that the "purpose of this meeting is to address recent concerns of your interactions with Buildings Division personnel" (State's Exhibit 3, page 41).

21. Tallon could not attend the December 15 meeting, and Assistant Superintendent Scott Baker attended in his place. MVRCF Security and Operations Supervisor Bob Wallet, Craig and Grievant also attended the meeting. Craig told Grievant that he was concerned about comments attributed to Grievant about the quality of work of the maintenance staff at MVRCF. Grievant became angry when Craig raised this issue. Grievant indicated that he worked third shift and did not see the maintenance employees or talk to them. Grievant indicated that he had not done anything wrong and was being treated unfairly, and he left the meeting. There was no discussion during the meeting with Grievant about handguns, the door slamming incident, or the comments made by Grievant to Imperato when she was adjusting the timer in late October or early November (State's Exhibit 3, page 37; State's Exhibit 9).

22. After Grievant left the meeting, Craig asked Imperato and Bride to meet with him, Baker and Wallet. Imperato and Bride indicated that they regularly had interaction with Grievant, either in the morning or when Grievant's wife was at the facility. They also indicated that Grievant had been critical of their maintenance work.

During the meeting, Imperato revealed that Grievant had tried to get her to write a statement in August that the doors were broken at the time Grievant angrily slammed the S15 and S16 doors, and that Grievant was upset at her because she would not write the statement (State's Exhibit 3, page 37; State's Exhibit 9).

23. After becoming aware on December 17 or 18, 1998, of Craig's letter dated December 11, 1998, concerning Imperato's complaint about Grievant's actions when she was adjusting the timer, Tallon and Baker arranged to meet with Imperato on December 18, 1998. At the meeting, Imperato reported details of the incident (State's Exhibit 11).

24. The following Monday, December 21, 1998, Imperato and Bride approached Baker shortly after he arrived at work. They had an unsigned memorandum with them addressed to Imperato that they had just found in their mail slot at the facility. The memorandum indicated that it was from "certain people of the third shift". It stated that Grievant had been making derogatory and untrue comments about the maintenance staff, and that Grievant wanted to sue Imperato, Bride and Craig for "producing a hostile work environment". The note upset Imperato and Bride. Imperato asked Baker if she and Bride should hire an attorney to defend themselves (State's Exhibit 10, 12).

25. After the December 15, 1998, meeting, and prior to January 4, 1999, Craig asked Bride if he felt threatened by Grievant due to Grievant's derogatory comments about him and Imperato. Bride responded by informing Craig that he had seen Grievant's loaded handgun in his van parked on facility grounds.

26. Tallon was on vacation during the latter part of December 1998 and the first part of January 1999. On January 4, 1999, Baker gave Grievant a letter providing in pertinent part:

Effective January 4, 1999, you are temporarily relieved from duty with pay for a period of up to thirty (30) days in order for the Department to conduct an investigation into the following allegations:

- 1) Your statements of a sexual nature to Joan Imperato that may have amounted to sexual harassment.
- 2) You have or may have had a firearm in your vehicle on State property.
- 3) You attempted to induce Joan Imperato to provide a false statement to the Department of Corrections in an effort to mitigate your wrongdoing in a matter that was under investigation.
- 4) You have repeatedly made derogatory statements about Building's Division and its staff.

...

(State's Exhibit 4)

27. Richard Wright, Director of the Employer's Court and Reporative Services Unit in Rutland, was assigned to investigate the allegations against Grievant. Wright began his investigation on January 5, 1999. Imperato and other employees told Wright of derogatory comments Grievant made about other employees (State's Exhibit 3).

28. During his employment as a Correctional Officer I, Grievant made derogatory comments about other employees. He called Correctional Officer Shari Fitzgerald a "slut". He made disparaging inappropriate comments about the sexual orientation of Casework Supervisor Ellen McWard. He called former employee Sean Ball a "fucking queer," or words to that effect. He made comments regarding the frequency with which Lisa Casey had sexual relations, and implied that he could have sex with her any time. Other employees at MVRCF made disparaging comments about Fitzgerald, Casey and other employees, and told off-color jokes.

29. During Wright's investigation of the allegations against Grievant, some employees told him that Grievant had threatened lawsuits against the staff of the Department of Buildings and General Services (State's Exhibit 3).

30. During his employment with the Employer and as a Maintenance Mechanic, on more than one occasion Grievant talked about taking action against employees of the Department of Buildings and General Services.

31. During the investigation of allegations against him, Grievant denied attempting to induce Imperato to write a statement that the doors he had slammed were broken, having a firearm in his van in the facility parking area, making comments of a sexual nature to Imperato while she was adjusting the timer, and making derogatory and disparaging comments about other employees. He also told Wright that he had given Bride a high recommendation to Craig when Bride was selected for the Maintenance Mechanic position. Grievant told Wright that he did not threaten lawsuits at work. He told Wright that he discussed at the workplace bringing VOSHA into the facility to address some issues (State's Exhibit 3).

32. On February 4, 1999, during the course of Wright's investigation, Grievant sent Wright a memorandum concerning the party that had been held for him in the spring of 1998 when he was leaving his Maintenance Mechanic position to accept the Correctional Officer I position. Grievant indicated that he was "extremely embarrassed" by the "gifts" Imperato had given him at the party, and "very uncomfortable" in receiving them. Grievant further stated that his wife was "embarrassed and disturbed". Wright spoke with some of the participants at the party to determine whether Grievant and his wife appeared embarrassed and upset at the party concerning what Imperato gave

Grievant. The persons Wright spoke to indicated that Grievant and his wife did not appear embarrassed or upset (State's Exhibit 3).

33. On February 1, 1999, Wright submitted a written report on his investigation of the allegations against Grievant. Wright incorrectly concluded during his investigation that Grievant had shown Imperato and Bride together the handgun in his van in the facility parking area. Wright also incorrectly concluded that the date of the incident in which Grievant made the comment of a sexual nature to Imperato while she was adjusting the timer was November 5, 1998 (State's Exhibit 3).

34. On March 3, 1999, Tallon sent Grievant a *Loudermill* letter providing 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 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. On or about August 12, 1998, you had a disagreement with CFSS Buley, and thereafter stormed out of the facility, slamming and punching doors as you left. On or about August 13, 1998, you attempted to induce Joan Imperato, Building Maintenance Mechanic, to write a false statement to the effect that one or more of the doors in the facility were broken, and had to be slammed. She responded that she wasn't going to write something like that because those doors weren't broken. You then said, words to the effect of, "Fuck you, Joanie. I would do it for you." When she continued to refuse, you said, words to the effect of, "Well, fine fucking friend you are. Just write the letter."

These actions appear to have violated: (1) DOC Work Rule 4, which requires you to be honest in all circumstances related to your employment; (2) DOC Work Rule 6, which forbids malicious, demeaning, harassing or insulting actions towards employees or members of the public; and (3) DOC Work Rule 9, which forbids actions by employees that reflect discredit on DOC. (These violations are

alleged in relation to your actions toward Ms. Imperato on or about August 13, 1998 – not your earlier actions toward CFSS Buley.)

2. Some time in the late summer or early fall of 1998, while in the parking lot of the Marble Valley Regional facility, you took a handgun from your vehicle's glove compartment and showed it to Joan Imperato and Dan Bride, another Buildings employee. They report that you described the handgun as a 9-millimeter, and said you had been carrying it in your car since an incident with an offender. In your investigative interview, you denied having a firearm in your vehicle at any time, but admitted that you own two 9 millimeter pistols and acknowledged that bringing firearms onto state property was prohibited.

These actions appear to have violated: (1) DOC Work Rule 1 by violating Buildings Department Rule #9, which states: "No person while on property shall carry firearms, either openly or concealed, except for official purposes;" (2) DOC Work Rule 12, which states: "while engaged with an activity associated with the Department of Corrections, unless expressly approved by the Commissioner, the possession or use of firearms is prohibited;" and DOC Work Rule 9, which prohibits behavior that reflects discredit on the DOC.

3. On or about November 5, 1998, Ms. Imperato came in early to work on the clock near or behind the PC desk. You said to her, apparently three times in slightly different ways, words to the effect of, "I love a woman when she's on her knees." After you repeated yourself to that extent, Ms. Imperato said, words to the effect of, "That's enough, John, it's too early in the morning." Another CO present for such comments stated that, while he could not quote your words, he was positive your comments were sexual in nature, and involved something about Ms. Imperato being on her knees.

These actions appear to have violated: (1) DOC Work Rule 6, which forbids malicious, demeaning, harassing or insulting actions towards employees or members of the public; (2) DOC Work Rule 9, which forbids actions by employees that reflect discredit on DOC; and (3) DOC Work Rule 1, by making statements of a type that are prohibited by the Vermont Department of Personnel Policies and Procedures on Sexual Harassment. (Prohibits "sexual innuendoes, suggestive comments, jokes of a sexual nature.")

4. Ms. Imperato also reports that you made derogatory and disparaging comments in reference to several other DOC employees. She reports that you called CO Shari Fitzgerald a "slut", that you made inappropriate comments about the sexual orientation of Casework Supervisor Ellen McWard, and you called former CSS Sean Ball a "fucking queer," or words to that effect. She states that you have also made comments regarding how "easy" Lisa Casey was, and implied that you could have sex with her any time. The same or similar comments about those employees have also been heard by another Buildings Department employee and a DOC employee.

These actions appear to have violated: (1) DOC Work Rule 6, which forbids malicious, demeaning, harassing or insulting actions towards employees; (2) DOC Work Rule 9, which forbids actions by employees that reflect discredit on DOC; and (3) DOC Work Rule 1, by making statements of a type that are prohibited by the Vermont Department of Personnel Policies and Procedures on Sexual Harassment. (Prohibits “sexual innuendoes, suggestive comments, jokes of a sexual nature” and “degrading words to describe an individual.”); and (4) DOC Work Rule 10, by violating the anti-discrimination provisions of the Corrections Unit Agreement, Article 5, and 21 VSA 495, when you discriminated against Ellen McWard and Sean Ball on the basis of your perception of their sexual orientation.

5. During the course of the investigation, you falsely denied the above-referenced allegations of misconduct against you. In particular, you falsely denied having attempted to induce Ms. Imperato to make a false statement to DOC, you falsely denied that you had a firearm in your vehicle on state property, you falsely denied the comments of a sexual nature that Ms. Imperato attributed to you, and you falsely denied making the above-referenced derogatory, disparaging and discriminatory comments about co-workers that were attributed to you by Ms. Imperato and others.

In addition, you falsely claimed during the investigation:

- (1) That you had given Dan Bride a high recommendation to Mr. Craig.
- (2) On December 15, 1998, you falsely reported to Bob Wallet that you didn't see the buildings division staff, and had not talked to them or about them.
- (3) That you had not talked about and/or threatened on more than one occasion to bring a lawsuit or lawsuits against the Buildings Division staff.
- (4) That Ms. Imperato engaged in unwelcome sexual harassment of you when she gave you a present of her underwear at a party given in your honor when you were leaving the Buildings Division to return to the DOC. There are at least three witnesses who disagree with your claim that Ms. Imperato's behavior was unwelcome to you.

These actions appear to have violated: (1) DOC Work Rule 4, which requires you to be honest in all circumstances related to your employment; and (2) DOC Work Rule 9, which forbids actions by employees that reflect discredit on DOC.

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 . . .

...  
(State's Exhibit 2)

35. On March 22, 1999, Grievant's attorney, A. Jeffry Taylor, informed Tallon by letter that Grievant denied each of the allegations against him. Grievant did not request a meeting to respond to the allegations (State's Exhibit 17).

36. Tallon decided to dismiss Grievant. In deciding to dismiss Grievant, Tallon spoke to Wright and relied on Wright's investigation report. He also spoke to some of the involved employees. Tallon considered the nature and seriousness of Grievant's offenses as the most important factor. He considered that the credibility of correctional officers is paramount to the integrity of the correctional facility since officers often have to give testimony on incidents. He concluded that Grievant was dishonest and did not have credibility. He viewed Grievant's comments to Imperato while she was adjusting the timer as sexual harassment. He determined that Grievant's supervisors had lost confidence in Grievant's ability to perform assigned duties. He determined that Grievant had clear notice that his misconduct was prohibited. Tallon concluded that Grievant did not have potential for rehabilitation since a person had to accept responsibility for his actions, and Grievant had denied his offenses. He considered progressive discipline, but concluded there was no appropriate sanction less than dismissal.

37. Tallon informed Grievant by letter dated March 30, 1999, that he was dismissed from the position of Correctional Officer I, effective March 30, 1999. Tallon stated: "The reasons for this action are those that are enumerated in my letter of March 9, 1999 . . . which are incorporated herein by reference (State's Exhibit 1).



38. In 1997, Imperato purchased a handgun from MVRCF Correctional Officer Dana Berg. Berg delivered the handgun to Imperato at the maintenance shop at MVRCF.

#### MAJORITY OPINION

Grievant alleges that the Employer violated Article 14 of the Contract by dismissing him. Specifically, Grievant contends that the Employer improperly bypassed progressive discipline, failed to apply discipline with a view toward uniformity and consistency, and dismissed him without a basis in fact and without just cause.<sup>1</sup>

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 standard for implied notice is whether the employee should have known the conduct was prohibited. Grievance of Towle, 164 Vt. 145 (1995). Brooks, supra, 135 Vt. at 568. Knowledge that certain behavior is prohibited and subject to discipline is notice of the possibility of dismissal. Towle, supra. Grievance of Gorruso, 150 Vt. 139, 148 (1988).

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.

In reviewing dismissals, we do not look beyond the reasons given by the employer in the dismissal letter for the action taken; Grievance of Buckbee, 15 VLRB 34, 49 (1992); but we will not turn disciplinary letters into dialectic exercises. Grievance of Erlanson, 5 VLRB 28, 39 (1982). A letter which adequately puts an employee on notice of the misconduct will not be considered deficient. Erlanson, 5 VLRB at 39.

The Employer has made several charges against Grievant, and we will discuss each of them in turn. The Employer charged Grievant with attempting to induce Joan Imperato to write a false statement to the effect that doors Grievant had slammed in a disagreement with a supervisor on August 12, 1998, were broken. The Employer further charged Grievant with becoming angry with Imperato when she refused to write the statement and cursing at her. The Employer contends that this violated Work Rules that: 1) require employees to be honest in all circumstances related to their employment; 2) forbid malicious, demeaning, harassing or insulting actions towards employees; and 3) forbid actions that reflect discredit on the Employer.

We conclude that the Employer has proven the underlying facts of this charge against Grievant by a preponderance of the evidence. This dishonest action by Grievant violated the work rules requiring employees to be honest in all circumstances related to their employment, and forbidding actions that reflect discredit on the Employer. It is not evident that Grievant's cursing at Imperato constituted a malicious, demeaning, harassing

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<sup>1</sup> In the grievance filed with the Board, Grievant made the additional allegation that the Employer violated certain procedural provisions of Article 15 of the Contract. However, Grievant has made no further mention of that allegation, and we consider Grievant to have waived that issue.

or insulting action towards Imperato. Instead, it reflected Grievant's anger that Imperato was unwilling to be a partner to his dishonesty.

Another charge that the Employer made against Grievant was that, while in the parking lot of MVRCF, Grievant took a handgun from his van's glove compartment and showed it to Imperato and Dan Bride. The Employer contends that this violated work rules prohibiting employees having firearms on state property, and prohibiting possession of firearms while engaged with an activity associated with the Employer.

Grievant contends that this charge cannot be sustained because the testimony of both Imperato and Bride conflicted with the charge that Grievant showed Imperato and Bride the handgun together. We have concluded by a preponderance of the evidence that Grievant did not show Imperato and Bride the handgun at the same time. However, this does not result in a conclusion that Grievant is exonerated from culpability in this incident. The essence of the charged wrongdoing against Grievant is that he had a firearm on facility grounds. We have concluded by a preponderance of the evidence that Grievant showed Bride his handgun while in his van in the facility parking area. This is sufficient to prove the essence of the charge against Grievant.

We have further concluded that, on a separate occasion, Grievant showed Imperato his handgun while in his van in the parking lot of a restaurant that they had traveled to directly from the facility parking area. It is technically accurate that Grievant did not show Imperato the handgun in the MVRCF parking area as charged. However, the essence of the charge that Grievant had a handgun on facility property on this date has been established since Imperato and Grievant rode directly from the facility parking area to the restaurant. The letter of dismissal adequately put Grievant on notice of the charged

misconduct of having a firearm on facility grounds, and we conclude the essence of the charge has been proven. Erlanson, 5 VLRB at 39. This offense of Grievant violated the work rules prohibiting having firearms on facility grounds.

A further charge made by the Employer against Grievant is that, “on or about November 5, 1998”, Grievant made sexual comments to Imperato while she was on her knees adjusting a timer to the effect of “I love a woman when she’s on her knees.” The Employer contends that these actions violated work rules: 1) forbidding malicious, demeaning, harassing or insulting actions towards employees; 2) prohibiting actions that reflect discredit on the Employer; and 3) prohibiting sexual innuendoes, suggestive comments, and jokes of a sexual nature.

Contrary to Grievant’s assertions that the incident did not occur, we have concluded that Grievant did make such comments while Imperato was adjusting a timer in late October or early November, 1998. Nonetheless, Grievant contends the charge has not been established because the evidence indicates that any such incident could not have occurred on November 5, 1998. We agree the incident did not occur on November 5, 1998. However, this does not mean the charge has not been proven. First, the charge indicates the incident occurred “on or about November 5, 1998”, which encompasses dates beyond the specific date of November 5. Moreover, the essence of the charge is not the date it occurred, but that Grievant engaged in the improper conduct. Grievant’s actions in this regard violated the work rules as charged. His comments were demeaning and harassing in that they constituted innuendoes and suggestive comments of oral sex.

The Employer further charges Grievant with making derogatory and disparaging comments about employees Shari Fitzgerald, Ellen McWard, Sean Ball and Lisa Casey.

Specifically, Grievant was charged with calling Fitzgerald a “slut”, making inappropriate comments about the sexual orientation of McWard, calling Ball a “fucking queer”, and making comments regarding the sexual relations of Casey and that he could have sex with her any time. The Employer contends that these actions violated a work rule forbidding malicious, demeaning, harassing or insulting actions towards employees; as well as sexual harassment and anti-discrimination provisions of policies, statute and the collective bargaining agreement.

We have concluded by a preponderance of the evidence that Grievant made the disparaging and derogatory comments as charged. His comments were demeaning, malicious and insulting; and they violated the work rule prohibiting such behavior.

The Employer further charges Grievant with falsely denying the above allegations during the course of the investigation against him. The Employer contends that Grievant’s actions violated the work rules requiring employees to be honest in all circumstances related to their employment, and forbidding actions that reflect discredit on the Employer.

This charge has been established. During the investigation, Grievant denied the allegations of attempting to induce Imperato to write a statement that the doors he had slammed were broken, having a firearm in his van in the facility parking area, making comments of a sexual nature to Imperato while she was adjusting the timer, and making derogatory and disparaging comments about other employees. Since these allegations have been established, Grievant violated the work rule prohibiting dishonesty in all circumstances related to employment.

Similarly, the Employer charges Grievant with falsely claiming during the investigation: 1) that he had given Bride a high recommendation to Roger Craig when Bride was applying for a Maintenance Mechanic position; 2) that he had indicated at a December 15, 1998, meeting that he did not see buildings division staff, and had not talked to them or about them; 3) that he had not talked about and/or threatened on more than one occasion to bring a lawsuit or lawsuits against Department of Buildings and General Services staff; and 4) that Imperato had engaged in unwelcome sexual harassment of him at a party when he left his Maintenance Mechanic position to assume a Correctional Officer I position. The Employer contends that Grievant's actions violated the work rules requiring employees to be honest in all circumstances related to their employment, and forbidding actions that reflect discredit on the Employer.

The Employer has established Grievant's dishonesty during the first two of these incidents. Grievant gave Bride a negative recommendation to Craig, and it was dishonest of him to claim otherwise during the investigation. Similarly, he regularly saw and interacted with the maintenance staff, and had spoken critically about them. It was dishonest of him to claim otherwise.

The Employer has not presented sufficient evidence with respect to the other two incidents to support a charge of dishonesty. The evidence does indicate that Grievant at times discussed taking action against Buildings staff. However, to sustain a charge of dishonesty, the Employer must present more than general discussion; there must be specific evidence of threatened lawsuits on identified matters. We conclude that evidence is not before us.

We also conclude that the Employer has not demonstrated that Grievant falsely claimed that Imperato's actions at the party were unwelcome to him. It is true that he did not appear visibly upset by the "gag" gift or cake given him by Imperato, and did not report the incident until ten months later when he was under investigation. However, visible appearance and failure to make a complaint through official channels does not lead to a conclusion that he welcomed Imperato's actions.

In sum, the bulk of the charges against Grievant have been established. The fact that all of the charges against Grievant have not been proven in their entirety 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 charges justify dismissal. The pertinent factors here are: 1) the nature and seriousness of the offenses and their relation to the employee's duties and position, 2) the effect of the offenses upon Grievant's ability to perform at a satisfactory level and its effect upon supervisors' confidence in Grievant's ability to perform assigned duties, 3) the clarity with which Grievant was on notice of any rules that were violated in committing the offenses, 4) the consistency of the penalty with those imposed upon other employees for the same or similar offenses, 5) Grievant's past disciplinary record, 6) the potential for Grievant's rehabilitation, and 7) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

Grievant's misconduct was serious. Grievant engaged in repeated acts of dishonesty as detailed above through falsely denying acts of misconduct he had committed, denying or falsely reporting workplace interactions and communications in which he had been engaged, and attempting to induce another employee to make a dishonest statement. Dishonesty is a serious offense by an employee against an employer. In re Carlson, 140 Vt. 555, 559 (1982). Repeated acts of dishonesty justify dismissal as a reasonable action, and warrant the bypassing of progressive discipline. Id. Grievance of Graves, 147 Vt. 519, 523 (1986). The nature of a correctional officer's duties requires accurate and truthful reporting of incidents involving offenders, including providing testimony concerning interactions with offenders in various forums where credibility is crucial, and in previous cases we have upheld dismissals of correctional officers where their dishonesty to the employer has been a proven charge. Grievance of Johnson, 9 VLRB 94(1986). Grievance of Pretty, 22 VLRB 260 (1999). Grievance of Corrow, 23 VLRB 101 (2000). Grievant has severely damaged his credibility by his demonstrated pattern of dishonest behavior.

Grievant's repeated dishonesty also impeded the resolution of workplace disputes. His false claim that he did not see or interact with maintenance staff impeded attempts by management of the Department of Corrections and the Department of Buildings and General Services to resolve friction between their employees. Also, his false denial of all allegations against him impeded the Employer's investigation. Employees have a responsibility to cooperate in investigations. *e.g.*, Grievance of Adams, 22 VLRB 271, 283-84 (1999). Grievant failed miserably in that duty here by his stonewalling and lack of cooperation.



Grievant's additional offenses exacerbated the severity of his misconduct. Grievant created a security risk and disregarded known rules by having a handgun in his van on facility grounds. He demonstrated offensive workplace behavior by his demeaning and harassing comments of a sexual nature to Imperato when she was adjusting the timer. He demonstrated further offensive behavior by making derogatory and disparaging comments about employees concerning their sexual orientation and sexual practices as he perceived them.

Grievant's offenses understandably impacted the trust his supervisors placed in him and greatly reduced supervisors' confidence in Grievant's ability to perform assigned duties. Grievant's repeated dishonesty seriously undermined supervisors' confidence that he would provide truthful testimony with respect to interactions he had with offenders or other employees. Also, his offensive behavior and his bringing a handgun onto facility property further reduced the ability of supervisors to have confidence that Grievant would adequately perform his security responsibilities and interact productively with other employees.

Grievant had fair notice that the misconduct he engaged in would result in disciplinary action. Honesty is an implicit duty of every employee and, at a minimum, an employee should know that dishonest conduct is prohibited. Carlson, 140 Vt. at 560. Graves, 147 Vt. at 524. Johnson, 9 VLRB at 94. Similarly, Grievant should have known that the offensive behavior in which he engaged, particularly his comments of a sexual nature, were prohibited. Grievant also had clear notice that he should not bring a handgun onto facility grounds since he was aware that he could be disciplined for such behavior.

In considering the consistency of the penalty imposed on Grievant compared to other employees, Grievant did not establish that the Employer failed to apply discipline with a view toward uniformity and consistency. The evidence did not indicate any other employees who approached the level of dishonesty engaged in by Grievant. Also, although general evidence was introduced that other employees at the facility made disparaging comments about employees and engaged in off-color jokes, the evidence did not indicate any other employees whose level of offensive behavior was as high as Grievant. The actions of Imperato at the party for Grievant when he left the Maintenance Mechanic position provide evidence of the atmosphere at MVRFCF concerning jokes of a sexual nature, and give some insight into the nature of the relationship between Grievant and Imperato. However, Imperato's actions do not exonerate Grievant with respect to his offensive behavior towards her and other employees.

Grievant also did not demonstrate inconsistent treatment of him concerning having a handgun on facility property. At the time he was dismissed, there is no evidence of the Employer being aware of other employees having handguns on facility property. Correctional Officer Dana Berg delivered a handgun to Imperato at the maintenance shop at MVRFCF in 1997, but that did not come to light until the hearings in this grievance. In any event, Grievant was dismissed for several offenses of a varied nature, and there is no evidence of other employees engaging in offenses similar in extent and severity.

In determining whether Grievant's offenses were sufficient for the Employer to reasonably bypass progressive discipline and dismiss him, we consider that he had not received any previous disciplinary action. We also consider his potential for rehabilitation and the adequacy and effectiveness of alternative sanctions. Grievant has not

demonstrated that he is good candidate for rehabilitation due to his repeated dishonesty and his failure to take any responsibility for his misconduct. Ultimately, we conclude that just cause existed for Grievant's dismissal. The seriousness of Grievant's offenses justified bypassing progressive discipline, and the Employer acted reasonably by concluding that a lesser sanction than dismissal would not be effective or adequate.

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Edward R. Zuccaro, Acting Chairperson

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Richard W. Park

#### DISSENTING OPINION

I agree with my colleagues concerning the underlying facts and the conclusions on the establishment of charges against Grievant. However, I disagree with their decision that just cause existed for Grievant's dismissal. I believe that a lengthy suspension was justified, but conclude that progressive discipline was inappropriately bypassed.

Grievant had received no previous disciplinary action, and his offenses did not warrant his summary dismissal. The offensive behavior engaged in by Grievant concerning his comments of a sexual nature to and about other employees cannot be condoned. However, other employees at MVRFCF made disparaging comments about employees and told off-color jokes. Further, Joan Imperato, the main witness against Grievant, had given Grievant a "gag" gift of a sexual nature, and given him a cake on which she had inserted an off-color comment, at a party for Grievant. This indicates that an atmosphere of jokes and comments of a sexual nature, and off-color behavior, existed

at the facility. This provides a mitigating circumstance diminishing Grievant's culpability.

Also, the seriousness of Grievant's offense of bringing a handgun onto facility property is lessened given the evidence of Dana Berg delivering a handgun to Imperato at the maintenance shop at MVRFCF in 1997. Although this did not come to light until the hearing in this matter, the way the Employer addressed the issue is revealing with respect to the seriousness in which the Employer views the offense. Evidence was presented that Berg was offered immunity from discipline if he testified that he delivered the handgun to Imperato at the facility. I question how seriously the Employer views bringing a handgun onto facility grounds as an offense, and how rigorously the Employer will enforce consistent treatment of employees, given no discipline of one offender and the dismissal of the other.

Grievant's repeated dishonesty is the most troubling of his offenses. However, it was not only Grievant's dishonesty that made this case troubling. There was also inconsistent testimony provided by other witnesses, most notably Imperato, and the lack of support for some conclusions reached by the investigator. Under the circumstances, I do not think it was reasonable to bypass progressive discipline altogether. Grievant should be provided an opportunity to rehabilitate himself, with the understanding that further dishonesty will not be tolerated.

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Carroll P. Comstock

ORDER

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

Dated this 10th day of July, 2000, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

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Edward R. Zuccaro, Acting Chairperson

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Richard W. Park