

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 00-18
RANDY HURLBURT)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On March 22, 2000, Randy Hurlburt (“Grievant”) filed a grievance contending that his dismissal from his position as a Microphotography Supervisor with the Vermont Department of Buildings and General Services (“Employer”) violated Article 14 of the collective bargaining contract between the Vermont State Employees’ Association and the State of Vermont for the Non-Management Unit, effective July 1, 1999, to June 30, 2001 (“Contract”). Specifically, Grievant alleged that his dismissal violated Article 14 of the Contract because it was not based in fact or supported by just cause, the Employer improperly bypassed progressive discipline, and the Employer failed to apply discipline with a view toward uniformity and consistency.

Hearings were held in the Labor Relations Board hearing room in Montpelier on October 19 and November 16, 2000, before Board Members Edward Zuccaro, Acting Chairperson; Carroll Comstock and John Zampieri. Attorney Kimberly Cheney represented Grievant. Assistant Attorney General William Reynolds represented the Employer. The parties filed post-hearing briefs on December 11, 2000.

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.

...

The parties agree that there are appropriate cases that may warrant the State . . bypassing progressive discipline . . .

...

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. Grievant was employed by the State for approximately 20 years. His overall performance on his performance evaluations has always been rated either “consistently meets job requirements/standards”, “frequently exceeds job requirements/standards”, or “satisfactory”. Grievant received several letters of commendation during his employment (Grievant’s Exhibits A, B).

3. In October 1985, Grievant was dismissed from his Support Services Worker position with the Agency of Human Services. The central reason for his dismissal was because he was unavailable to drive for 98 days during 1985 due to the suspension of his driver’s license. He filed a grievance over his dismissal with the Labor Relations Board. In an October 1986 decision, the Board determined that just cause did not exist for Grievant’s dismissal. The Board substituted a 13-day suspension for the dismissal, and

required that Grievant be referred to the Employee Assistance program. 9 VLRB 174 (1986).

4. Grievant was employed as a supervisor in the Employer's Microphotography Section in Middlesex from 1995 until his dismissal in February 2000. Among Grievant's supervisory responsibilities was overseeing the Reference/Research Unit in Middlesex. Catherine McDonald has been employed by the Employer for 5 years, and at all times relevant to this grievance she was employed as a Clerk C in the Reference/Research Unit. Janet Walker also worked in the Reference/Research Unit. Walker was the immediate supervisor of MacDonald. Grievant was the immediate supervisor of Walker. Grievant reported to John Yacavoni, Director of Public Records and Central Services for the Employer. Yacavoni considered Grievant to be successful as a supervisor in achieving good production from his subordinates.

5. On October 29, 1997, Thomas Torti, Department of Buildings and General Services Commissioner, suspended Grievant for two weeks. Grievant did not grieve the suspension. In the letter notifying Grievant of the suspension, Torti set forth the following reasons for the suspension:

- ❑ On September 25 while on special assignment to provide security for vehicles and equipment to be auctioned by the State you were accompanied by another person against a direct order prohibiting such.
- ❑ You had no authority to enter, start or drive any of the vehicles yet you did so.
- ❑ You were driving the auction vehicles in an inappropriate manner.
- ❑ You violated an expressed directive against the use of alcohol and were under the influence of alcohol while working.
- ❑ In addition to the above, you also engaged in conduct unbecoming a supervisor by:
 1. Relaying intent to spin donuts.
 2. Displaying a belligerent and disrespectful attitude toward a fellow employee.

...

(State's Exhibit 23)

6. On March 18, 1998, Yacavoni issued Grievant a written reprimand for failing to properly follow up on the loss of a one hundred dollar bill from the Reference/Research Unit, and for displaying behavior unbecoming of a supervisor during the investigation of the incident (State's Exhibit 22).

7. As of November 1999, Grievant and MacDonald had lived together in an apartment located on Stowe Street in Waterbury for approximately three years. MacDonald at that time had two children from a prior marriage, James who was age 14 and Salina who was age 8. MacDonald's children resided with their father in Northfield.

8. On November 24, 1999, the day before Thanksgiving, Grievant took the day off from work to go hunting. At approximately 3:00 p.m., he drove to the Department of Buildings and General Services facility in Middlesex in his truck to pick up MacDonald at the end of her workday. MacDonald's two children were with her. Grievant had been drinking prior to arriving at the Middlesex facility, and when he arrived he appeared intoxicated. MacDonald indicated she would drive and attempted to get into the driver's seat of Grievant's truck. Grievant pushed MacDonald, and MacDonald pushed him back. Grievant lost his balance and fell to the ground. Grievant cursed MacDonald. Grievant then drove to Depot Beverage, where he and his dog got out of the truck and he left MacDonald and her children with the truck. MacDonald drove the truck back to their apartment on Stowe Street (State's Exhibit 1).

9. Shortly thereafter, Grievant arrived at the apartment. Grievant kicked MacDonald hard in the back. He also shoved MacDonald into a captain's chair, resulting in MacDonald losing her balance and landing on the floor. MacDonald demanded several times that Grievant leave the apartment. Grievant left a few times, each time returning to

the apartment. MacDonald and her children eventually left the apartment and walked approximately four miles to the Vermont State Police barracks in Middlesex. State Police Officer Pam Barney met MacDonald at the barracks and put her in touch with a battered women's shelter in Barre. MacDonald arranged to stay at the shelter with her children (State's Exhibit 1).

10. MacDonald and her children spent Thanksgiving at the battered women's shelter. On November 26, 1999, the day after Thanksgiving, MacDonald made a request for emergency relief from abuse against Grievant. MacDonald filled out an affidavit in support of her request. In the affidavit, MacDonald set forth the details of the November 24, incident, and stated that she was "afraid of" Grievant (State's Exhibits 1, 3).

11. On November 26, 1999, Family Court Judge Nancy Corsones issued a Temporary Order for Relief From Abuse. The order provided that Grievant "shall not telephone, write to, contact or otherwise communicate with the plaintiff in any way . . . this includes any work related contact." The order further provided that Grievant "shall not place himself within 500 feet of plaintiff individually or of the following address(es): plaintiff's children and residence. While at work Defendant shall not place himself within 50 ft. of plaintiff." The order provided that it would remain in effect until December 9, 1999, when a hearing would be held on whether to extend or modify the order (State's Exhibit 2).

12. On the evening of November 26, 1999, State Police Trooper Barney and Waterbury Police Officer Scott Patterson served the Temporary Order for Relief from Abuse on Grievant. Grievant refused to answer the door. Officer Patterson verbally

paraphrased the order and left the order at Grievant's doorway, which was located on the second floor of the apartment building (State's Exhibit 2, State's Exhibit 40).

13. On Monday, November 29, 1999, Grievant advised his supervisor, John Yacavoni, that he had been served with a restraining order. Grievant showed the order to Yacavoni. Yacavoni ordered Grievant to abide by the temporary restraining order. He told Grievant to stay away from MacDonald or he would get into more trouble. MacDonald called Yacavoni that day to advise him she was in a battered women's shelter and would be out of work that week. At some point while she was in the shelter, MacDonald discussed quitting her job or being transferred to another job. Yacavoni told her not to do either and that he would see what he could do on his end. As a result of MacDonald's absence, Yacavoni reassigned an employee from the Microphotography Section to the Reference/Research Unit to cover MacDonald's position (State's Exhibit 40).

14. On November 30, 1999, during work hours and using his work computer, Grievant sent MacDonald three e-mail messages addressed to MacDonald's personal e-mail account. On December 1, 1999, during work hours and using the work computer, Grievant sent MacDonald five more e-mail messages. One of the December 1 messages stated in part: "P.S. This will probably (sic) be the last note I send because I was reading the order and it does say that contacting you this way maybe (sic) a violation and that's not my intent." (State's Exhibit 8).

15. On or about December 3, 1999, Grievant asked Terry Lamos, the office computer system administrator and Grievant's half-sister, to help him delete the e-mail messages he sent MacDonald on November 30 and December 1. Lamos assisted Grievant

in deleting the messages from his computer. Later that day, Grievant asked Lamos to assist him in deleting the messages from MacDonald's personal e-mail account. Grievant gained access to MacDonald's personal e-mail account and deleted the messages from MacDonald's "in-box" in her e-mail account. Grievant did not delete the messages from the "wastebasket" in MacDonald's e-mail account.

16. On December 3, 1999, Grievant was arraigned in Barre District Court on the charge of domestic assault. By order of Judge Mark Keller, conditions of release were imposed on Grievant. Among the conditions of release were that Grievant "shall not purchase, possess or consume any alcoholic beverages"; that he "shall not associate with Catherine MacDonald, nor personally contact, harass, or cause to be harassed same"; and that he "shall not be within 50 feet of victim, victim's residence, vehicle, or place of employment". Grievant was provided a copy of the order containing the conditions of release, and signed a statement acknowledging: "I have received a copy of this order. I have read it. I understand it." (State's Exhibit 5).

17. While MacDonald was staying at the battered women's shelter, she attempted to access her personal e-mail account. She saw that she had e-mail messages from Grievant, but was unable to view those messages because her computer "locked up". MacDonald visited the victim's advocate office in Barre. Montpelier police officer Cheryl Goslant was at the office. Goslant allowed MacDonald to use her computer to access MacDonald's e-mail account. Upon opening her account, MacDonald discovered that the e-mails from Grievant were no longer in her in-box. Goslant then assisted MacDonald in retrieving the e-mail messages from Grievant from the "wastebasket" of MacDonald's e-mail account. MacDonald received a printed copy of the e-mail

messages. Goslant told MacDonald that the e-mail messages were in violation of the restraining order, and informed her that she would forward copies of the messages to the Vermont State Police for possible prosecution. MacDonald told Goslant she was staying at the shelter because she was afraid of Grievant.

18. MacDonald returned to work on Monday, December 6, 1999. Both Grievant and MacDonald are smokers. Smoking is permitted in the workplace in two places: on the outside loading dock, and in an interior smoking room. On December 6, Yacavoni, also a smoker, went to the loading dock to smoke a cigarette. When he arrived there, he observed both Grievant and MacDonald on the loading dock smoking a cigarette. They were less than 50 feet apart. While Yacavoni was on the loading dock, Grievant and MacDonald did not speak to one another.

19. On or about December 6, 1999, employee Heidi Quenneville walked by the interior smoking room and observed Grievant and MacDonald in the room arguing. Quenneville told coworker Melanie Rutledge what she observed. Rutledge went near the smoking room and heard Grievant and MacDonald arguing. She heard MacDonald mentioning something about “victim’s assistance”, and Grievant talking about the “new friends” MacDonald was making.

20. On December 8, 1999, Yacavoni advised Grievant, MacDonald and Janet Walker that Grievant was relieved of any supervisory responsibilities over the Reference/Research Unit. Yacavoni also told Grievant and MacDonald they were to use different areas for smoke breaks. He instructed Grievant to use the back loading dock, and told MacDonald to use the smoking room.

21. On December 13, 1999, State Police Trooper Barney went to Grievant's Stowe Street apartment to flash-cite him for having sent e-mail messages to MacDonald in violation of the Temporary Order for Relief From Abuse. When she arrived at the apartment, she discovered that MacDonald and Grievant were in the apartment together in violation of the court-ordered conditions of release. Barney cited Grievant to appear in court the following day.

22. On December 14, 1999, Grievant was arraigned in Barre District Court on one count of violation of abuse prevention order and two counts of violation of conditions of release. By order of the court, conditions of release were imposed on Grievant. Among the conditions of release were that Grievant "shall not associate with Catherine MacDonald, nor personally contact, harass, or cause to be harassed same"; that Grievant "shall have a 24 hr. curfew except for court appointments, attorney appointments, medical appointments and work" and reside with his father; and that Grievant shall follow all the previous conditions of release imposed on December 3, 1999. Grievant was provided a copy of the order containing the conditions of release, and signed a statement acknowledging: "I have received a copy of this order. I have read it. I understand it." (State's Exhibit 6).

23. On the night of Thursday, December 16, 1999, Grievant was drinking alcohol, had contact with MacDonald and did not abide by his curfew in violation of his conditions of release. Grievant was arrested and lodged at a correctional facility for violating his conditions of release. Grievant remained incarcerated until Monday, December 20, 1999 (State's Exhibit 15).

24. Grievant did not contact Yacavoni on Friday, December 17, 1999, to tell him he had been arrested and would not be working that day. Yacavoni asked Lamos where Grievant was, and she told him that Grievant probably was in “detox”. Lamos told Yacavoni that Grievant’s family was concerned about his drinking, and that they were planning an “intervention” in which they could confront him and tell him his drinking was unacceptable and could not continue.

25. On Monday, December 20, 1999, Grievant did not contact Yacavoni to tell him he would not be working that day. Lamos told Yacavoni that day that Grievant was not in “detox”, but was incarcerated.

26. Grievant subsequently submitted a time sheet claiming 8 hours of sick leave for both December 17 and December 20. The Employer denied Grievant’s request for sick leave for those days and considered that Grievant was in off payroll status those days due to unauthorized absence (State’s Exhibits 27, 28, 29, 30, 31, 32 and 42).

27. The intervention planned by Grievant’s family occurred when he was arraigned in court for violating his conditions of release. Following the intervention, Grievant entered a residential alcohol treatment program where he remained from December 20, 1999, to January 2, 2000. On December 20, 1999, modified conditions of release were issued by the court indicating that Grievant would enter the residential alcohol treatment program at Maple Leaf Farm, and providing that all other conditions of release would remain in effect (State’s Exhibit 16).

28. On Tuesday, December 21, Grievant called Yacavoni for the first time since his arrest and informed him that he had entered the residential alcohol treatment

program. Yacavoni told Grievant that he was authorized to take sick leave for this absence. Since completing the treatment program, Grievant has not consumed alcohol.

29. On December 30, 1999, Bradley Ferland, Business Manager for the Employer, sent a letter to Grievant. The letter referenced the conditions of release imposed on Grievant, and provided in pertinent part:

Our past understanding of these conditions is that you are not to have contact or communication with Catherine or be within 50 feet of her while at work. You are hereby ordered as a condition of your employment to adhere to any and all such conditions. I am notifying you that any violation of these conditions will be treated as misconduct and work place discipline up to and including dismissal will follow.

(State's Exhibit 33)

30. Grievant returned to work on Monday, January 3, 2000. On January 4, both Grievant and MacDonald were at work. Melanie Rutledge walked to the doorway of Grievant's office to ask him a question, and observed MacDonald and Grievant together in Grievant's office. MacDonald was standing behind the door and Grievant was standing near the center of his office. On Rutledge's approach, Grievant moved to the doorway of his office to speak to Rutledge. After Rutledge left Grievant's office, MacDonald approached her and asked her not to tell anyone about what she had seen.

31. During the period the court-imposed restrictions on Grievant's workplace contact with MacDonald were in effect, Yacavoni set up an arrangement whereby, when it was necessary for Grievant to work in the Reference/Research Unit, Grievant would contact Janet Walker who would ask MacDonald to leave the area. This procedure was followed on at least one occasion. There were other occasions during this period when Walker observed Grievant and MacDonald having conversations in the Reference/Research Unit contrary to the arrangement made by Yacavoni.

32. On January 10, 2000, Grievant and the prosecutor entered into a plea agreement in which the prosecutor reduced the charge of domestic assault to disorderly conduct, and Grievant pled guilty to the reduced charge of disorderly conduct and two counts of violations of conditions of release. Grievant was sentenced to serve 30 days on the work crew with credit for five days Grievant had already served in prison. He also received two consecutive six-month sentences which were suspended with probation. As a result of the plea agreement, the restraining order against Grievant was terminated (State's Exhibit 19).

33. Ferland was assigned to investigate Grievant's alleged misconduct from late November 1999 through early January 2000. As part of his investigation, Ferland asked Grievant whether he had an argument in the smoking room with MacDonald on or about December 6, 1999. Grievant replied that he did not recall the incident. On February 2, 2000, Ferland submitted his investigation report to Buildings and General Services Commissioner Thomas Torti (State's Exhibit 35).

34. On February 11, 2000, Deputy Commissioner Thomas Sandretto sent Grievant a *Loudermill* letter providing in pertinent part as follows:

As a result of your behavior described below, the Department of Buildings and General Services is contemplating serious disciplinary action against you, up to and including dismissal from the position of Microphotography Supervisor. You have the right to respond to the specific allegations listed below, either orally or in writing, before the final decision is made. You have the right to be represented by V.S.E.A. or private counsel, at no expense to the State, during proceedings connected with this action.

The reasons serious disciplinary action is contemplated are as follows:

1) On or about November 26, 1999, you assaulted Catherine McDonald. This off-duty conduct was work-related misconduct because Ms. MacDonald is a subordinate employee of this Department who works in the unit that you supervise.

2) You were given a direct order from John Yacavoni on November 29, 1999 to abide by a Temporary Restraining Order (TRO) that was issued by a Vermont Family Court Judge on November 26, 1999, after Ms. MacDonald reported the assault to police authorities. The TRO, and Director Yacavoni's order, prohibited you from telephoning, writing, contacting, or otherwise communicating with Ms. MacDonald in anyway (sic), and from coming within 500 feet of Ms. MacDonald, or 50 feet at work. The TRO conditions were in effect through December 9, 1999. On December 3, 1999, a Vermont District Court Judge issued an order specifying conditions on your release from custody of the state. The conditions included a prohibition on your contacting, harassing, causing to be harassed, and associating with Catherine MacDonald. Those conditions also prohibited you from being within 50 feet of Ms. MacDonald. On December 30, 1999, Bradley Ferland gave you a written order to comply with all Conditions of Release imposed by the District Court. On January 4, 2000, Director Yacavoni verbally gave you an additional direct order to stay away from Catherine MacDonald. You violated the orders of Director Yacavoni and Bradley Ferland, as indicated, by the following acts:

(a) On November 30, 1999, you sent three e-mail messages to Ms. MacDonald using the computer assigned for your work use. This contact violated Director Yacavoni's order.

(b) On December 1, 1999, you sent five e-mail messages to Ms. MacDonald using the computer assigned for your work use. This contact violated Director Yacavoni's order.

(c) You came within 50 feet of Ms. MacDonald on or about December 5, 1999, when you were observed together smoking cigarettes in the loading dock area. This contact violated Director Yacavoni's order.

(d) On or about December 6 or 7, 1999, you were observed in the smoking room at work with Ms. MacDonald and you were having a heated conversation with her. This contact violated Director Yacavoni's order.

(e) On or about January 4, 2000, you were in your office with Ms. MacDonald. This contact violated Bradley Ferland's written order.

(f) At various times between January 3, 2000 and January 10, 2000, you entered Ms. MacDonald's work area on several occasions. These actions violated Bradley Ferland's order and, in all instances after January 4, 2000, violated Director Yacavoni's order as well.

3) In addition to constituting violations of the orders issued by Director Yacavoni and Bradley Ferland, the acts described above in paragraph 2

are criminal acts in violation of Vermont statutes that were committed in the workplace and on work time. For the period from December 3 to December 9, 1999, your actions described above were in violation of both the TRO and the Conditions of Release.

4) You were absent from work without authorized leave on December 17 and 20, 1999.

5) On or about December 3, 1999, using computers belonging to the Department of Buildings and General Services, you attempted to delete from Ms. MacDonald's e-mail account the e-mail messages that you sent to her on November 30 and December 1. This occurred in the workplace and on work time. You enlisted the help of another Department employee to assist you. In attempting to delete the messages you were attempting to destroy evidence of your workplace misconduct and evidence of a crime. Misusing departmental resources in that manner also constitutes violation of Chapter 3 of the Rules and Regulations for Personnel Administration (Published as Personnel Policy 2.3) and the code of conduct for state employees (Policy 5.6), which each prohibit use of State property and time for personal interests or gain.

6) During the investigation of this matter you were asked about your contact with Ms. MacDonald in the smoking room on or about December 6 or 7. You were observed having a heated conversation or argument with her. You said that you did not honestly recall such contact. I believe that your statement, effectively denying this significant event, was a lie.

I am also considering your entire history of discipline as an employee of the State of Vermont.

You must notify me within twenty-four 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 36)

35. On February 18, 2000, Grievant and his representative, VSEA Field Representative David Watts, had a *Loudermill* meeting with Buildings and General Services Deputy Commissioner Thomas Sandretto. At the meeting, Grievant stated that he did not assault MacDonald, and denied that he had argued with MacDonald in the smoking room. Grievant was contentious at the meeting.

36. Commissioner Torti delegated to Sandretto the authority to decide whether to dismiss Grievant. Prior to making his decision, Sandretto discussed the issue with other managers of the Employer and with representatives of the Department of Personnel. By letter dated February 23, 2000, Sandretto informed Grievant that he was dismissed from his position for the reasons set forth in Sandretto's February 11, 2000, letter to Grievant (State's Exhibit 37).

37. In deciding that Grievant should be dismissed, Sandretto determined that Grievant's offenses were serious. He found the assault by a supervisor on a subordinate employee to be egregious. He believed there was a nexus between this off-duty assault and employment because both Grievant and MacDonald were employees, and this disrupted the working environment for MacDonald and other employees. He further concluded that Grievant had engaged in a series of coverups through his attempt to delete the e-mails and his denials of other offenses. He also considered these offenses serious, and determined they could not be condoned in a supervisor. He considered that Grievant's past disciplinary record was too poor to impose a lesser penalty than dismissal. He weighed Grievant's 20 years of employment with the State and his good productivity record, but determined these factors were insufficient to justify his continued employment. He considered that he had been involved in dismissing one employee for stealing a box of paper, and another employee for making a small amount of money from selling scrap metal, and determined that these were lesser offenses than those of Grievant. He concluded that Grievant had fair notice that he could be disciplined for his misconduct since he had direct orders not to associate with MacDonald during the effective period of the restraining order. He determined that Grievant had broken his superiors' trust by

bringing his problems into the workplace after Yacavoni had given him the opportunity to continue after his previous disciplinary problems. He considered the notoriety of Grievant's offenses to the extent that he thought the State Police might wonder what it would take for an employee to lose a job.

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.

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.

The Employer has made various charges against Grievant. The Employer first charged Grievant with assaulting Catherine MacDonald while off-duty. The Employer contends that this off-duty conduct was work-related misconduct because MacDonald is a subordinate employee who worked in the unit supervised by Grievant. We have concluded that the Employer has established by a preponderance of the evidence that Grievant assaulted MacDonald. On the evening of November 24, 1999, in the apartment shared by Grievant and MacDonald, Grievant kicked MacDonald hard in the back. He also shoved her into a chair, resulting in MacDonald losing her balance and landing on the floor.

Nonetheless, Grievant contends there is not a sufficient nexus between Grievant's off-duty conduct and his employment to warrant discipline. In cases where an employer disciplines an employee for off-duty conduct, there must be a nexus between the off-duty conduct and employment for an employer to be justified in taking disciplinary action against an employee for such conduct. Grievance of Soucier, 21 VLRB 202 (1998). Grievance of Petty, 20 VLRB 44 (1997). Grievance of Ackerson, 16 VLRB 262, 272 (1993). Grievance of Boyde, 13 VLRB 209, 227 (1990). Grievance of Jamison, 10 VLRB 239, 243-44 (1990).

We conclude there is a sufficient nexus between Grievant's off-duty assault on MacDonald and his employment to warrant disciplinary action. Although Grievant contends that his behavior toward MacDonald was not caused by the employment relationship, but by their domestic relationship, his offense generally impacted the

workplace environment given that MacDonald was a subordinate employee to Grievant working in the Reference/Research Unit that he supervised. Also, as a result of Grievant's assault of MacDonald, the Employer lost a week of MacDonald's services because she spent a week at a battered women's shelter. Further disruption to the workplace also resulted from the assault due to a restraining order issued against Grievant restricting his contact with MacDonald in the workplace. Grievant's supervisor, John Yacavoni, took over supervision of the Reference/Research Unit and established other special arrangements to restrict Grievant's contact with MacDonald.

The Employer also made several charges against Grievant that he violated the restraining order issued against him, court-ordered conditions of release, and orders issued by his work superiors through various workplace contacts he had with MacDonald. We conclude the Employer has established each of these charges. He violated the restraining order providing that he not "contact or otherwise communicate with" MacDonald, and disregarded Yacavoni's order that he abide by the restraining order, by sending eight e-mails to MacDonald on November 30 and December 1, 1999, at work on his work computer. Grievant cannot credibly assert that such communications did not come within the scope of the restraining order.

Further, as charged, Grievant violated the restraining order and/or court-order conditions of release, and supervisory orders, by the following workplace contacts he had with MacDonald: a) smoking on the loading dock with MacDonald on December 6, 1999; b) engaging in an argument with MacDonald in the smoking room on or about December 6, 1999; c) being with MacDonald in Grievant's office on or about January 4,

2000; and d) having conversations on occasions with MacDonald in the Research/Reference Unit.

Grievant again asserts that there is not a sufficient nexus between these offenses and Grievant's employment to warrant discipline. We disagree. First, even though these offenses stemmed from his off-duty behavior assaulting MacDonald, they occurred in the workplace during work hours. Further, management has the right to enforce court orders in the workplace, particularly when it involves relations between employees, and is justified in disciplining an employee for violating such orders.

The Employer further charges Grievant with attempting to destroy evidence of his workplace misconduct by attempting during work time to delete from MacDonald's personal e-mail account the e-mail messages that he sent her on November 30 and December 1. Grievant contends that he was attempting to delete the e-mails to prevent MacDonald from reading them in order to comply with the restraining order, not that he was attempting to suppress evidence that he had violated the restraining order. We conclude by a preponderance of the evidence that the Employer has sustained this charge against Grievant, as we believe Grievant was attempting to destroy evidence of his violation of the restraining order.

The Employer also charges Grievant with being absent from work without authorized leave on December 17 and 20, 1999. This charge has been established. Grievant made no attempts to receive authorization for leave for the days he was incarcerated subsequent to his arrest for violating his conditions of release. After the fact, he sought to use sick leave for his absences, but the Employer properly denied his request. Thus, he was left in the status of being on unauthorized leave for those days.

Finally, the Employer charges Grievant with lying during the Employer's investigation of the allegations against him by telling the investigator he did not recall having an argument with MacDonald in the smoking room on or about December 6, 1999. We conclude by a preponderance of the evidence that the Employer has sustained this charge against Grievant, as we believe Grievant dishonestly indicated that he did not recall this contact with MacDonald.

The Employer having established the charges against Grievant, we look to the factors articulated in Colleran and Britt, 6 VLRB at 268-69, to determine whether the proven charges justify dismissal. The pertinent factors here are: 1) the nature and seriousness of the offenses and their relation to Grievant's duties and position, 2) Grievant's job level, including supervisory role, 3) the effect of the offenses upon supervisors' confidence in Grievant's ability to perform assigned duties, 4) the clarity with which Grievant was on notice any rules that were violated in committing the offenses, 5) the consistency of the penalty with those imposed upon other employees for the same or similar offenses, 6) Grievant's past disciplinary record, 7) Grievant's past work record, 8) the potential for Grievant's rehabilitation, 9) mitigating circumstances surrounding the offenses, and 10) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

Grievant's offenses were serious. His off-duty assault on a subordinate employee was an egregious offense. As discussed above, Grievant's violent conduct towards MacDonald had a significant adverse impact in the workplace. Management should be able to rely on supervisors interacting with their subordinates without the atmosphere being poisoned by past violent conduct. Also, Grievant's numerous contacts with

MacDonald in violation of orders of the court and from his work superiors demonstrated the serious shortcoming of flaunting the legitimate exercise of authority. Grievant's attempts to destroy evidence of his misconduct and his dishonesty during the investigation exacerbated his misconduct. We view Grievant's remaining offense, being on unauthorized leave for two days, as a less serious offense, but cumulatively his offenses demonstrated substantial shortcomings detrimental to the Employer's interests

Grievant undermined his supervisors' confidence in his ability to perform his duties. Through his assault on a subordinate employee, Grievant brought his personal problems into the workplace, thereby damaging the trust placed in him by the Employer. He then irreparably damaged this trust through his repeated contacts with MacDonald in violation of court orders and orders of his work superiors. Management should be able to rely on supervisors to demonstrate and enforce compliance with legitimate management directives. By disregarding orders of his supervisors on several occasions, Grievant compromised his ability to manage the workers under his supervision. Further, Grievant's attempt to destroy evidence of his misconduct and his dishonesty during the investigation contributed to the undermining of the trust management needed to have in him as a supervisor.

Grievant had fair notice that his offenses could result in his dismissal. He should have known that assaulting a subordinate employee, whether off-duty or on-duty, was prohibited conduct that could result in discipline. He had explicit notice that his contacts with MacDonald constituted prohibited conduct, as he was under court orders and orders of his work superiors not to engage in such contact. Also, Grievant was on fair notice that

his dishonesty could be a cause for discipline, as honesty is an implicit duty of every employee. Grievance of Carlson, 140 Vt. 555, 560 (1982).

Grievant has alleged that the Employer has failed to apply discipline with a view toward uniformity and consistency. However, he has presented no evidence in support of this contention. Thus, we have no basis to conclude that the penalty imposed on Grievant was inconsistent with the penalty imposed upon other employees for the same or similar offenses.

Grievant's past work history is mixed. A review of his general work record operates in his favor. He is a long-term employee, having been employed by the State for approximately 20 years. His overall performance evaluations always have been at least satisfactory, and at times have exceeded satisfactory. Further, his supervisor considered Grievant to be successful as a supervisor in achieving good production from his subordinates. This lengthy service and positive performance record are offset by his poor disciplinary record. Grievant received two lengthy suspensions for misconduct during his employment, one of which was imposed a few years before his dismissal, and also received a written reprimand within two years of his dismissal.

Grievant contends that he has a strong potential for rehabilitation since his problems appear to have been caused by his use of alcohol, and since undergoing treatment in late 1999 he has not consumed alcohol. We have considered Grievant's problems with alcohol as a mitigating circumstance surrounding his offenses, but ultimately conclude that this is insufficient to warrant his reinstatement. Grievant's successful treatment is a positive development, but cannot erase the seriousness of his offenses. Also, even after his treatment and prior to his dismissal, Grievant engaged in

misconduct by being in the presence of MacDonald in the workplace and being dishonest in responding to questions posed to him during the Employer's investigation. Such conduct demonstrated a continuing unwillingness to accept full responsibility for his misconduct.

In fulfilling our task to determine whether the Employer acted reasonably at the time the Employer discharged Grievant for certain conduct, we conclude the Employer acted reasonably in determining that alternative sanctions less than dismissal were inadequate under the circumstances. The seriousness of Grievant's offenses and his past disciplinary record outweighed his lengthy service and positive performance record. Just cause existed for Grievant's dismissal.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is hereby ordered that the Grievance of Randy Hurlburt is dismissed.

Dated this 21st day of February, 2001, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Edward R. Zuccaro, Acting Chairperson

Carroll P. Comstock

John J. Zampieri