

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 04-38
GEOFFREY MACDONALD)	
GRIEVANCE OF:)	
)	DOCKET NO. 04-39
GEOFFREY MACDONALD)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

Geoffrey MacDonald (“Grievant”) filed a grievance (Docket No. 04-38) on September 10, 2004, contending that the State of Vermont Department of Motor Vehicles (“Employer” or “DMV”) violated Article 14 of the collective bargaining agreement between the State of Vermont and the Vermont State Employees’ Association (“VSEA”) for the Non-Management Unit, effective July 1, 2003 – June 30, 2005 (“Contract), by issuing him an oral reprimand without just cause, which was not based in fact, and constituted failing to apply discipline with a view to uniformity and consistency. Grievant further contended that the Employer violated Article 15 of the Contract by applying work rules in a discriminatory manner.

Grievant filed a second grievance (Docket No. 04-39) on September 10, 2004, contending that the Employer violated Article 14 of the Contract by issuing him a written reprimand without just cause, which was not based in fact, and constituted failing to apply discipline with a view to uniformity and consistency. Grievant further contended that the Employer violated Article 15 of the Contract by applying work rules in a discriminatory manner.

The Labor Relations Board consolidated Docket Nos. 04-38 and 04-39 for hearing and decision. A hearing was held on April 14, 2005, in the Board hearing room in Montpelier before Board Members Richard Park, Acting Chairperson; Carroll Comstock and Joan Wilson. Jes Kraus, VSEA Staff Attorney, represented Grievant. Assistant Attorney General Joseph Winn represented the Employer. The parties filed post-hearing briefs on May 2, 2005.

FINDINGS OF FACT

1. The Contract provides in pertinent part:

ARTICLE 14. DISCIPLINARY ACTION

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 or corrective action with a view toward uniformity and consistency;
- (c) impose a procedure of progressive discipline or progressive corrective action;
- (d) In misconduct cases, the order of progressive discipline shall be:
 - (1) oral reprimand;
 - (2) written reprimand;
 - (3) suspension without pay;
 - (4) dismissal.
- (e) In performance cases, the order of progressive corrective action shall be as follows:
 - (1) feedback, oral or written; (records of feedback are not to be placed in an employee's personnel file except in compliance with the Performance Evaluation Article.);
 - (2) written performance evaluation, special or annual, with a specified prescriptive period for remediation specified therein, normally 3 to 6 months;
 - (3) warning period of thirty (30) days to three (3) months, extendable for a period of up to six (6) months. Placement on warning status may take place during the prescriptive period if performance has not improved since the evaluation;
 - (4) dismissal.
- (f) The parties agree that there are appropriate cases that may warrant the State:
 - (1) bypassing progressive discipline or corrective action;

- (2) applying discipline or corrective action in different degrees;
- (3) applying progressive discipline for an aggregate of dissimilar offenses, except that dissimilar offenses shall not necessarily result in automatic progression; as long as it is imposing discipline or corrective action for just cause.

...

2. Grievant has been a permanent status Motor Vehicle Examiner for the Employer since approximately 2001. As an Examiner, Grievant conducts road tests for both regular and commercial driver licenses. He also administers written license tests. Grievant has received two annual performance evaluations since he became a Motor Vehicle Examiner. On one evaluation, he received an overall rating of excellent. His overall rating on the other evaluation was satisfactory.

3. The Employer's Work Rules provide in pertinent part:

...

STANDARDS OF ACCEPTABLE CONDUCT

1. No employee shall, while on duty, conduct himself/herself in a manner that will discredit the employee or the Department of Vehicles.
2. Employees shall be courteous and respectful, and shall not use disrespectful or profane language. . .
3. While at work . . . employees shall present the state laws and department policies and procedures in a professional and positive manner . . .

...

(State's Exhibit 9, p.42)

4. In evaluating the performance of Motor Vehicle Examiners, the Employer uses a Summary of Major Job Duties with Performance Expectations which provides in pertinent part:

MAJOR JOB DUTY (1)

Administer driver exams (road testing)

PERFORMANCE EXPECTATION (1)

Administers road tests conforming to the guidelines set forth in the Examiner's Manual. . . Evaluates driving skills and explains to applicants in a clear, concise and constructive manner the result of driving skill's evaluations, maintains a productivity level sufficient to process the assigned workload, and does so with a high degree of customer satisfaction.

PERFORMANCE EXPECTATION (2)

Screens applications with minimal error rates. Properly grades written tests and evaluates applicant's vision. Demonstrates a thorough knowledge of vision screening terminology, safe driving practices and laws, and effectively conveys this information to applicants while addressing their questions and concerns. Maintain a productivity level sufficient to process the assigned workload and does so with a high degree of customer satisfaction.

. . .

MAJOR JOB DUTY (4)

Customer Contact . . .

Answers questions, schedules examination appointments, provides forms and reference materials, researches law and policy to address customer inquiries, provides other customer services, and does so in a friendly, cooperative, and efficient manner.

. . .

(State's Exhibit 9, p.47)

5. Until recently, the Employer made forms available to DMV customers for them to provide positive or negative feedback on their interactions with DMV employees. From the time Grievant became a Motor Vehicle Examiner through April 28, 2004, when Grievant filed the last grievance in these cases, customers had completed approximately four forms that reported negative interactions Grievant had with customers, and approximately 25 forms that made positive comments on Grievant's dealings with customers (Grievant's Exhibit 1, State's Exhibit 5).

6. Barry Barton is Supervisor of the Burlington DMV branch. He has been Grievant's supervisor for most of the period that Grievant has been an Examiner. Prior to the incident leading to the oral reprimand of Grievant at issue in this case, Barton had

received approximately four complaints from customers about Grievant's demeaning actions towards them in administering tests. Barton and Mike Smith, Chief of Customer Services for the Employer, spoke to Grievant concerning the complaints and informed him that he needed to improve his behavior in this regard.

7. Roger McManis was interim Supervisor of the Burlington DMV branch from March to October 2003. During this period, two customers made significant complaints about Grievant being unfriendly, rude and condescending. McManis viewed these complaints as performance issues and provided supervisory feedback to Grievant about them. Grievant did not accept that he was at fault in these incidents (State's Exhibit 5).

8. On February 12, 2004, Brenda Bushey was scheduled to take a commercial driving license ("CDL") road test with Grievant to become a school bus driver for Bellows Free Academy in Fairfax, Vermont. Bushey had taken the road test the previous week with another Examiner and had failed. After that test, the Examiner took Bushey's photo ID permit.

9. CDL road tests are administered from DMV offices located in a trailer near Fort Ethan Allen in Colchester. Bushey and her trainer and supervisor, Wendell Sweat, arrived at the trailer on February 12 shortly before 10:30 a.m. for the test. When they arrived, Daniel Merrigan, operator of Champlain Valley Driver Training School, was present in the trailer because he had students scheduled to take their CDL tests that morning. Merrigan has not witnessed Grievant raising his voice to Merrigan's students, belittling them or being rude to them.

10. Bushey gave Grievant completed documents she had in conjunction with taking the CDL test. She informed Grievant that she did not have the permit photo ID because the Examiner who administered the test the previous week had kept it. Grievant responded in a raised voice that the Examiner would not have kept the permit. He indicated that Bushey needed to know that she should have all the necessary paperwork. Sweat intervened at this point to indicate to Grievant that it was not Bushey's fault if someone enforcing the motor vehicle laws kept a document.

11. Grievant then informed Bushey and Sweat that he would not administer the test without the permit photo ID. He told them they would have to go to the DMV office on North Avenue in Burlington to obtain a permit photo ID. Bushey and Sweat informed Grievant that they were under time constraints because the bus they were using for the road test needed to be returned to Fairfax by the early afternoon to transport students. Nonetheless, Grievant told them they would have to go to the North Avenue office to obtain the permit.

12. When Bushey and Sweat arrived at the North Avenue office, a DMV employee told them that Grievant could have administered the test without the permit photo ID by contacting the North Avenue office. Bushey and Sweat then spoke with Barton. Barton told them they could return to Colchester to take the test without having the permit photo ID. Bushey and Sweat expressed reluctance to do so because Grievant already was upset with them. Barton then contacted Grievant by telephone and told him to administer the test to Bushey as soon as she and Sweat arrived in Colchester. Due to the delay in the administration of the test, Sweat made other arrangements for the

afternoon school bus runs in Fairfax to account for the absence of the bus he and Bushey had for the test.

13. Given the time constraints under which they were operating, Bushey and Sweat were angry about the delay in Bushey taking the test. When they were at the North Avenue office, Bushey completed a customer feedback form, which provided in pertinent part:

I went in for my 2nd skills test & did not have my picture ID permit. But I did have my permit yellow/orange sheet. At my 1st skills test in Colchester when I did not pass the backing up test, we went into the office and he kept my ID permit w/all my paperwork. When I went for my 2nd skills test – he wanted my paperwork & ID permit. I explained twice that at my last skills test they kept all my information. He then lectured to myself & my instructor (boss) that that would never happen & then sent us to North Ave to get another permit.

...

(State's Exhibit 1a, Grievant's Exhibit 3)

14. When Bushey and Sweat returned to Colchester, Grievant was polite and apologetic. He administered the test in a friendly manner. Bushey passed the test.

15. Operators of commercial vehicles generally are required to have their CDL permit with them when they are driving. They can be fined up to \$5,000 for failure to have the permit when driving. Nonetheless, it is DMV practice that a CDL permit holder can take a road test for the CDL license with a Motor Vehicle Examiner without having the permit on their person. An Examiner can administer a road test to such a person by verifying in DMV records that the person possesses the permit.

16. On March 12, 2004, Barton sent a memorandum to Grievant which provided:

In accordance with current agreements between (the State and VSEA) . . . I am hereby giving you an oral reprimand for misconduct.

The incident that led to this oral reprimand took place on February 12, 2004.

On this date you were assigned to administer CDL Skill tests at Fort Ethan Allen in Colchester. On the schedule that day was one Brenda Bushey, who had scheduled to take a school bus exam to obtain a Class B CDL. Ms. Bushey's appointment was at 10:30 A.M. that day.

When Ms. Bushey arrived at the CDL site, along with her accompanying driver, she did not have her photo permit. She did however have in her possession both her receipt from her previous CDL exam and a paper copy of her current CDL permit. The previous paperwork was attached to the application that Ms. Bushey had filled out for her first CDL Skill test and that was on file at the CDL Skill test location at Fort Ethan Allen

When an attempt was made to explain this circumstance to you by Ms. Bushey, you dismissed her explanation as "impossible" and proceeded to lecture both her and her accompanying driver, who is her boss, on the responsibility they have to be prepared for the test. In addition, you made Ms. Bushey drive over to the North Avenue DMV branch to obtain a duplicate permit with no assurance that you would administer the CDL test to her once she returned. Your actions unnecessarily inconvenienced Ms. Bushey.

I find this behavior on your part as unacceptable and I am issuing you an oral reprimand as a result of your actions that day.

I am directing you to cease your behavior that causes embarrassment and anxiety to our customers . . . specifically, actions that are rude and unprofessional.

Furthermore, you will be made aware that any further occurrences of this nature will result in further disciplinary action, up to and including dismissal.

...

(State's Exhibit 1c)

17. On March 8, 2004, Lee Richard went to the DMV North Avenue office to take her road test to obtain a regular license. Grievant administered her test. During the road test, Richard took a turn in front of an approaching vehicle. Grievant raised his voice to tell Richard that she almost caused an accident and should not have pulled out in front of the other vehicle. Grievant immediately failed Richard as a result of this maneuver.

18. On March 10, 2004, Richard contacted the Burlington DMV office to make a complaint about the Motor Vehicle Examiner's behavior during the March 8 road

test. There was no supervisor in the Burlington office available to speak with Richard, and her call was forwarded to Montpelier to Chief of Customer Services Michael Smith. Richard informed Smith that she had never been treated as rudely as she had by the Examiner on March 8. Richard told Smith that the Examiner had raised his voice numerous times during the exam, including telling her that she needed to know what she was doing before they went on the road. Richard also told Smith that, after she had completed a turnaround and was awaiting instructions from the Examiner, the Examiner yelled: "What are you waiting for?" Richard did not discuss with Smith whether she had failed or passed the exam. Subsequent to this telephone conversation, Smith sent an e-mail message to Barton describing the conversation (State's Exhibit 2a).

19. Richard returned to the North Avenue office for another test one to two weeks after the March 8 test. Grievant administered the test. He was nice and friendly with Richard. Richard passed the test. At some point subsequent to passing the test, Richard contacted the Burlington DMV office to withdraw her complaint against Grievant.

20. On April 28, 2004, Barton sent a memorandum to Grievant which provided:

In accordance with current agreements between (the State and VSEA) . . . I am hereby giving you a written reprimand for misconduct.

The incident that led to this written reprimand took place on Monday, March 8, 2004.

On this date you were assigned to administer road tests at the Burlington Exam Office. On the schedule that day was one Lee Richard, who had scheduled an operator road test exam at 09:00 A.M.

On Thursday, March 11, 2004 at 7:41 A.M. I received an E-mail from Customer Service Chief Michael Smith, advising of a call received from Lee Richard. Miss

Richard stated to Mike Smith that the Examiner who administered her road test in Burlington on Monday, March 8, 2004 was extremely rude to her. She indicated that the Examiner has also yelled at her.

She described the Examiner by physical appearance. She stated that the Examiner raised his voice numerous times during the exam and told her, "you need to know what you are doing before we go on the road."

In addition, after completing the required turn around maneuver Miss Richard states she paused for further instructions and the Examiner yelled, "what are you waiting for?"

. . . (You) administered all the road tests on this day.

On Wednesday, April 7, 2004 I met with you and your union representative, Kathi Partlow, to discuss this matter.

After initially outlining the complaint brought by Lee Richard you immediately denied any participation in this matter, quickly responding that you did not administer the road test. After being presented with the documentation that clearly showed you as the road test examiner that day, you responded by indicating that you did administer the exam however(sic) you never yell at an applicant.

Complaints that have been received from customers regarding your belligerent attitude toward them have been discussed with you on several occasions. At the end of each of these meetings you were told that inappropriate behavior on your part would not be tolerated, and that appropriate disciplinary action would be forthcoming if these incidents continued.

I find this continued behavior on your part unacceptable and I am issuing you a written reprimand as a result of your actions. I am directing you to cease your behavior that causes embarrassment and anxiety to our customers . . . specifically, actions that are rude and unprofessional.

Furthermore, be aware that any further occurrences of this nature will result in further disciplinary action, up to and including dismissal. . .

(State's Exhibit 2b)

21. Barton did not speak with Richard prior to issuing the written reprimand to Grievant. He attempted to contact her by telephone once. Richard did not return Barton's call.

22. Smith tracks complaints made to the Employer about employees. There have been more customer complaints made to the Employer about Grievant than any other Examiner.

23. In issuing Grievant the oral and written reprimands, Barton concluded that Grievant's rudeness to customers damaged the reputation of the Employer. Grievant's behavior undermined Barton's confidence in Grievant's ability to perform assigned duties in a professional manner. He determined that the reprimands were appropriate because Grievant was on notice that rude behavior was unacceptable to the Employer, yet he persisted in such behavior. In deciding to discipline Grievant, Barton did not consider the positive customer feedback that Grievant had received because he expects employees to receive positive feedback for doing their jobs.

OPINION

Grievant contends that the oral reprimand and written reprimand imposed on him violated Article 14 of the Contract because: 1) the alleged deficiencies which gave rise to the reprimands were performance issues, rather than alleged misconduct, and thus were not properly subject to disciplinary action; and 2) even if the alleged deficiencies could properly be categorized as misconduct, there was no just cause for the disciplinary action imposed. The Employer responds that the Employer could choose to deal with Grievant's conduct as either a performance issue or misconduct, and that the evidence demonstrated that just cause existed for imposition of an oral reprimand and written reprimand.

We first address Grievant's contention that the alleged deficiencies which gave rise to the reprimands were performance issues, rather than alleged misconduct, and thus were not properly subject to disciplinary action. Article 14 of the Contract distinguishes

between progressive discipline steps in misconduct cases and progressive corrective action steps in performance cases. Given this contractual language, it is clear that the parties intended a distinction between misconduct and nonperformance. Grievance of Lawrence, 17 VLRB 360, 369 (1994). Grievance of Roy, 13 VLRB 167, 182 (1990). Thus, an employee's underlying actions or inactions must first be categorized as a question of misconduct or a question of performance. Id.

At the outset, we reject the position taken by Barry Barton, the immediate supervisor of Grievant who imposed the disciplinary actions, that it was up to him to decide whether performance issues or misconduct issues were involved irrespective of the nature of the alleged deficiencies as long as he provided notice to Grievant that he could be disciplined in the future for such issues. The categorizing of actions or inactions as misconduct or performance issues must be based on objective standards rather than the subjective whims of supervisors. Fair notice to employees that certain conduct is prohibited is an important factor in determining whether just cause exists for discipline, but it is not the only factor. In addition, an employee's conduct must be sufficiently egregious to justify discipline; the ultimate criterion of just cause is whether the employer acted reasonably in disciplining the employee because of misconduct. Grievance of Ackerson, 17 VLRB 105, 124 (1994). Grievance of Early and Ibey, 6 VLRB 72, 82 (1983).

Grievant contends that, at worst, his behavior rose to the level of imperfect judgment, and matters of judgment are matter of performance, not misconduct. Grievant cites the Labor Relations Board decision, Grievance of Roy, supra, to support this argument. 13 VLRB at 183-185. The underlying actions at issue in Roy involved

judgments by a social worker impacting on the safety of children for which precise guidelines did not exist, and a judgment by the social worker making choices between competing priorities. Id. The Board determined that any deficiencies of the grieving social worker should have been handled by the employer through the corrective action route, rather than through progressive discipline. Id.

However, the Roy decision does not mean that all matters of judgment are necessarily performance issues to be handled outside the discipline route. In Grievance of McCort, 16 VLRB 70 (1993), the Board determined that just cause existed for the disciplinary actions of written reprimand and suspension of a State Agency of Transportation auditor for a one-year pattern of a propensity to demonstrate bad judgment by making inappropriate comments, exhibiting rude behavior, and failing to control himself in his professional dealings.

Thus, it is appropriate for an employer to consider that an employee has committed misconduct warranting imposition of discipline where a pattern exists of an employee engaging in inappropriate interactions despite the employee's knowledge that such interactions are prohibited. In such cases, the issue is not like the Roy case where the employee's judgment is questioned concerning whether the employee can perform job duties. Instead, the employee's exercise of judgment is appropriately treated as misconduct because, first, the behavior at issue is recurring and, second, the employee knows that the behavior is inappropriate but engages in it anyway.

In applying this standard to the disciplinary actions imposed on Grievant, we first consider the oral reprimand stemming from the CDL road test of Brenda Bushey. Grievant was charged with engaging in rude and unprofessional behavior by dismissing

Bushey's explanation of why she did not have her permit photo ID with her, lecturing Bushey and her trainer, and unnecessarily requiring Bushey to drive to the Burlington DMV office to obtain another permit. In determining whether the Employer has established the charge of rude and unprofessional conduct, we note that 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. Grievance of Colleran and Britt, 6 VLRB 235, 265 (1983). We find that the Employer has met its burden of proving the charge against Grievant. The evidence presented by the Employer was more credible than the version of events presented by Grievant and was sufficient to substantially establish each component of the charge.

The proven charge against Grievant was of such a nature and of sufficient seriousness to warrant imposition of disciplinary action. The Employer demonstrated that a pattern existed of Grievant engaging in interactions with Department of Motor Vehicles customers on several occasions which resulted in customer complaints about Grievant engaging in rude, condescending and demeaning behavior. There have been more customer complaints made about Grievant than any other Examiner in Vermont. Grievant's supervisors informed him that he needed to improve his behavior in this regard. Despite this notice, Grievant engaged in rude and unprofessional behavior in his interactions with Brenda Bushey and her trainer.

This demonstrated an unwillingness by Grievant to conform his behavior to reasonable management expectations. This adversely impacted supervisors' confidence that Grievant would have positive customer interactions, an important component of an Examiner's responsibilities. It also had the potential to adversely affect the Employer's

reputation with the public. Under such circumstances, it was reasonable for the Employer to handle Grievant's deficiencies as misconduct warranting discipline, rather than as a performance issue to be addressed through progressive corrective action.

The imposition of an oral reprimand was the least severe disciplinary sanction that the Employer could select, and was an appropriate measured response to deter similar conduct by Grievant in the future. This is particularly so under circumstances where Grievant had no prior disciplinary record.

We turn to addressing the written reprimand imposed by the Employer on Grievant due to his interactions with Lee Richard while administering a road test to her to obtain a license. The Employer charged Grievant with being extremely rude to Richard, yelling at her and raising his voice numerous times during the exam.

The Employer has not met its burden of demonstrating that Grievant engaged in misconduct to the extent charged. The charges by the Employer essentially were a recitation of a telephone conversation that Richard had with Chief of Customer Services Michael Smith a few days after the road test. However, this is not the best evidence of what occurred during the road test. The best evidence is the testimony of Richard at the hearing before us, presented under oath and with the opportunity for direct examination and cross examination.¹

Richard's testimony indicating improper conduct by Grievant was limited to Grievant raising his voice to tell Richard that she almost caused an accident and should not have pulled out in front of the other vehicle. We conclude by a preponderance of the evidence that the Employer has established the underlying facts of the charge only to the

¹ Grievant's testimony was unhelpful in this regard given that he testified to a lack of recall as to what had occurred.

extent testified to by Richard. This does not necessarily require reversal of the discipline; instead we must determine whether the proven offense justifies a written reprimand.

The proven offense, one instance of raising his voice to a license applicant for pulling out in front of another vehicle, is minor. It provides limited evidence of continuing deficiencies in customer interactions, but constitutes substantially reduced misconduct from the charges against Grievant for which he received a written reprimand. Just cause does not exist for moving up the progressive discipline ladder to a written reprimand. Another oral reprimand is the reasonable action for the proven offense.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered:

1. The Grievance of Geoffrey MacDonald in Docket No. 04-38 is denied;
2. The Grievance of Geoffrey MacDonald in Docket No. 04-39 is sustained to the extent that the written reprimand imposed by the State of Vermont Department of Motor Vehicles against him is rescinded and shall be removed from Grievant's personnel file, and shall be replaced by an oral reprimand.

Dated this 1st day of June, 2005, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Richard W. Park, Acting Chairperson

Carroll P. Comstock

Joan B. Wilson