

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 05-12
GEOFFREY MACDONALD)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

Geoffrey MacDonald (“Grievant”) filed a grievance on May 6, 2005, contending that the State of Vermont Department of Motor Vehicles (“Employer” or “DMV”) violated Articles 14 and 15 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 a two-day suspension. Grievant alleges that just cause did not exist for the suspension.

The Labor Relations Board conducted a hearing on October 13, 2005, in the Board hearing room in Montpelier before Board Members Richard Park, Acting Chairperson; Carroll Comstock and Joan Wilson. Grievant represented himself. Assistant Attorney General Joseph Winn represented the Employer. Grievant and the Employer filed post-hearing briefs on November 1 and 7, 2005, respectively.

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 . . . 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.

...

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

- (1) bypassing progressive discipline . . .
- (2) applying discipline . . . 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 . . . 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.

- 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 Motor 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.21)

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.26)

5. On March 12, 2004, the Employer imposed an oral reprimand on Grievant for treating a customer in a rude and unprofessional manner. On April 28, 2004, the Employer imposed a written reprimand on Grievant for his interactions with another customer. Grievant filed grievances over the oral reprimand and written reprimand, and both grievances ultimately were heard and decided by the Labor Relations Board. The Board issued decisions on June 1, 2005, upholding the verbal reprimand of Grievant for rude and unprofessional conduct, and reducing the written reprimand to an oral reprimand. In reducing the written reprimand to an oral reprimand, the Board determined that the proven offense of Grievant was minor and constituted substantially reduced misconduct from the charges against him for which he received a written reprimand.

Grievances of Geoffrey MacDonald, 28 VLRB 55.

6. On October 20, 2004, Grievant administered a road test to Marguerite Clark, an elderly woman. She was accompanied to the DMV branch office on North Avenue in Burlington by her elderly husband, John Clark. Grievant failed Marguerite Clark on the road test because she made what are termed “dangerous actions” in making two left turns in front of oncoming vehicles (Grievant’s Exhibit 5).

7. When Grievant and Marguerite Clark returned to the DMV office, John Clark met Grievant outside the office and discussed with him other recent road test failures of his wife. Included among the failures were instances where the examiner had concluded that she had taken dangerous actions. Grievant and John Clark then walked together into the exam room of the DMV office. Michael Murray, another driving examiner, was present in the exam room and overheard the conversation in the exam room between Grievant and John Clark. Grievant told John Clark that his wife was dangerous on the highway and that she almost got them killed twice during the road test. Grievant also told Clark that, if something happened out on the highway and his wife got severely injured so that she might end up in a wheelchair, then he was going to feel bad taking care of her. Grievant then walked with John Clark out to the Clarks’ vehicle (Grievant’s Exhibits 6 – 8).

8. Murray immediately reported the conversation to Barry Barton, Supervisor of the Burlington DMV branch office. Barton left the office, approached the Clarks’ vehicle and spoke to John Clark about his interactions with Grievant.

9. In December 2004, Linda Snyder, Director of Operations for the Employer, sent Grievant a memorandum which provided in pertinent part as follows:

In accordance with current agreements between the State of Vermont, State Employee Association, Non-Management Bargaining Unit, Article 14, I am

hereby suspending you without pay for a period of two (2) workdays for misconduct.

The incident that led to this suspension took place on October 20, 2004 and involved allegations that you made inappropriate comments to Marguerite Clark and her husband, John Clark, after administering a road test to Marguerite Clark. An investigation was conducted and you were given an opportunity to respond to these charges at a meeting that was held with you on November 3, 2004. The investigation substantiated that your statements while giving feedback to the Clarks were in violation of the code of acceptable conduct for Examiners and violated the Department's standard of acceptable customer service.

You will serve the two-day suspension on Tuesday, December 14, 2004 and Wednesday December 15, 2004. . .

Please be advised that future incidents of a similar nature may result in further discipline up to and including dismissal.

(State's Exhibit 5)

10. Although Snyder signed the memorandum of suspension, Michael Smith, Chief of Customer Services for the Employer, made the decision to suspend Grievant. Smith viewed a suspension as the appropriate step in progressive discipline since Grievant already had received an oral reprimand and a written reprimand due to inappropriate customer interactions. Smith viewed Grievant's actions as undermining supervisors' confidence in Grievant's ability to perform his duties.

11. After the Board issued the June 1, 2005, decisions discussed above in Finding of Fact No. 5, Smith considered whether to reduce the suspension to a lesser disciplinary action. Smith decided not to change the penalty since this was the third incident of misconduct of a similar nature on Grievant's part resulting in disciplinary action.

OPINION

Grievant contends that just cause does not exist for the two-day suspension imposed on him. Grievant states that he engaged in no conduct that discredited the Employer; that he was “totally respectful and courteous to the Clarks.” Grievant maintains that he should receive no punishment. The Employer responds that just cause existed for bypassing progressive discipline and imposing a two-day suspension on Grievant due to the pattern of misconduct engaged in by Grievant with respect to customer interactions.

Pursuant to the Contract, the Employer is to impose a procedure of progressive discipline for misconduct, such order of progressive discipline being: (i) oral reprimand, (ii) written reprimand, (iii) suspension, and (iv) dismissal. Article 14, Section 1(d). There are appropriate cases that may warrant the Employer bypassing progressive discipline. Article 14, Section 1(e)(1). Such disciplinary action may only be imposed for just cause. Article 14, Section 1.

To establish just cause for discipline, it is necessary for the Employer to show that disciplining the employee for certain conduct is reasonable; and the employee had fair notice, express or implied, that such conduct would be grounds for discipline. In re Grievance of Brooks, 135 Vt. 563, 568 (1977). 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). 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.

Grievant was charged with violating the code of acceptable conduct for examiners and the Employer's standard of acceptable customer service by making inappropriate comments to John Clark after Grievant administered a road test to Clark's wife. We find that the Employer has met its burden of proving the charge against Grievant. 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. Grievance of MacDonald, 27 VLRB 55, 67 (2005). The evidence presented by the Employer was more credible than the version of events presented by Grievant, and was sufficient to establish the charge that Grievant made inappropriate comments to John Clark despite his knowledge that such interactions were prohibited. His comments were an unprofessional and non-constructive response to the difficult road test Grievant had with Clark's wife.

The charge against Grievant having been proven, we look to the factors articulated in Colleran and Britt, 6 VLRB at 268-69, to determine whether the proven charge justifies a two day suspension. The pertinent factors here are: 1) the nature and seriousness of the offense and its relation to Grievant's duties, 2) Grievant's type of employment and contacts with the public, 3) Grievant's past disciplinary record, 4) the clarity with which Grievant was on notice of the prohibited conduct, 5) the effect of the offense upon supervisors' confidence in Grievant's ability to perform assigned duties, 6) the impact of the offense upon the reputation of the Employer, 7) mitigating circumstances surrounding the offense, and 8) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

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 exists of Grievant engaging in rude and unprofessional interactions with Department of Motor Vehicles customers on several occasions, including two previous instances where he received the disciplinary action of oral reprimand. Despite ample notice to Grievant that he needed to improve his customer interactions, Grievant once again demonstrated misconduct in this respect through his inappropriate comments to John Clark.

This demonstrates a continuing unwillingness by Grievant to conform his behavior to reasonable management expectations. It is particularly troubling that, despite a pattern of inappropriate customer interactions, Grievant does not take personal responsibility for his failings. In this case, like his two previous grievances heard by the Board, he asserts he did nothing wrong and should receive no discipline. His actions and his failure to accept responsibility for his conduct adversely impacts supervisors' confidence that Grievant will have positive customer interactions, an important component of an Examiner's responsibilities. It also has the potential to adversely affect the Employer's reputation with the public.

We conclude that the misconduct engaged in by Grievant in this case, taken together with the two earlier oral reprimands and his lack of acceptance of personal responsibility, warranted the Employer bypassing the progressive discipline step of written reprimand and imposing a two day suspension. It was reasonable for the Employer to conclude that the lesser penalty of a written reprimand would not be an adequate and effective sanction to deter Grievant from similar misconduct in the future.

We recognize that Grievant's inappropriate comments to John Clark followed a stressful road test in which Clark's wife engaged in actions potentially endangering herself and Grievant. We question the Employer not having policies in effect to more adequately screen persons taking road tests, especially for those persons whom have engaged in dangerous actions in past road tests. Nonetheless, this does not serve to lessen Grievant's misconduct. His method of dealing with the difficult road test was unprofessional and not constructive.

Our conclusion that the Employer was justified in bypassing progressive discipline should not be construed as diminishing the importance of progressive discipline as set forth in the Contract. Its bypass in this case was reasonable under all the circumstances, but progressive discipline is the norm that may not be followed only in limited appropriate cases.

Also, our decision should not be viewed as necessarily justifying dismissal of Grievant if another incident of inappropriate customer interactions occurs. A suspension sends a strong message to Grievant that failure to improve his customer interactions may have strong consequences up to and including dismissal. Nonetheless, the dismissal of an employee will be upheld only if the employee has demonstrated "some substantial shortcoming detrimental to the employer's interests which the law and a sound public opinion recognize as a good cause for dismissal." In re Grievance of Brooks, 135 Vt. 563, 568 (1977). The Board will closely examine any case to determine whether it is reasonable to dismiss an employee because of certain conduct. Id.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the Grievance of Geoffrey MacDonald is dismissed.

Dated this 24th day of January, 2006, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Richard W. Park, Acting Chairperson

Carroll P. Comstock

Joan B. Wilson