VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 80-13
JO ANN KINDESTIN	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of the Case

On February 2, 1980, the Vermont State Employees' Association, Inc., (hereinafter, "VSEA"), filed a grievance with the Vermont Labor Relations Board on behalf of Jo Ann Kindestin. Grievant Kindestin appeals her dismissal from state service, alleging she was dismissed without just cause and in violation of the contractual progressive discipline policy.

Assistant Attorney General Bennett Greene filed an answer for the State on February 14, 1980, admitting the essential facts of the grievance and maintaining that Grievant's sleeping on the job did constitute grounds for her dismissal under the contract.

A hearing was held in the Board hearing room in Montpelier on May 29, 1980, before members Kimberly B. Cheney, William G. Kemsley, Sr., and Robert H. Brown. Assistant Attorney General Bennett Greene represented the State. Counsel for VSEA, Michael Zimmerman, represented Grievant.

Requests for findings of fact and memoranda were filed by Attorneys Zimmerman and Greene on June 16 and 17, 1980, respectively.

FINDINGS OF FACT

1. At all times relevant to this grievance, Grievant was a permanent status employee, and, as such, had rights conferred by the Agreement

between the State of Vermont and the Vermont State Employees' Association, Inc., for the Non-Management Unit, effective July 1, 1979, (hereinafter, "the contract").

2. From January, 1975, to January 13, 1980, Grievant was employed by the State of Vermont, Department of Public Safety, as a clerk dispatcher, a pay scale 9 position (Grievant's Exhibit #1). During that period, Grievant's work place was the Middlesex Barracks.

3. The position of clerk dispatcher, Department of Public Safety, is a non-uniformed or "civilian" position.

4. Throughout the State, the practice varies at state police barracks with respect to the number of clerk dispatchers on duty during particular shifts. In some of the barracks only one dispatcher works each shift, while in others two clerk dispatchers work each shift. In one respect, however, all police barracks throughout the state are the same. At least one dispatcher is on duty 24 hours a day. The Middlesex Barracks, at all times relevant to this grievance, scheduled two dispatchers for each shift, each being responsible for different duties.

5. At the Middlesex Barracks, the clerk dispatcher assigned to the radio console is considered the primary dispatcher. He is the direct link with the officer in the field. In addition, he is responsible to take telephone calls from members of the public reporting accidents, criminal activity, fires, and similar incidents. He is also responsible for a direct telephonic line to the Middlesex Barracks from the Vermont Yankee Nuclear Power Plant, the purpose of which line is to report nuclear accidents.

6. At the Middlesex Barracks, the clerk dispatcher not assigned to the radio console is considered "the backup" to the primary dispatcher, answering telephone calls when the console dispatcher is busy. In addition

to those "backup" responsibilities, however, he does have his own responsibilities. One of those responsibilities is to check the teletype machine during its active periods. That machine is connnected to a computer with a tie-in to the National Crime Information Center (NCIC). The secondary dispatcher both receives messages and sends inquiries on the teletype. While it could vary, normally during the midnight to 8 a.m. shift, the teletype machine is active (with incoming messages) about 30 minutes per shift during the mid-week, and for about 2 hours per shift toward the end of the week and on weekends.

7. The majority of duty time for the secondary dispatcher on the midnight to 8 a.m. shift is spent typing reports and other things that, for some reason, the daytime clerical staff had not been able to attend to.

8. During the midnight to 8 a.m. shift, the primary dispatcher is not responsible for any clerical duties.

9. During the week prior to January 5, 1980, Grievant voluntarily took only 1 day off.

10. On January 4, 1980, Grievant worked continuously from 12 a.m. to 1:30 p.m. On that date from 8 a.m. to 12 p.m. she worked overtime in order to complete some work for her immediate superior, Sgt. Vinton, which she had not been able to complete during her midnight to 8 a.m. shift.

11. From 12 p.m. to 1:30 p.m., Grievant donated her time in order to complete her task. Between 1:30 p.m., January 4, 1980, and midnight, January 5, 1980, Grievant slept only two hours.

12. At midnight on January 5, 1980, Grievant began her normal shift at the Middlesex Barracks. On that date Grievant was assigned as secondary clerk dispatcher. Her co-worker was Roger Halford, who manned the radio console as primary clerk dispatcher.

13. Trooper 1st Class T. E. Austin, a State Police Officer since 1971, was assigned to the Middlesex Barracks on January 5, 1980, and was, from 2 a.m. to 4 a.m., the only trooper on duty assigned from that barracks.

14. At about 4 a.m., January 5, 1980, Trooper Austin returned from the field to the Middlesex Barracks in his police vehicle. After he got out of his vehicle and approached the barracks, Trooper Austin, while passing a window on the barracks, glanced inside and saw Grievant with her head down on her desk, and not moving. He then entered the barracks, without either dispatcher noticing, through a back entrance inadvertently left ajar. When Trooper Austin opened the door which entered into the dispatchers' work area, Grievant suddenly sat upright in her chair, apparently awakening. Trooper Austin did not confront Grievant with his observation of her sleeping (Grievant's Exhibit #4).

15. The total elapsed time from the moment he glanced in the outside window until Grievant suddenly sat upright in her chair was, according to Trooper Austin's estimate, about 3 minutes.

16. Later that same day, during the evening of January 5, 1980, Trooper Austin telephoned Sgt. Vinton, his immediate superior, with the sole purpose of reporting to Sgt. Vinton that he had observed Grievant asleep. Sgt. Vinton instructed Trooper Austin to prepare a memorandum setting forth what he had observed. Trooper Austin did so and that memorandum is in evidence as Grievant's Exhibit #4.

17. On January 6, 1980, Grievant was assigned to work the midnight to 8 a.m. shift. Her co-worker on this date, as it had been on January 5, 1980, was Roger Halford. On January 6, however, Grievant was primary dispatcher and worked the radio console. Mr. Halford was assigned as secondary dispatcher.

18. At the Middlesex Barracks, the two dispatchers work in the same room, and their work stations when both dispatchers are seated are about twenty feet apart.

19. The midnight to 8 a.m. shift on January 6, 1980, was a quiet one, with little radio or other activity. Mr. Halford's duties during that shift were primarily typing. When he was seated at his typewriter, Mr. Halford was positioned in such a way that he could only see Grievant, at the radio console, out of the corner of his eye.

20. On two occasions during the midnight to 8 a.m. shift on January 6, 1980, (once some time between 3:30 and 4:00, and the other some time between 4:30 and 5:00) Mr. Halford observed Grievant with her head down on her desk at the radio console. On both occasions, Grievant's head rested on her arms. On both occasions, the back of Grievant's head was facing Mr. Halford, and he could not see her eyes. On those occasions, Grievant did not appear, to Mr. Halford, to be moving. It was (and is) Mr. Halford's opinion that Grievant was asleep during these periods.

21. During the midnight to 8 a.m. shift on January 6, 1980, Grievant did not fail to answer any radio calls that came in to her.

22. Even though Mr. Halford testified that he views sleeping on duty by a clerk dispatcher as a very serious transgression, he made no effort to arouse her after he observed her motionless state.

23. On January 7, 1980, between 3 p.m. and 6 p.m., Grievant, then off-duty, was informed by Sgt. Vinton that she was being suspended for 3 days pending investigation of Trooper Austin's allegation of her sleeping on duty. Sgt. Vinton then asked her to respond to Trooper Austin's memorandum (Finding #16, Grievant's Exhibit #4).

24. By memorandum to Sgt. Vinton, dated January 7, 1980, Grievant admitted that she had slept on duty on January 5, 1979. (Grievant's Exhibit #5).

25. It is unclear when, but at some point after January 5, 1980, Sgt. Vinton asked Mr. Halford if Trooper Austin's memorandum (Grievant's Exhibit #4) was true. Mr. Halford responded yes, it was true, and that he (Mr. Halford) believed Grievant had also slept on duty January 6, 1980.

26. Between the time she was observed sleeping on January 5 and was on duty January 6, Grievant was not asked to respond to allegations of her sleeping on duty January 5, nor was she given notice that should that conduct recur she may be dismissed.

27. Upon completing his investigation, Sgt. Vinton recommended to the Commissioner of Public Safety that Grievant be dismissed. In making that recommendation, Sgt. Vinton considered (1) Trooper Austin's memorandum (Grievant's Exhibit #4), (2) Grievant's memorandum response to Trooper Austin's memorandum (Grievant's Exhibit #5), and (3) Mr. Halford's allegations regarding Grievant's sleeping on January 6, 1980.

28. Sgt. Vinton did not, in making his recommendation, review Grievant's entire personnel file to examine, in detail, her past performance and to determine if Grievant had previously slept on the job.

29. On January 10, 1980, Grievant received a dismissal letter dated January 10, 1980, from the Commissioner of the Department of Public Safety, which letter provided, in pertinent part, as follows:

> "This is to advise you that you are hereby being dismissed from the position of Clerk-Dispatcher, Department of Public Safety, effective Sunday, 13 January 1980, for the following reasons:
>
> (a) Gross neglect of duty by sleeping on duty on 5 & 6 January 1980."

Grievant was also, by that letter, given 2 weeks pay in lieu of notice. (Grievant's Exhibit #11).

30. During her period of employment, Grievant received the following favorable Performance Evaluation Reports:

(A) For the period July 1, 1976, to July 1, 1977: An overall 3 rating (consistently meets job requirements/standards)(Grievant's Exhibit #2);

(B) For the period July 1, 1977, to June 30, 1978: An overall rating of 3 (consistently meets job requirements/standards)(Grievant's Exhibit #3).

31. Article XV, "Disciplinary Action," of the contract provides, in pertinent part, as follows:

> "1. ... (T)he State will:
>
> ... (b) apply discipline with a view toward uniformity and consistency; and
>
> (c) impose a procedure of progressive discipline, in increasing order of severity:
>
> 1. oral reprimand;
> 2. written reprimand;
> 3. suspension without pay;
> 4. demotion;
> 5. dismissal.
>
> The parties agree that there are appropriate cases that may warrant the State bypassing progressive discipline or applying discipline in differing degrees so long as it is imposing discipline for just cause.
>
> 2. The appointing authority ... may dismiss an employee for just cause with two weeks' notice or two weeks' pay in lieu of notice ...
>
> 3. Notwithstanding the provisions of Paragraph 2 above, an employee may be dismissed immediately without prior notice or pay in lieu of notice for any of the following reasons:
>
> (a) gross neglect of duty ..."

32. While Grievant has admitted sleeping on January 5, 1980, she denies having slept on duty on January 6, 1980. There is no evidence to indicate Grievant has slept on duty prior to January 5, 1980, and there is no record of any prior sleeping incident for which Grievant was disciplined.

OPINION

Grievant admitted sleeping on duty January 5, 1980. Grievant appeared to her co-worker to be sleeping on duty January 6, 1980, as well, although she denies it. Based on Grievant's admission of sleeping on the job January 5, and the allegation of the second dispatcher on duty that she also slept on duty January 6, Grievant was dismissed for "gross neglect of duty." Given all the circumstances peculiar to this case, we are required to determine if Grievant's conduct on those occasions constitutes just cause for her dismissal; and if not, what is an appropriate remedy.

The State concedes and we agree the issue of whether or not Grievant's conduct constitutes "gross neglect of duty" under the contract (Article XV, section 3) is moot in this appeal. Grievant did receive two weeks pay here, evidently by administrative error, which the State has no intention of recouping. Thus, we need only view Grievant's conduct in light of the "just cause" standard.

"Just cause" was first defined by our Supreme Court in In re Grievance of Albert Brooks, 135 Vt. 563, 568 (1977) as:

> ... some substantial shortcoming detrimental to the employer's interests, which the law and a sound public opinion recognize as a good cause for his dismissal ... (cites omitted)

Where the Court held that the purpose of a contractual just cause clause is to remove from the employer the right to arbitrarily fire its employees, it set forth two requisite criteria of reasonableness which must be met for a dismissal to be upheld as one for cause:

> ... one that it is reasonable to discharge employees because of certain conduct, and the other, that the employee had fair notice, express or fairly implied, that such conduct would be ground for discharge. Ibid, (cites omitted)

On the issue of fair notice, we are further instructed that:

> [T]he ultimate question for the Board is whether the conduct was or should have been known to the employee to be prohibited by the employer. The standard is an objective one.
>
> Id.

In a very recent decision, our Court further addressed the "fair notice" criterion of a dismissal for cause. In In re Grievance of Michael Yashko, Vt. Sup. Ct. Slip Op. Docket #102-79, June 3, 1980, the Court reversed the Board's decision sustaining a dismissal because grievant Yashko, mistakenly placed in a probationary status rather than a "warning period," did not have "fair notice that actions on his part, or inactions, might be cause for dismissal." In re Yashko, supra, p. 3. The Court held the requirement for fair notice was not met because prior to actual termination, Yashko's only notice as a probationary employee "was that he could be terminated without cause and not that any specified conduct would be grounds for dismissal." Id., (emphasis in original).

In view of the Brooks and Yashko decisions, we find the requisite fair notice criterion for upholding a dismissal for cause was not met in Grievant's case. While Grievant knew or should have known sleeping on duty was prohibited by her employer, particularly where she held a responsible communications position in the Department of Public Safety, she was not on notice that this specific conduct would result in dismissal.

The State seeks to avoid the notice issue by asserting categorically that one incident of sleeping on duty in a public safety job is enough to constitute grounds for dismissal, even though Grievant was charged with sleeping on two occasions in her letter of dismissal (Grievant's Exhibit #11). As we point out in the discussion infra, this may be true in some circumstances, but we do not think it so on these facts. We feel it

necessary to take into account all the circumstances of an offense in determining whether an employee was fairly on notice of the grounds for dismissal. Here, Grievant was allowed to report to work and assume the more responsible dispatching position for the midnight shift on January 6 without any notice from her supervisor, directly or indirectly, of what her behavior of January 5 specifically could mean to her job security. Moreover, the record is devoid of evidence that the Department of Public Safety gave prior notice to its employees not only that sleeping was prohibited conduct but the penalty it carried. Certainly Grievant was aware she should not sleep on duty, and did so at her peril, but had she known at what peril specifically, we speculate she may not have indulged herself in those cat naps. Perhaps she wouldn't have reported to work, cognizant of her weary state and the hazards of sleeping on the job. In any event, there was no clear, pre-existing policy from which this Grievant could infer that sleeping in a quiet office where another was awake to handle emergencies would result in dismissal.

We have looked for guidance to several other arbitration cases (cited in, "Table of Offenses, Sleeping on the Job," p. 654, How Arbitration Works, 3rd ed., Elkouri & Elkouri, 1979) in which employees were discharged for sleeping on the job. Our research reveals that discharge as a penalty for sleeping on the job has been overruled at least as frequently as it has been upheld.

The major reasons given in the decisions we researched which sustained an employer's discharge were generally as follows: 1) the employee had received warnings and other lesser disciplinary actions for the same offense prior to the offense which resulted in his dismissal; 2) the sleeping offense was the "last straw" on a record replete with various and numerous

offenses; 3) sleeping on the job was clearly prohibited by a specific rule which prescribed dismissal as the penalty; 4) the employee's sleeping jeopardized the safe or critical operation of a process.

On the other hand, the reasons cited for reducing discharge to some lesser penalty, varying from less than a day's lost pay to a four week suspension, related to the fact that it was the employee's first offense on an otherwise good record of prior service, and that the employer had not put the employee on notice that the practice was prohibited (or at least not condoned) and the penalty he may expect to receive. C.f.: In re Rockwell Standard Corporation, 41 LA 345 (1963), In re Nestle Co., 45 LA 524 (1965), and In re Kimberly-Clark Corp., 50 LA 437 (1968), (discharges reduced to lesser penalties); with In re Standard Oil Co. of California, 55 LA 1269 (1971) and In re American Cyanamid Co., 51 LA 181 (1968), (discharges upheld).

This Board has likened its responsibility and authority in finally determining grievances to that of an arbitrator. See Grievance of James Harrison, 2 VLRB 171, 183 (1979) and Grievance of Richard Harrison, 2 VLRB 304, 324 (1979). We think that analogy is pertinent here as well. Furthermore, where the parties have expressly agreed to a policy of progressive discipline designed to correct misconduct, and we find a particular disciplinary action excessive, this Board has held that it is within our authority and responsibility to impose a penalty commensurate with the seriousness of the employee's offense. Grievance of Paul Cook, 3 VLRB 105, 128 (1980). One authority has characterized an arbitrator's power to modify penalties as "inherent" in his power to decide the sufficiency of cause. He states:

> In many disciplinary cases, the reasonableness of the penalty imposed on an employee rather than the existence of proper cause for disciplining him is the question an arbitrator must decide ... In disciplinary cases generally, therefore, most arbitrators exercise the right to change or modify a penalty if it is found to be improper or too severe, under all the circumstances of the situation. This right is deemed to be inherent in the arbitrator's power to discipline and in his authority to finally settle and adjust the dispute before him. Arbitrator Harry Platt, "The Arbitration Process in the Settlement of Labor Disputes," 31 J. Am. Jud. Soc. 54, 58 (1947).

The offenses giving rise to Grievant's dismissal were her first in almost five years of dispatching with the Department of Public Safety. In all other respects the record shows Grievant performed her work satisfactorily or better. With respect to the lack of notice that sleeping was prohibited, Grievant certainly did know it was wrong and should have expected some disciplinary action, but she definitely was not aware this lapse on one midnight shift in a span of five years would result in her dismissal.

Sgt. Vinton testified that several years ago he and another officer discovered a dispatcher asleep on duty, apparently passed out from inebriation. He recalls that dispatcher was dismissed on his reporting of the incident. He and Grievant were aware of no other dismissals for sleeping on the job and Grievant, until Sgt. Vinton's testimony, was unaware of that incident and resultant dismissal. In any event, we find Grievant's case does not parallel a situation where an employee reports for work drunk, and subsequently sleeps it off on duty.

Another reason which mitigates the seriousness of Grievant's offense is the fact that no extraordinary harm was probable as a result of her actions. Her fellow dispatcher, Mr. Halford, maintained he could and definitely would have awakened Grievant had he needed her assistance. As it was,

Grievant did not perform her typing responsibilities the brief period it was proved she slept on January 5, and she missed no incoming calls (perhaps fortuitously) on January 6.

On the particular circumstances of this case, where Grievant has admitted to wrongdoing, it is now our duty to try and set a just penalty for the offense. The contract reinforces the necessity for this Board to set such standards by providing for "discipline with a view toward uniformity and consistency" (Article XV, section (1)(b). If this Board does not set standards, there is no mechanism within the grievance system by which an effort to articulate reasons for, and impose uniform standards, can exist. We are inclined to impose a rather serious disciplinary action where Grievant was in a public safety position. The standard is not what harm actually occurred but what harm was reasonably probable. It was probable that some emergency would receive either delayed or less than alert response. Sleeping on the job then certainly constitutes neglect of duty, and as such is undoubtedly detrimental to the State's interests. While in this instance it would be unreasonable to discharge Grievant, it is not unreasonable to impose some measure of discipline. For these reasons, we feel Grievant's reinstatement should include a twenty working day suspension without pay.

This suspension shall serve to put Grievant and all other similarly situated employees in the Department of Safety on notice that such conduct will be met with serious disciplinary action.

ORDER

Now, therefore, for all the foregoing reasons and based on the foregoing findings of fact, it is hereby ORDERED that Jo Ann Kindestin be reinstated with backpay to her former position at the same rate in pay, subject

to a suspension without pay for a period of twenty working days, commencing the first work day after her effective date of dismissal.

Dated this 10th day of July, 1980, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.

Robert H. Brown