

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	
DANIEL SWAINBANK)	DOCKET NO. 79-74S

FINDINGS OF FACT, OPINION AND ORDER

Statement of the Case

On October 24, 1979, the Vermont State Employees' Association, Inc., (hereinafter "VSEA") filed a petition on behalf of Daniel Swainbank (hereinafter "Grievant") with the Vermont Labor Relations Board (hereinafter "Board"). That petition appealed a Step III grievance decision of the Director of Employee Relations (Grievant's Exhibit B) dated September 25, 1979. The Grievant alleges here that a five day suspension sustained by him is in violation of the progressive discipline procedures under Article XV of the agreement between the State and VSEA for the Non-Management Unit, effective July 1, 1979, through June 30, 1981 (hereinafter the "contract").

The State filed an answer to Grievant's allegations on November 15, 1979, wherein the State maintained the disciplinary action resulted from Grievant's failure as a Correctional Officer to follow a direct order and his negligent conduct thereafter. As such, the State maintained the disciplinary action was appropriate and that this Board had no authority to modify it.

A hearing on this matter was held on November 29, 1979, before Board Chairman Kimberly B. Cheney and Member Robert H. Brown. Member William G. Kemsley, Sr. was absent. The Grievant was represented by Michael R. Zimmerman,

counsel for VSEA. Assistant Attorney General Bennett E. Greene represented the State.

Requests for findings of fact and memoranda were filed by VSEA and the State on December 11 and 13, 1979, respectively.

FINDINGS OF FACT

1. At all times relevant, Grievant was a "permanent status" employee, as that term is used in the contract, employed as a Correctional Officer since August of 1977 with the State of Vermont Department of Corrections at the Diagnostic Treatment Facility, St. Albans, Vermont (hereinafter the "Facility").

2. Under the system in effect at the Facility, the most difficult to manage prisoners were assigned to what was called the "D Wing," (or isolation wing), while somewhat less difficult and troublesome prisoners were assigned to "E Wing." Both of these areas were reserved for the most difficult inmates housed at the Facility.

3. For the period beginning about six months prior to June 26, 1979, Grievant had been assigned to E Wing at the Facility.

4. During most of the time Grievant had been assigned to work the E Wing, prisoner Zera resided in that wing.

5. Prisoner Zera was, during the times Grievant knew him, about twenty-seven years of age, weighed about two hundred pounds, was a weight-lifter, and was physically powerful. During the time Grievant was assigned to E Wing, prisoner Zera was volatile and violent. On several occasions Grievant had verbal "run-ins" with Zera, in which prisoner Zera threatened to "punch" Grievant.

6. Grievant was on June 26, 1979, twenty-one years old, five feet eleven inches tall, and weighed about one hundred and seventy-five pounds.

7. Grievant understood that prisoner Zera was in confinement because of convictions for assault, and escape.

8. Grievant understood that during prisoner Zera's periods of confinement at the Facility, he had injured or assaulted certain Correctional Officers: David Kelly, Paul Silva, Carl Whitney, Richard Papineau and Herb Clogsdon.

9. On June 26, 1979, at about 6:30 p.m., Grievant, who was at home off-duty, received a telephone call requesting him to report immediately to the Facility in order to transport a prisoner to the hospital.

10. On June 26, 1979, at about 6:50 p.m., Grievant reported to the Facility, where he obtained his assignment to drive the Facility's van in order to transport prisoner Zera to Kerb's Hospital in St. Albans. At that time, Grievant learned that prisoner Zera had received injuries in a fight that had occurred earlier between prisoner Zera and prisoner Germain.

11. Thereafter (on June 26, 1979), Grievant drove the van from its parking place to the front gate of the Facility. He observed prisoner Zera, in handcuffs, being escorted from the Facility by Lieutenant Pelton (Grievant's superior officer) and Correctional Officer Haner. The three came to the van, which was being driven by Grievant, and entered.

12. Grievant then drove the van from the Facility to Kerb's Hospital in St. Albans. During the entire time, prisoner Zera was restrained by handcuffs.

13. Upon arrival at Kerb's Hospital, prisoner Zera, in handcuffs, was escorted into the Emergency Room by Grievant, Correctional Officer Haner and Lieutenant Pelton.

14. In the Emergency Room, prisoner Zera was examined by a physician. At the examining physician's request, prisoner Zera's handcuffs were removed

by Lieutenant Pelton. During the time prisoner Zera's handcuffs were removed, Correctional Officer Haner and Grievant were present. The examining physician told Grievant, Correctional Officer Haner, Lieutenant Pelton, and prisoner Zera that X-rays of prisoner Zera would have to be taken, and indicated that the X-rays would have to be taken in a room other than the Emergency Room. At some point before prisoner Zera was moved from the Emergency Room to the X-ray room, prisoner Zera's handcuffs were replaced. At the time prisoner Zera's handcuffs were replaced, Lieutenant Pelton, Correctional Officer Haner and Grievant were present.

15. Handcuffed prisoner Zera was accompanied to the X-ray room from the Emergency Room by Correctional Officer Haner, Lieutenant Pelton, and Grievant. In the X-ray room, again at the request of medical personnel, prisoner Zera's handcuffs were removed by Lieutenant Pelton. At the time Lieutenant Pelton removed prisoner Zera's handcuffs, Correctional Officer Haner and Grievant were present. X-rays of prisoner Zera were then taken, and the handcuffs were replaced on prisoner Zera in the presence of Lieutenant Pelton, Correctional Officer Haner and Grievant.

16. Lieutenant Pelton, Correctional Officer Haner, and Grievant then accompanied prisoner Zera back to the Emergency Room. In the Emergency Room, the examining physician advised Lieutenant Pelton, Correctional Officer Haner, Grievant and prisoner Zera that he (the examining physician) wished to hold prisoner Zera overnight in the hospital.

17. After being advised that prisoner Zera would be held overnight, Lieutenant Pelton ordered Grievant to return with him (Lieutenant Pelton) to the Facility in order to bring prisoner Germain to the hospital. At the time Grievant and Lieutenant Pelton left the hospital, prisoner Zera, in handcuffs, and Correctional Officer Haner were in the Emergency Room.

18. Thereafter, Grievant drove the Facility's van, with Lieutenant Pelton as a passenger, from the hospital to the Facility.

19. Upon returning to the Facility, Lieutenant Pelton and Lieutenant Goupre gave leg irons to Grievant, and, jointly, directed Grievant as follows: When you get up there, [meaning Kerb's Hospital], use the leg irons to secure him [prisoner Zera] to the bed, then remove the handcuffs."

20. After receiving his instructions, Grievant went to E Wing in order to get prisoner Germain and Correctional Officer Wallet for the trip to the hospital.

21. Thereafter, Grievant drove the van once more to Kerb's Hospital with handcuffed prisoner Germain and Correctional Officer Wallet.

22. Upon arriving at the hospital, Grievant instructed Correctional Officer Wallet and prisoner Germain to remain in the van until he (Grievant) could make certain that prisoner Zera was no longer in the Emergency Room; for, Grievant wished to avoid another confrontation between prisoners Zera and Germain.

23. Grievant entered the hospital alone carrying the leg irons in his pants pocket. Grievant went to the nurse's station and inquired as to prisoner Zera's whereabouts. He was advised that prisoner Zera had been moved from the Emergency Room to another room.

24. During his employment at the Facility, Grievant had, on numerous occasions, accompanied prisoners being transported to Kerb's Hospital for medical care. As a result of that experience, Grievant found it to be normal hospital practice to assign prisoners to a particular room in the hospital. The room normally assigned to prisoners was located a couple of doors away from an exit, which exit required passage through two sets of double doors and was therefore more difficult.

25. After being advised at the nurse's station of the location of prisoner Zera's room, Grievant discovered that prisoner Zera's room was not the room normally assigned to prisoners, but instead was directly next to an exit that required passage through only one set of double doors to reach the outside.

26. When he entered prisoner Zera's room, Grievant observed that prisoner Zera was sitting in a chair, without handcuffs, and that Correctional Officer Haner was standing nearby while a nurse was taking prisoner Zera's blood pressure. Grievant testified that while he was surprised to see prisoner Zera without handcuffs, he did not say anything about it since he did not wish to question the judgment of his fellow Correctional Officer in the presence of a prisoner.

27. As Grievant entered the room, prisoner Zera asked if he could have something to eat, but the nurse replied that he could not. Prisoner Zera then asked if he could have a "coke," and the nurse replied that he could.

28. Correctional Officer Haner then asked Grievant to step out into the hall. In the hall just outside prisoner Zera's room, Correctional Officer Haner asked Grievant, in a whisper, whether Lieutenant Pelton had come back to the hospital with Grievant. Grievant replied "No." Correctional Officer Haner did not ask if Grievant had leg irons for prisoner Zera with him, and Grievant did not volunteer that information.

29. Grievant and Correctional Officer Haner then stepped back into prisoner Zera's room. The nurse was still in the room. It was then decided, by conversation between Grievant and Correctional Officer Haner, that Grievant would leave the room in order to get a "coke" for prisoner Zera. Grievant then left the room, leaving prisoner Zera, Correctional Officer Haner and the nurse in the room.

30. From the time Grievant entered prisoner Zera's room until the time he left to get prisoner Zera a drink, the only persons in prisoner Zera's room were Zera, Correctional Officer Haner, the nurse, and Grievant. At no time during that period did Grievant make any attempt to put the leg irons on prisoner Zera, fearing that prisoner Zera may attempt to escape, perhaps violently, while Grievant and Correctional Officer Haner attempted to restrain him with the leg irons.

31. Thereafter, before Grievant went to get prisoner Zera's drink, Grievant went to the van in order to advise Correctional Officer Wallet and prisoner Germain that prisoner Zera was no longer in the Emergency Room. Grievant then re-entered the hospital and went to get prisoner Zera a "coke."

32. Grievant then returned to the wing of the hospital containing prisoner Zera's assigned room. As Grievant turned the corner to that wing, he immediately observed that prisoner Zera, without handcuffs, was in the hallway, leaning against the crashbar of the emergency exit door. Grievant also observed that Correctional Officer Haner was standing next to prisoner Zera and that he (Correctional Officer Haner) was attempting to coax prisoner Zera back into the hospital room. Grievant observed that prisoner Zera looked up, and, evidently seeing Grievant approaching, bolted out of the emergency exit door of the hallway. Correctional Officer Haner and Grievant immediately gave chase.

33. During the foot pursuit of prisoner Zera, even though Correctional Officer Haner was initially closer to prisoner Zera than was Grievant, Grievant soon passed Correctional Officer Haner and began gaining on prisoner Zera. After prisoner Zera had run about two hundred yards from the hospital's emergency exit (across the hospital lawn, across a road, and into a meadow of high grass), Grievant was about ten yards behind prisoner

Zera. At that point, prisoner Zera stopped running, and turned to face Grievant. At about that time, Correctional Officer Haner reached Grievant, and was "huffing and puffing."

34. Correctional Officer Haner was, on June 26, 1979, about 50 years of age, a heavy smoker, and not in good physical condition.

35. When he turned to face Grievant and Correctional Officer Haner, prisoner Zera removed his shirt, assumed a combative stance, and said, "Okay, come on," or similar words to that effect inviting a fight.

36. Declining to engage in physical combat with prisoner Zera, Grievant instead attempted to reason with him. Grievant told prisoner Zera that he (Zera) had too much to lose by persisting in his escape attempt. Here, Grievant was referring to prisoner Zera's pending request for transfer from the Facility to the Chittenden Community Correctional Center at Burlington, Vermont. Such a transfer would represent, to prisoner Zera, an improvement in conditions. Prisoner Zera appeared to respond to Grievant's remarks positively, saying "You're right," or words to that effect. He then put his shirt back on.

37. Grievant, prisoner Zera, and Correctional Officer Haner, in that order, then began walking back toward the hospital. As they reached the end of the trail through the tall grass of the meadow, Grievant told prisoner Zera that they would re-enter the hospital through the door from which prisoner Zera escaped. Prisoner Zera responded by saying, "Okay, whatever," or words to that effect. Grievant also told prisoner Zera that when they got to his (Zera's) room, Grievant would chain him to the bed. Again, prisoner Zera responded by saying, "Okay, whatever," or words to that effect.

38. As they were walking back to the hospital, prisoner Zera did not have any restraints on, neither handcuffs nor leg irons. Correctional

Officer Haner had lost the handcuffs during his pursuit of prisoner Zera. Grievant still had the leg irons in his pocket, but did not attempt to place the leg irons on prisoner Zera at any time prisoner Zera was outside of the hospital. Grievant testified that he had not attempted to place the leg irons on prisoner Zera because he (Zera) appeared to be responding to reason, because the high grass on either side of the trail in the meadow would be a deterrent to his escape, and because it would be difficult for prisoner Zera to walk back to the hospital through the underbrush of the meadow with leg irons on.

39. As they reached the edge of the hospital lawn, prisoner Zera again bolted and ran. Grievant and Correctional Officer Haner gave chase, but Correctional Officer Haner soon informed Grievant that he (Haner) could not continue running. Grievant then asked Correctional Officer Haner to get to a telephone and summon assistance, and continued pursuing prisoner Zera alone.

40. As Grievant continued his lone pursuit of prisoner Zera, Grievant became entangled in some wire and boards. Soon after freeing himself from the wire, Grievant lost sight of prisoner Zera.

41. Later, after help from the Facility had arrived at the hospital, Grievant and others continued the search for prisoner Zera, but without success.

42. On July 2, 1979, Grievant was personally served with a letter dated June 29, 1979, from Superintendent Richard Bashaw (Grievant's Exhibit A), notifying him that as a result of the Zera incident, Grievant was being suspended for five workdays, effective July 3, 1979, through July 9, 1979. Superintendent Bashaw gave these two reasons in his letter of suspension:

1. Violation of Rules and Regulations of this facility, 200.1, page 1; to wit, "No employee or volunteer shall disobey the direct order of a superior." You admitted that you were told by Lt. Pelton that, "I heard him say that I was to go

back to the facility, get the leg irons, return to the hospital, chain him up to the bed with the leg irons, and then remove the handcuffs." After arriving back to the hospital with the leg irons, you failed to utilize the leg irons in any manner. In fact, inmate Zera was without benefit of any restraints.

2. Violation of Rules and Regulations, 200.1, page 2; to wit; "No employee shall engage in any type of behavior or lack of behavior which constitutes negligence and/or endangers the safety of staff or resident." You did not again apply the leg irons that you had in your back pocket when you first stopped inmate Zera in back of the hospital.

43. On July 19, 1979, and August 30, 1979, respectively, Grievant filed a Step II and Step III grievance, charging that the allegations against him resulting in his suspension were erroneous. Both grievances were denied.

44. Correctional Officer Haner and Lieutenant Pelton, as well, were disciplined as a result of the escape of prisoner Zera. Correctional Officer Haner was suspended for ten days without pay, while a letter of reprimand was placed in Lieutenant Pelton's personnel file.

45. The relevant contract provision, Article XV - DISCIPLINARY ACTION, employed by the State in Grievant's case, and which Grievant alleges was violated by the State in its bypassing of less severe disciplinary action, provides in pertinent part that:

"1. The parties jointly recognize the deterrent value of disciplinary action. Accordingly, the State will:

- (a) act promptly to impose discipline within a reasonable time of the offense;
- (b) apply discipline with a view toward uniformity and consistency; 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."

and, regarding suspension without pay:

"The appointing authority or his authorized representative may suspend an employee without pay for disciplinary reasons for a period not to exceed ten work days. Notice of suspension, with specific reasons for the action, shall be in writing or shall be given personally by the appointing authority or his representative and confirmed in writing within 24 hours. The provisions of this paragraph shall not preclude the settlement of dismissal cases with respect to suspensions in excess of 10 work days." (Article XV, Part 7)

OPINION

We are required to determine whether Grievant committed the acts of disobedience or negligence he is charged with in the letter of suspension, and whether the discipline imposed by the State was permissible under the contract.

Grievant was the sole witness so the facts are undisputed. The letter of suspension contains two charges of violations of the Rules and Regulations of the Facility: disobedience of a direct order of a superior officer, occurring when Grievant failed to apply the leg irons in prisoner Zera's hospital room; and negligence, in Grievant's failure to restrain prisoner Zera with the leg irons in the meadow.

Grievant considered literal compliance with Lieutenant Pelton's order to be impossible ("Use the leg irons to secure him to the bed, then remove the handcuffs"). He submits that under conditions not contemplated by his superior, he was left to use his own judgment in determining how to carry out the order of applying leg irons to prisoner Zera once the handcuffs had been removed. And, in his judgment, to attempt to restrain prisoner Zera at this point would have necessitated the use of force which may have resulted in a violent response from Zera, endangering not only Grievant, but Officer Haner and the attending nurse as well.

Grievant also argues that he acted in a reasonable manner in the meadow given the circumstances. He argues that Zera's pugnacious attitude and Haner's poor physical condition and breathlessness after the pursuit of Zera invited disaster. An attempt to restrain Zera with leg irons at that point would have been the most reckless course of action available to him, he says, because he would have had to take on Zera alone, leaving

Zera's eventual apprehension still uncertain. Grievant also testified that Zera's apparent positive response to Grievant's attempt to reason with him, as well as the difficulty of Zera walking through the underbrush with leg irons on, contributed to his decision to use a "low key" approach.

The State, however, in defending the actions taken against Grievant, maintains that Grievant's testimony as to the reasonableness of his judgment and behavior are inconsistent with his admitted actions. Specifically, regarding the disobedience charge, the State contends that if Grievant in fact could not carry out the order as directed, he should have sought modification of the order and additional assistance, if necessary, from his superior officer, Lieutenant Pelton. Grievant's independent decision not to place the leg irons on prisoner Zera upon first arriving at the hospital disregarded what the State asserts was the obvious, primary objective of the order, the prevention of Zera's escape by restraining him with leg irons. And again, regarding the charge of Grievant's negligence in the meadow, the State maintains Grievant's insistence on a "low key" approach to be gravely erroneous and without factual basis in view of the apparent ineffectiveness of that approach in the hospital.

In our opinion, Grievant did not violate Rule 200.1 - disobedience of a direct order. Circumstances had changed by the time Grievant arrived at the hospital. Zera's handcuffs had been removed. Thus, the order could not be literally complied with.

Disobedience of a direct order of a superior which permits a dangerous criminal to escape is a grave charge. To be sustained, we think proof of intentional defiance or proof that the employee deliberately substituted his judgment for that of his superior in circumstances where it was unreasonable to do so, is required. See e.g. National Park Service and Policeman's

Association of District of Columbia, Gov't Employees Relations Report 4/2/79
804:30 (Police officer's refusal to work at a protest demonstration without a helmet unjustified, 10-day suspension for disobedience of an order upheld). That is lacking here. The legal analysis here is similar to that required when an employee refuses to do a particular job for fear of his own safety. Then the employee's refusal will be evaluated to determine whether valid safety reasons exist which will excuse employee compliance with an order. See e.g. Checker Motor Corp., 61 L.A. 33 (1973). We find here that the removal of Zera's handcuffs made it impossible to follow Lt. Pelton's order, and created circumstances where Grievant was required to exercise independent judgment. After all, someone else removed the handcuffs which ultimately led to the chain of events permitting Zera's escape. He, therefore, was not disobedient, but arguably negligent.

Nor can we find that Grievant violated Rule 200.1 by being negligent, at least for the reasons given by Mr. Bashaw, that is failure to apply the leg irons in the meadow. "Negligence" taken in its ordinary meaning connotes a failure to do what a reasonably prudent man in Grievant's circumstances would do to accomplish his job mission. We think Grievant's judgment that he risked personal injury in a confrontation with Zera was not unfounded given Zera's history; and that his judgment that both he and Haner might be unable to subdue Zera was not unreasonable. While the employer might believe Grievant should have tried to put on the leg irons, there is no way of knowing whether the attempt would have succeeded. Grievant is not charged with failing to attempt shackling Zera, but with failure to do so. We cannot find negligence in failing to do an act which we are not convinced was capable of being done. Simply put, proof that Zera escaped is not proof of grievant's responsibility for this unfortunate result.

We do, however, believe Officer Swainbank was negligent in not calling Lt. Pelton for help at the hospital once he discovered he could not comply with his earlier order. His actions in going to get Zera a "coke", and failing to call for help to shackle him, are highly irresponsible. It was then clear that assistance might be required to put the leg irons on, and that Pelton's order would go unfilled. Assuming Grievant's assessment of the situation was correct, he needed help and should have asked for it. We are in full agreement with the State that "grievant should have reported the situation to Lt. Pelton and requested further instructions". His failure to do so was plainly negligent, and would warrant discipline.

Nevertheless, we cannot uphold this suspension. In deciding this case, we believe we may not look beyond the reasons given by Supt. Bashaw for the disciplinary action he took. The contract, in Article XV, requires that "specific reasons for the (suspension) action" be given, so we conclude this Board must review the State's actions against those specific reasons and no others. Nzomo v. Vt. State Colleges, 136 Vt. 97, 100-101 (1978) strengthens the conclusion that contractually mandated procedural steps must be strictly adhered to where the State disciplines a state employee. There, our Supreme Court observed that "defined dismissal procedures...must be scrupulously observed". We see no reason why that rule should not be applied to disciplinary matters as well. We have considered holding that "negligence" during the hospital portion of the actions we are reviewing should be considered as a type of lesser included offense in the charge of "disobedience", but have rejected that approach as a violation of the contractually mandated requirement that "specific reasons" be given. Such an approach would eviscerate the parties' bargain.

We have, however, reviewed arbitration decisions reaching a contrary result on the basis that employee misbehavior should not go unpunished because of technical procedural violations. See e.g. United Telephone Co., 58 L.A. 1246 (1972); Frontier Airlines Inc., 49 L.A. 620 (1967). Tolerance of procedural defects is particularly common where no prejudice to the employee is shown. That is the case here. Grievant would not be prejudiced by our upholding this suspension on the basis of a negligent failure to ask for help at the hospital. He was put on notice of this charge by the State's answer to his grievance.

But we think Nzomo forecloses us from taking this action. The fundamental issue in this case, whether procedural violations excuse punishable conduct, has been settled by Nzomo. Moreover, this result, which values due process over substantive determinations of guilt or innocence is an established basis of our jurisprudence. See e.g. Miranda v. Arizona, 384 U.S. 436 (1966). This Board has insisted that employees state their entire grievable case at the first formal grievance stage to help promote settlements at that level, and contain the number of issues to be litigated before us. See Grievance of Peck, 1 VLRB 329 (1978); Grievance of Wheeler, 2 VLRB 289 (1979). We think the employer should be held to the same standard for the same reasons. Accordingly, we rule the State may not rely on Grievant's negligent performance at the hospital to sustain the suspension.

This disposition avoids the necessity for decision concerning the application of the "progressive discipline" aspect of this case.

ORDER

For the foregoing reasons, it is hereby ORDERED:

1. The grievance of Daniel Swainbank is ALLOWED,
2. The order of suspension issued by Superintendent Bashaw is REVERSED, and
3. The State of Vermont shall compensate Daniel Swainbank for the period July 3, 1979 through July 9, 1979.

Dated this 7 day of January, 1980, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney
Kimberly B. Cheney, Chairman

Robert H. Brown
Robert H. Brown

*Repre. Co.
Board order reversed by
SC and remanded
for a further hearing*