VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 07-06
ELLIOT TURCOTTE	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On February 5, 2007, Elliot Turcotte ("Grievant") filed a grievance with the Vermont Labor Relations Board, contending that the State of Vermont Department of Corrections ("Employer") violated the collective bargaining agreement between the State and the Vermont State Employees' Association for the Corrections Bargaining Unit effective July 1, 2005 to June 30, 2007 ("Contract") by dismissing him from employment as a Correctional Officer I. Specifically, Grievant alleged that the Employer violated Articles 14, 15 and 17 of the Contract because: 1) the dismissal was not based on fact or supported by just cause, 2) the Employer improperly bypassed progressive discipline, 3) the Employer failed to apply discipline with a view toward uniformity and consistency, 4) the Employer failed to impose discipline within a reasonable time of the alleged offense, 5) the dismissal decision constituted a discriminatory application of rules and regulations, and 6) the Employer's application of work rules to him was unreasonable.

Hearings were held in the Labor Relations Board hearing room in Montpelier on March 7 and April 3, 2008, before Board Members Richard Park, Acting Chairperson; Leonard Berliner and James Dunn. Assistant Attorney General Margaret Vincent represented the Employer. Grievant represented himself. Grievant was present for the first part of the March 7 hearing, and then left the hearing. Prior to Grievant leaving the hearing, the Labor Relations Board informed him that the second day of hearing in the

case was scheduled for April 3, 2008, at 8:30 a.m. Subsequent to the hearing, the Labor Relations Board mailed Grievant by certified mail the notice of hearing for the April 3 hearing. Grievant signed for, and received, the certified notice of hearing. Grievant did not appear at the April 3 hearing, and provided no notification either before or on April 3 that he would not be present at the hearing.

The Employer filed a Motion to Dismiss on April 7, 2008, and filed Proposed Findings of Fact and Memorandum of Law on April 17, 2008. Grievant did not file a response to the Employer's Motion to Dismiss and did not file requested findings of fact and a memorandum of law. On April 16, 2008, Grievant filed a letter with the Board setting forth an explanation for missing the April 3 hearing and alleging discrimination against him by the Employer.

FINDINGS OF FACT

1. The Contract provides in pertinent part as follows:

. . .

ARTICLE 14
DISCIPLINARY ACTION

1. No permanent or limited status 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:
   a. act promptly to impose discipline . . . within a reasonable time of the offense;
   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.

   . . .
   f. The parties agree that there are appropriate cases that may warrant the State:
      (1) bypassing progressive discipline . . .

. . .

2. The appointing authority or authorized representative . . . may dismiss an employee for just cause with two (2) weeks' notice or two (2) weeks' pay in lieu of notice. . .

. . .

3. Notwithstanding the provisions of paragraph 2 above, the appointing authority or authorized representative . . . may dismiss an employee immediately without two (2) weeks' notice or two (2) weeks' pay in lieu of notice for any of the following reasons:
   (a) gross neglect of duty;
   (b) gross misconduct;
   (c) refusal to obey lawful and reasonable orders given by supervisors;
   (d) conviction of a felony;
   (e) conduct which places in jeopardy the life or health of a co-worker or of a person under the employee's care.

. . .

8. The appointing authority or authorized designee may suspend an employee without pay for reasons for a period not to exceed thirty (30) workdays.

. . .

10. In any misconduct case involving a suspension or dismissal, should the Vermont Labor Relations Board find just cause for discipline, but determine that the penalty was unreasonable, the Vermont Labor Relations Board shall have the authority to impose a lesser form of discipline.

. . .

ARTICLE 17
AGENCY, DEPARTMENT AND INSTITUTION
WORK RULES

. . .

3. **REASONABLENESS AND APPLICATION OF RULES**

(a) An employee or the VSEA may grieve the reasonableness of any rule promulgated under this Article and, further, may grieve any action taken against an employee based upon any such rule. In either case, the grievance may include a claim that the rule is unreasonable in its application to the employee or group of employees so aggrieved. . .

. . .

2. Grievant submitted an employment application to the Employer in September 2003 to be hired as a correctional officer. The employment application

Grievant completed presented the question: "In the past five years have you been convicted, imprisoned, placed on probation or under supervision, or fined for any violation of any law including motor vehicle violations?" Grievant responded "No" to this question (State's Exhibit 1, page 1).

3. The employment application also provided in pertinent part:

> If you have had any prior involvement with the court system at any time, you must provide a written account of what happened unless your record had been sealed for the following reasons**:**
>
> - You appeared in juvenile court as a defendant.
> - You successfully completed a deferred sentence agreement or a diversion program.
> - You received a governor's pardon.
>
> **Use the reverse side of this form to describe any contact you have had with any court system.** [emphasis in original] Describe details to the best of your recollection. The Vermont Department of Corrections conducts criminal and motor vehicle record checks on all candidates beyond the 5 year time period listed on the State of Vermont job application form. We reserve the right to investigate fully any criminal or motor vehicle offense prior to consideration for employment. . .
>
> ---
>
> Signature (I have read and understood this form) Date
>
> NOTE: THE DEPARTMENT OF CORRECTIONS COMPLETES A CRIMINAL AND MOTOR VEHICLE RECORD CHECK FOR ALL APPLICANTS WHO PASS THE INITIAL WRITTEN TEST. MISREPRESENTATION OF THE REQUIRED INFORMATION FOR ANY REASON IS GROUNDS FOR DISQUALIFICATION OR TERMINATION FROM EMPLOYMENT.
> (State's Exhibit 1, page 8)

4. Included with this form were questions. One of the questions provided: "Have you ever had any prior involvement with the court system at any time (and don't have your record sealed for the above reasons)?" Grievant responded "Yes". The next question provided: "If Yes, describe details to the best of your recollection." Grievant responded: "juvenile court do not remember". Grievant signed the form and dated it "9-

23-03". Grievant indicated on his employment application that he was born in 1970 (State's Exhibit 1, pages 7, 9).

5. At the time Grievant completed the application for employment, his involvement with court systems included the following:

- Misdemeanor Charge of Simple Assault, Franklin County District Court. Misdemeanor Conviction, September 25, 1991.
- Misdemeanor Charge of Disorderly Conduct by Telephone, Franklin County District Court. Misdemeanor Conviction, September 25, 1991.
- Misdemeanor Charge of Disorderly Conduct by Telephone, Franklin County District Court. Case Dismissed, September 25, 1991.
- Charge of Accessory After the Fact, Franklin County District Court. Dismissed by States Attorney, March 8, 1993.
- Misdemeanor Charge of Unlawful Mischief, Franklin County District Court. January 14, 1997, Misdemeanor Conviction.
- Felony Charge of Lewd & Lascivious Conduct With a Child, Arrested 3/16/98. Jury Trial in Franklin County District Court – Hung Jury. Dismissed by States Attorney, November 13, 2000.

(State's Exhibit 7, pages 60-62)

6. The Employer hired Grievant in the fall of 2003 as a Correctional Officer I assigned to the Northwest State Correctional Facility ("NWSCF") in Swanton, Vermont.

7. The Employer provided Grievant with a copy of the Employer's Work Rules on October 29, 2003. Grievant certified that he had "read and fully understand" the Work Rules. The Work Rules provided in pertinent part at all times relevant:

> . . .
> 4. Employees shall be honest and complete in their descriptions, whether given orally or in writing to the employer of events occurring in the work place and in all other circumstances related to their employment.
>
> 5. Employees shall cooperate fully with any inquiry or investigation, whether formal or informal, conduct(sic) by the Department. This shall include answering fully and truthfully any questions related to their employment.
> . . .
> 9. No employee, whether on or off duty, shall comport himself or herself in a manner that reflects discredit upon the Department.

> 10. No employee, whether on or off duty, shall violate any law or ordinance. Any conduct constituting a felony or misdemeanor can be the basis for disciplinary action whether or not prosecution or conviction results. A formal adjudication of felonious or misdemeanant behavior is not necessary before a decision to discipline is made.
>
> 11. Any employee shall report in writing to his/her supervisor of his/her arrest or citation for criminal activity as soon as possible, but no later than the first day he/she reports to work following the arrest or citation. The disposition of the charge must be reported immediately. The employee shall also immediately report, when known by the employee, that he/she is being investigated for criminal conduct by a law enforcement agency.
> . . .
> (State's Exhibit 10)

8. Grievant received satisfactory performance evaluations during his tenure of employment as a correctional officer. On March 21, 2006, NWSCF Superintendent Sue Blair imposed a written reprimand on Grievant for three instances of insubordinate behavior. Grievant received no other disciplinary action prior to his dismissal (State's Exhibit 12, p.126).

9. On August 4, 2006, Superintendent Blair was informed through an e-mail that an offender had reported to Correctional Officer James Frank that his underage daughter had been touched sexually by another NWSCF officer. Later that day, Superintendent Blair was informed that Grievant was the officer accused of touching the offender's daughter and that Grievant had been criminally charged with lewd and lascivious conduct on August 3, 2006, in connection with the incident. Grievant did not inform the Employer that he had been charged with a crime (State's Exhibit 7).

10. One of the conditions in the August 3, 2006, Conditions of Release Order issued by Judge James Crucitti in connection with the lewd and lascivious conduct charge was: "You must not be charged with or have probable cause found for a new offense while this case is open." (State's Exhibit 7, page 65).

11. On August 4, 2006, Superintendent Blair sent Grievant a letter which provided in pertinent part:

> This is to notify you that, effective upon receipt of this letter, pursuant to Article 14, Section 9, of the Corrections Unit Agreement, you are temporarily relieved from duty, with pay, for a period of up to 30 workdays. You will remain in this status pending the resolution of an investigation into whether you have committed misconduct related to work. The nature of the allegation includes, but may not be limited to, whether you have violated DOC Work Rules #1, #9, #10 and #11 by engaging in criminal conduct that caused you to be arrested and arraigned for a violation of Title 13 V.S.A. 2601.
>
> . . .
> (State's Exhibit 3)

12. On August 15, 2006, Superintendent Blair sent Grievant a letter which provided in pertinent part:

> I have received allegations about actions on your part that may have violated DOC Work Rules #1, #9 and #10 by your actions on or about 7/25 and 7/26/06 that caused you to be charged criminally for a violation of Title 13 VSA as well as the falsification of documents during your hiring process. I have asked Peter Canales of the Agency of Human Services Investigations Unit or his designee to investigate these allegations. . .
> (State's Exhibit 4)

13. Canales interviewed Grievant on August 30, 2006. VSEA Field Representative Jonathan Goddard was present representing Grievant. During the interview, the following exchange occurred between Canales and Grievant:

> . . .
> Canales: This is the original application that you filled out. Under the statements, it asks if in the past . . . five years, you've been convicted, in prison, placed on probation under supervision, or fined for any violation of any law, including motor vehicle, you've checked no for that, is that correct?
>
> Grievant: That's correct.
>
> Canales: Okay, had you been convicted of any crime in that time period?
>
> Grievant: Not to the best of my knowledge, no.

. . .

Canales: Okay, if you turn to this portion of the – this is your signature at the bottom of the page there?

Grievant: It appears to be.

Canales: It starts out be saying, "Dear Applicant," . . . "If you have had any prior involvement with the court system at any time, you must provide a written account of what happened unless your record has been sealed for the following reasons: You appeared in juvenile court as a delinquent, you successfully completed a deferred sentence agreement or diversion program, or you received a governor's pardon." Why did you not at that point inform the Department of your past criminal history, either convictions, or any involvement with the court system as it asks about?

Grievant: Because when I was told by my lawyer that anything that I was not convicted of, I didn't need to bring up.

Canales: Did you question your lawyer personally about this?

Grievant: My question to my lawyer personally when charges were dismissed against me. I had charges brought up against me that were dismissed and I asked him if I had to put any of that on an application and he said, "Absolutely no, Mr. Turcotte, you don't have to, you weren't convicted. It's not on your record. Therefore, you don't have to bring it up with you looking for jobs or anything else."

Canales: But did you ask him at the time – did you ask anyone at the time when you were filling out this portion of the application?

Grievant: At the time when I was filling out this personnel action, no.

Canales: Did you think that this was something that needed to be told?

Grievant: No, I didn't.

Canales: Why not?

Grievant: Because if you're not convicted, then you're not guilty.

Canales: But this isn't asking if you were convicted – "Have you had any prior involvement with the court system at any time." It's saying

you must provide a written account of what happened unless and it qualifies the "unless" portion.

Grievant: Well, then I didn't understand it.

Canales: At that time had you had any prior convictions?

Grievant: I had two prior convictions, misdemeanors.

Canales: Okay, had you had any other court involvements?

Grievant: I have had other court involvements.

Canales: And what were those involvements?

Grievant: I've had numerous court involvements.

. . .

Canales: So, . . . if I'm understanding this correctly is the reason you didn't provide the information requested was because you didn't understand the question.

Grievant: Apparently so because I was told by my lawyer that if you're not convicted of something, you don't need to mention it on an application. That's what I was told by my lawyer.

Canales: Okay, but you didn't ask anyone at the time.

Grievant: Not when I filled this out. I assume that it went for every application.

Canales: When . . did your lawyer tell you that, approximately what time frame?

Grievant: I don't recall.

. . .

(State's Exhibit 11)

14. On September 15, 2006, while Grievant remained on relief from duty, he was involved in an altercation with his estranged wife, Donna Brassard, and her 17 year old son, Darren Brassard. As a result of this incident, Grievant was arrested by New York

State Police and criminally charged with: 1) Aggravated Harassment of Donna Brassard, and 2) Attempted Assault of Darren Brassard (State's Exhibit 2, pp. 12 and 13).

15. Grievant and Donna Brassard met when they both were working at NWSCF. She was a nurse at the facility and continues to work there as a nurse. Grievant and Donna Brassard were married in February 2006. After they were married, they lived together at Donna Brassard's home in Moorers, New York, along with three children of Donna Brassard. In August 2006, Grievant and Donna Brassard separated.

16. On the evening of September 15, 2006, Donna Brassard was returning home from work when she received a call on her cell phone from Grievant. Grievant told her that he wanted to come by her home and pick up his motorcycle. She told Grievant that he could not do so. Grievant then threatened to trash her vehicles, and smash and blow out the windows of her home. Grievant threatened her that she would be leaving her home in a body bag.

17. Donna Brassard immediately drove home, and had her sister take her two younger children away from her house. She then called the police. A New York State Trooper arrived, and Donna Brassard filled out a sworn statement regarding the threats that Grievant had made against her.

18. After the State Trooper departed, Grievant arrived at the house. As he walked into the house, he angrily stated to Donna Brassard: "Thanks for calling the cops". Grievant told her that he was going to take his dog. She told Grievant to leave the dog with her because he had no place to keep the dog. Grievant told her that he would kill the dog if he could not take it. Donna Brassard then asked her son Darren Brassard to take the dog away from the home. Darren Brassard was putting the dog in his truck when

Grievant grabbed him. A struggle ensued between Grievant and Darren Brassard. Darren Brassard struck Grievant several times in the head. Grievant then dragged him to the ground and held him tightly around the neck so that his breathing was impaired. Grievant eventually released him. Shortly thereafter, the police arrived and arrested Grievant. Darren Brassard did not sustain any injuries. Grievant bled from a cut around his eye.

19. Later that evening, Jerrad Mesec, a NWSCF Correctional Officer, received a telephone call from a friend of Grievant. The friend asked Mesec to help raise money for Grievant's bail and bring him home from jail. Mesec and Grievant had become friends while working together as correctional officers. Mesec then drove to New York that evening, and met three of Grievant's friends. He drove them to the Clinton County jail, where they bailed Grievant out. Mesec then drove Grievant back to Mesec's house, where they spent the night. Grievant and Mesec continued to live together for the next few weeks.

20. On September 17, 2006, NWSCF Correctional Officer Jason Rushlow sent an e-mail to Superintendent Blair informing her that inmate Marvin Bluto had told him that he had helped bail Grievant out of jail in New York and that a correctional officer by the name of "Jared" had been at the jail assisting in bailing Grievant out. Prior to this e-mail, Grievant had not informed the Employer of the criminal charges against him in New York (State's Exhibit 7, p.47).

21. On September 20, 2006, Superintendent Blair sent Grievant a letter which provided in pertinent part:

> I have received allegations about actions on your part that may have violated DOC Work Rules #1, #9, #10, #11 and #13 by your recent actions that caused you to be arrested by the New York State Police on or about September 15, 2006 and your failure to notify your employer of same. By this arrest it

appears to violate the conditions of your release set upon you by the Vermont District Court. It also appears you have engaged in a relationship with an offender under the supervision of the DOC that gives the appearance of undue familiarity. I have asked Peter Canales . . . to investigate these allegations. . .
(State's Exhibit 5)

22. Canales interviewed Grievant on October 5, 2006. Goddard was also present as Grievant's VSEA representative. During the interview, the following exchange occurred between Canales and Grievant:

. . .

Canales: . . . We're here to talk about the new charges over in New York. You were charged with attempted assault on the third and aggravated harassment on the second. The attempted assault was on Donna's son. . . Tell me about that, what happened?

Grievant: I went over to Donna's house and I was going to retrieve the last of my property and I wanted to get my dog. Donna refused to give me my dog. She told Darren to take my dog and put him in the truck and take him for a ride which I really didn't have a problem with that until he grabbed his collar, he twisted it and my dog didn't want to go and so he was dragging him across the lawn. So, I went over and I reached for the collar because I was going to pull my dog's collar out of his hand and take him home and he punched me in the face and when he hit me, of course, I was stunned. Couldn't really believe what was happening and then he hit me several more times, and then finally, I took him to the ground so he couldn't hit me any more. That's what happened.

. . .

Canales: You grabbed the dog's collar?

Grievant: I grabbed the dog's collar.

Canales: Okay.

Grievant: And that's when he punched me in the face.

Canales: Did you grab him at all?

Grievant: No, I didn't.

. . .

Canales: Okay. Earlier in the day, did you make some phone calls to Donna about coming over to retrieve the items?

Grievant: I don't recall.

Canales: Did you call Donna about wanting a motorcycle?

Grievant: I don't recall.

Canales: So, if she were to say that you did, would you have any basis to contest that if you don't recall?

Grievant: I really don't recall. It's been too long. I don't remember if I called her that day and if I asked about a motorcycle.

Canales: Did you call her at any point and ask her about retrieving a motorcycle?

Grievant: I probably did. I wanted my motorcycle at one time.

Canales: And what was that conversation?

Grievant: The conversation is I would like to get my motorcycle.

Canales: And what she tell you?

Grievant: It's gone.

Canales: Did she say where it was?

Grievant: No.

Canales: What was your response?

Grievant: I wasn't very happy. I told her it was my property and she shouldn't have moved it.

Canales: Okay. Did you say anything about other property that the two of you had to include a couple of vehicles, a Durango and a Mustang?

Grievant: Yes, actually I did.

Canales: What did you say?

Grievant: I said that was my property. You shouldn't have moved it. How would you like it if I was to take your vehicles out and smash then and blow the windows out of them?

Canales: Okay.

Grievant: You wouldn't like that very much would you, as an example, and she said no.

Canales: Okay, What other statements did you make?

Grievant: That was it.

Canales: Did you make any statements about blowing out windows in the house?

Grievant: No, and when I say blowing out windows, I mean punching them out or kicking them out because I've already been charged with and they made me take all my guns out of the house and get rid of them and all that kind of stuff. I never once threatened to shoot anybody or anything if that's what you're getting at.

Canales: Well, that is where I'm going. I mean, you can see that, you know what the charges are.

Grievant: It didn't happen. I know what the charges are and you know what happened? I got assaulted. . . The only place that I was hit was in my eye, it was bulging out and I was attacked. I'm a martial arts instructor. I brought him to the ground as easily as I could. If I wanted to hurt him, I could have hurt him and crippled him, and possibly even killed him. I had no desire to do that. . . I was attacked, and because I was so upset about it, they charged me so they could remove me from the property and put me in jail. That's what happened. . . (W)hen I brought him to the ground, I grabbed him on the neck area to protect him on the way down. . . I held his hands, or his wrists so I wouldn't get hit any more, and that's all I did.

. . .

Canales: . . . Tell me if I've got this right. He's using his right hand to strike you, you step across his body, block that with the right hand blows with your left arm, you reach across the front of his chest with your right arm, you put your right leg behind his leg, use it as a pivot point, take him off balance, use your body weight and mass to bend him backward to the ground. Once he's on the ground, you release the chest and neck area . . .

Grievant: And restrained him.

Canales: And restrained him. Is that accurate?

Grievant: That is accurate.

. . .

Canales: Did you make any threats to Donna and you said, you know, blow out. "Would you like it if I blew out the windows in your car?" You said you didn't make any other threats about blowing out any other windows.

Grievant: No.

Canales: To include the house?

Grievant: To include the house, I did not.

Canales: Did you make any threats about her being in a body bag?

Grievant: No, I did not.

Canales: Okay. . . but you don't remember when that conversation happened. Could that have happened the morning before or the morning of this event?

Grievant: I don't really recall. . .

. . .

Canales: Did you make any threats to kill any dogs?

Grievant: No. . .

. . .

Canales: Okay. When you were arrested in New York, you were lodged?

Grievant: Yes, I was.

Canales: How much was bail set on that?

Grievant: $2,000 cash bail.

Canales: Okay, who did you call to post that bail?

Grievant: I called Marcel Baril.

Canales: And who is Marcel Baril?

Grievant: He's a friend of mine.

. . .

Canales: He has a stepson, Marvin Bluto, you may refer to him as Joe?

Grievant: That's not his stepson.

. . .

Canales: Whose house did you call when you set the . . .

Grievant: I called Marcel in Debby's house. They're a couple, they live together.

Canales: Yep.

Grievant: Joseph lives at his grandmother's house down one road. It's not in that house, he doesn't live there.

. . .

Canales: Did you speak to Joe about posting bail?

Grievant: No, I didn't.

. . .

Canales: . . . Do you know if (Joe's) under DOC supervision now?

Grievant: I do know.

Canales: Okay.

Grievant: I knew that because I was told that he got in trouble for going over to New York because he drove and Marcel and Debby went over to bail me out.

Canales: Okay, who told you that?

Grievant: Marcel. Supposedly he was bragging to people that he bailed me out for $2,000. Joe doesn't have $2,000. Joe will never have $2,000.

Canales: No?

Grievant: No. Yeah, he lives at his grandmother's house and he doesn't work and he doesn't have a job. Marcel has been drinking and he didn't want to drive and Debby's vision is not that good and she's not in that good of health conditions. I had Joe drive over.

Canales: How do you know that?

Grievant: How do I know that because when I got picked up by them I rode back with them and Joe was driving.

Canales: Okay. Who else was over there? . . . Who else came over to bail out? Marcel didn't come up with all $2,000?

Grievant: It was me, Joe, Marcel and Debby.

Canales: No one else from Vermont or New York came over to help . . .

Grievant: No, it was just Marcel. You can check the records. Marcel's name is on the bail receipt.

Canales: Well, he is, along with Jared.

Grievant: Who's Jared?

Canales: Another employee at the facility, I think.

Grievant: Maybe it's one of Marcel's friends. Marcel told me that he got the money.

. . .

Canales: Did you speak with Jared at all? . . .

Grievant: . . . I didn't see Jared there.

Canales: Who is Jared?

Grievant: I don't know who Jared is. I don't know if it's one of Marcel's friends or what because I'm sure in the middle of the night, Marcel didn't come up with all of that money by himself either. Two

thousand dollars is a lot of money to have in the middle of the night. I was told by Marcel that he's the one that came up with the money and it was his name on the bail receipt because he was the one that was in there when I was getting let out. Not Joe's, not anybody else's. I'm sure Debby came up with some of the money, too.

. . .

Canales: Have you been staying with someone on and off, periodically, named Jared?

Grievant: No, I've been staying with Debby Bluto. . .

. . .

Canales: Okay, so you just called Marcel, and Jared, did you see Jared over in New York at any point while you were being bailed out?

Grievant: No.

Canales: Did you see him shortly thereafter?

Grievant: No.

Canales: No, okay.

Grievant: Like I said, maybe it's one of Marcel's friends.

Canales: Do you know an officer at your facility named Jared?

Grievant: There is an officer at our facility named Jared.

Canales: What's his last name?

Grievant: Nesick.

Canales: Okay, that's, that's who I'm referring to, Jared Nesick. He didn't, he didn't put up any money to your knowledge?

Grievant: To my knowledge, no. I was in jail, how would I know? To my knowledge . . .

Canales: Because when you came out, if he was standing there . . .

Grievant: To my knowledge, no.

Canales: No, okay. Have you talked to him about this investigation?

Grievant: No, I don't go over and talk to Jared.

. . .

Canales: Why, why did you not tell anyone at DOC that you'd been arrested?

Grievant: Because I was assured that I didn't need to. It was a sheriff's department where I was. It's not just a regular jail. It's a sheriff's department. . . And they told me that they were going to call and notify my work place because I told them where I worked, I told them where I was from, I told them what was going on. They knew that I had charges that were pending over in Vermont, the whole thing. I was honest with them and I said I need to let work know. I don't know how long I'm going to be there and they said that they would notify my work and when you got an officer telling you that they're going to notify your work, I think you can pretty much believe it. And she was notified because she had all the paperwork, she had my restraining order. She had everything in front of her when she talked to me.

Canales: Yeah, well my question is why did you not, not call? The work rules say that you must notify your supervisor or the employing authority immediately.

Grievant: Immediately, and I did through the sheriff's department where I was being held. I let them know that they had to report and they had to let them know. They said they would.

. . .
(State's Exhibit 9)

23. On October 5, 2006, Superintendent Blair sent Grievant a letter which provided in pertinent part:

> This is to notify you that, effective October 4, 2006, pursuant to Article 14, Section 9, of the Corrections Unit Agreement, you are temporarily relieved from duty, with pay, for a period of up to 30 workdays. You will remain in this status pending the resolution of an investigation into whether you have committed misconduct related to work. The nature of the allegation includes, but may not be limited to, whether you have violated DOC Work Rules # 1, 9, 10, and 11 by engaging in criminal activity that has caused you to be arrested and arraigned for

a violation of Title 13, V.S.A. 2601 and two violations of NY State Law involving violence. . .
(State's Exhibit 6)

24. Superintendent Blair sent Grievant a letter dated November 21, 2006, which provided in pertinent part as follows:

> As a result of your behavior described below, the Department of Corrections ("DOC") is contemplating a disciplinary action up to and including your dismissal from your position as a Correctional Officer I. . . .
>
> This disciplinary action is contemplated for the following reasons:
>
> This action is based on an Investigation Report dated November 13, 2006, by Peter Canales, AHS Investigations Unit Chief, which is attached and may be consulted for additional information related to the following summarized charges.
>
> **I. Violation of DOC Work Rules 9 & 10 – Actions Leading to Attempted Assault and Aggravated Harassment Criminal Charges – September 15, 2006:**
>
> DOC Work Rule #9 states that:
>
> > No employee, whether on or off duty, shall comport himself or herself in a manner that reflects discredit upon the Department.
>
> DOC Work Rule #10 states that:
>
> > No employee, whether on or off duty, shall violate any law or ordinance. Any conduct constituting a felony or misdemeanor can be the basis for disciplinary action whether or not prosecution or conviction results. A formal adjudication of felonious or misdemeanant behavior is not necessary before a decision to discipline is made.
>
> Penal Law of the State of New York, Section 110.00/120.00 – Attempted Assault, 3rd degree, (misdemeanor) states that:
>
> > A person is guilty of Attempted Assault in the third degree, when with intent to cause physical injury to another person, he engaged in such conduct which tends to effect the commission of such crime, by attempting to cause such injury to such person or to a third person.

Penal Law of the State of New York, Section 240.30(1) – Aggravated Harassment, 2nd degree, (misdemeanor) states that:

> A person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten or alarm another person he or she communicates, . . . with a person, . . . by telephone . . . in a manner likely to cause annoyance or alarm.

On or about September 15, 2006, you were charged by New York law enforcement officials with Attempted Assault in the 3rd degree on Darren M. Brassard, your stepson. You allegedly committed that crime by taking him to the ground and placing him in a headlock, squeezing his neck and causing his breathing to become impaired.

In addition, on or about September 15, 2006, you were charged by New York law enforcement officials with Aggravated Harassment in the 2nd degree on Donna M. Brassard, your wife. You allegedly committed that crime by telephoning her and threatening to trash the vehicles, shoot the windows out of the residence, and telling her she would be "in a body bag," which caused her alarm.

The above criminal charges were based upon statements provided to New York law enforcement officials by your victims. Those statements were made on a form that warned them that making a false statement was punishable as a Class A Misdemeanor.

You deny violating the New York Penal Law but the weight of the evidence supports those charges. Your actions toward your stepson Darren Brassard, and your wife, Donna Brassard, appear to have violated DOC Work Rules 9 (reflecting discredit on DOC) and 10 (violation of a law). While you have not yet been convicted of those charges, a violation of New York Penal Law is a violation of DOC Work Rules.

II. Violation of DOC Work Rules 9 & 10 – Violation of Vermont Conditions of Release – September 15, 2006:

When you went to Donna Brassard's home on September 15, 2006, and engaged in the behavior described above, you were subject to Vermont Conditions of Release. You were arrested and charged by the Vermont State Police on August 3, 2006, with Lewd and Lascivious Conduct with a Child.[1] The Vermont District Court established conditions for your release on August 3, 2006. The Conditions of Release contained the following provisions:

[1] This felony charge is currently pending. DOC has decided for the present to hold in abeyance a decision on appropriate discipline arising from this charge. However, DOC reserves the right to take appropriate disciplinary action on that charge at any time.

> 3. You must not be charged with or have probable cause found for a new offense while this case is open.
>
> **VIOLATIONS . . OF ANY OF THESE IS A CRIME.** If you violate any of these conditions the court may send you to jail and you may be charged with new crimes. You must follow these conditions until your case is closed or until the court changes the conditions. [emphasis added]

In light of the New York criminal charges arising from your actions on September 15, 2006, you appear to have violated your Vermont Conditions of Release, and thereby violated DOC Work Rules 9 & 10.

III. Violation of DOC Work Rule #11 - Failure to Report Arrests to DOC:

DOC Work Rule #11 provides as follows:

> Any employee shall report in writing to his/her supervisor of his/her arrest or citation for criminal activity as soon as possible, but no later than the first day he/she reports to work following the arrest or citation.

You failed to report to DOC that you had been arrested on either August 3, 2006, or September 15, 2006, and, in doing so, appear to have violated DOC Work Rule #11.

IV. Violation of DOC Work Rules 4 & 5 – Dishonest Responses During Investigation Interviews – August 30, 2006 & October 5, 2006:

On August 30, 2006, and October 5, 2006, Peter Canales, Chief of the AHS Investigations Unit, conducted investigative interviews with you . . .

Background: After your September 15, 2006, arrest by New York police, you were held at the Clinton County Sheriff's facility. You called the home of Marcell Baril and Debbie Bluto and asked them to post $2,000 bail. You told them that they could ask Correctional Officer Jared Mesec for help in coming up with the bail. They contacted Mesec and he agreed to contribute to your bail and to ride with them to New York to post your bail. Marvin (Joe) Bluto also rode with them on that trip. Mesec contributed $600 toward your bail and rode back to Vermont in the same vehicle with you and the others.

In your investigative interview, you made the following dishonest claims:

1. You denied that anyone aside from Marcell Baril, Marvin (Joe) Bluto, and Debbie Bluto helped to post your bail or was present when that was done. This conflicts with evidence provided by Marvin (Joe) Bluto and CO Jared Mesec;
2. When you claimed that Marvin (Joe) Bluto drove the vehicle the night that Baril and Debbie Bluto came to New York to post your bail;
3. When you stated, "maybe its one of Marcel's friends," after being asked who "Jared" was;
4. When you denied knowing a "Jared" even after Mr. Canales suggested that you worked with him;
5. When you denied that you saw anyone named "Jared" in New York when your bail was posted or shortly thereafter;
6. When you denied having stayed at "Jared's" house for a period of time;
7. When you denied that you violated the New York Penal Law in your conduct toward Darren Brassard on or about September 15, 2006;
8. When you denied that you violated the New York Penal Law in your conduct toward Donna Brassard on or about September 15, 2006;
9. When you denied that you did anything after Darren Brassard hit you on September 15, 2006, aside from taking him to the ground and holding him so he couldn't hit you anymore.

V. Violation of DOC Work Rule #4 & 5 – Dishonest Failure to Disclose Prior Involvement with Court System in Application for DOC Employment Process – September 2003:

You were required, as part of your application for employment with DOC, to provide information in addition to the standard State application for employment. One of the additional required steps was to read and complete a form that contained the following:

> Dear Applicant:
>
> **If you have had any prior involvement with the court system at any time, you must provide a written account of what happened unless your record had been sealed** for the following reasons**:** [emphasis added].
>
> You appeared in juvenile court as a defendant.
> You successfully completed a deferred sentence agreement or a diversion program.
> You received a governor's pardon.
>
> **Use the reverse side of this form to <u>describe any contact</u> you have had with any court system.** Describe the details to the best of your recollection. . . [emphasis (boldface) in original – emphasis (underlining) added].

Signature (I have read & understand this form) Date

NOTE: THE DEPARTMENT OF CORRECTIONS COMPLETES A CRIMINAL AND MOTOR VEHICLE RECORD CHECK FOR ALL APPLICANTS WHO PASS THE INITIAL WRITTEN TEST. **MISREPRESENTATION OF THE REQUIRED INFORMATION FOR ANY REASON IS GROUNDS FOR DISQUALIFICATION OR TERMINATION FROM EMPLOYMENT.** [emphasis added].

DOC Work Rule #4 states that:

> Employees shall be honest and complete in their descriptions, whether given orally or in writing, to the employer of events occurring in the work place and in all other circumstances related to their employment.

DOC Work Rule #5 states that:

> Employees shall cooperate fully with any inquiry or investigation, whether formal or informal, conducted by the Department. This shall include answering fully and truthfully any questions related to their employment.

On September 23, 2003, you signed the above-quoted form, but failed to disclose any prior involvement with the court system despite the fact that you had, in your own words, "numerous court involvements" in the past. In doing so, you represented to DOC that you had not been involved at all in the past with the court system.

However, at that time, your past involvement with the court system had included:

- **Simple Assault**, Docket No. 1184-7-90, **Convicted** of Misdemeanor, 9/25/91.
- **Disorderly Conduct by Telephone**, Docket No. 742-4-91, Misdemeanor, **Convicted** of Misdemeanor, 9/25/91.
- **Disorderly Conduct by Telephone**, Docket 742-4-91, Misdemeanor, Case Dismissed, 9/25/91. . .
- **Accessory After Fact**, Felony, Docket No. 1750-11-92 FRCR, Dismissed by Court.
- **Driving License Suspended**, Misdemeanor, Docket No. 1696-11-92 FCRC, Arrest: 10/22/92. **Plea of Guilty. Conviction.**
- **Accessory After Fact**, Felony, Docket No. 1749-11-92 FRCR, 13 V.S.A. 5. Dismissed by States Attorney, 3/8/93.

- **Unlawful Mischief, Felony.** Docket No. 435-4-96 FRCR. Arrested 4/14/96. **Plea of Nolo. Conviction.**
- **Obstruction of Justice**, felony, Docket No. 435-4-96 FRCR, 13 V.S.A. 3015. Arrest: 4/14/96. Dismissed by the States Attorney.
- **Lewd & Lascivious Behavior With a Child**, felony. Docket No. 314-3-98 FRCR, 13 V.S.A. 2602. Arrested 3/16/98. Jury Trial – Hung Jury. Dismissed by States Attorney, 11/13/00.

In your investigative interview, you admitted that you read and signed the above form but did not disclose any of your prior record to DOC. You offered an explanation for your actions, but your explanation lacks credibility. You claim that an attorney gave you advice on what you were required to tell a prospective employer about prior criminal charges. You claim the attorney said you only had to disclose prior convictions to employers. You did not identify the attorney and indicated you received that advice several years before 2003. You also admitted you didn't consult an attorney in 2003 before completing the DOC form.

Nonetheless, you claim to have relied on this alleged attorney's advice when you failed to disclose the above information to DOC. However, you admitted that, at the time you completed the DOC form, you recalled having been convicted of one or more crimes. Even assuming you received the above advice from an attorney, it only applied to situations where you were <u>not</u> convicted. It could not conceivably excuse your failure to disclose your prior convictions. Clearly with regard to convictions for Simple Assault, Disorderly Conduct by Telephone, Driving with License Suspended and the felony of Unlawful Mischief, your purported excuse is invalid, thus it appears that you knowingly, intentionally and dishonestly withheld information from DOC regarding your prior convictions.

Furthermore, in light of the plain language of the above-quoted DOC form, it would be unreasonable for anyone to believe that he had no obligation to disclose the involvements that did not result in conviction. Thus, it appears that you knowingly, intentionally, and dishonestly withheld from DOC those prior involvements with the court system when you weren't convicted.

It also appears that you violated your general duty to be honest with your prospective employer when you failed to disclose your prior criminal record to DOC.

You signed the DOC Work Rules on November 3, 2003. Work Rule #4 emphasizes the importance of being honest and complete in all circumstances related to your employment. Work Rule #5 requires you to cooperate fully with any inquiry or investigation conducted by DOC, which includes answering fully and truthfully any questions related to your employment. Notwithstanding your knowledge of those Work Rules, you continued to conceal from DOC your prior involvement with the court system.

> It appears that your conduct provides just cause for bypassing progressive discipline and for a serious disciplinary action by to and including your dismissal. You appeared to have engaged in a pattern of dishonest and criminal conduct which is incompatible with your continuing employment with the Department of Corrections.
>
> You must notify me within twenty-four (24) hours after receiving this letter whether you wish to respond to the above allegations. . .
> (State's Exhibit 11)

25. Brian Bilodeau, Acting Superintendent of the Northwest State Correctional Facility, sent Grievant a letter dated January 4, 2007, providing in part:

> This is to notify you of your dismissal from the position of Correctional Officer I, effective January 4, 2007. You will not receive two weeks pay in lieu of two weeks notice. . . . The reasons for this action are those that are outlined in the letter of November 21, 2006 . . ., which are incorporated herein by reference. . . .
> (State's Exhibit 13)

26. Bilodeau determined that Grievant's offenses were very serious. He found Grievant's violent, threatening behavior disconcerting given that a correctional officer has to manage and control oneself. Bilodeau also decided that Grievant was not credible. He concluded that this dishonesty had an adverse effect on supervisory confidence in Grievant performing assigned duties; he believed that Grievant could no longer be trusted. He decided that Grievant did not have the potential for rehabilitation because he did not take responsibility for his actions. He concluded there were no adequate alternative sanctions to Grievant's dismissal.

OPINION

There are a few preliminary matters that we need to address before reaching the merits of this grievance. First, Grievant filed a letter with the Board after the hearings in

this matter which requires a response. Second, the Employer has filed a motion to dismiss the grievance.

Post-Hearing Letter from Grievant

Grievant was present for part of the March 7 hearing in this matter, and did not appear for the April 3 hearing. On April 3, 2008, Board Executive Director Timothy Noonan sent Grievant a letter stating:

> The State of Vermont Department of Corrections closed its case at the April 3 hearing in this matter. The evidence in this case is now closed given that you did not appear at the hearing to present any evidence on your behalf. The Labor Relations Board is providing you and the State of Vermont Department of Corrections with the opportunity to postmark by April 17, 2008, requested findings of fact and a memorandum of law. Please contact me if you have any questions.

Grievant filed a letter with the Board on April 16, 2008, providing in part: "I am writing this in response to your letter informing me that I missed our meeting on the 3rd. I want to apologize to you as well as everyone present as I realize your time is important and would never waste it. I had the date of our meeting as the 13th. I must have misunderstood and once again I am sorry."

Grievant's contention that he misunderstood the second day of hearing was scheduled for April 3 is not credible. Prior to Grievant leaving the March 7 hearing, the Chairperson of the Board panel informed him that the second day of hearing in the case was scheduled for April 3, 2008, at 8:30 a.m. Subsequent to the hearing, the Labor Relations Board mailed Grievant by certified mail the notice of hearing for the April 3 hearing. Grievant signed for, and received, the certified notice of hearing. This provided ample notice to Grievant that the hearing was scheduled for April 3. No basis existed for

Grievant to believe that the hearing was scheduled for April 13. We note that April 13 was a Sunday, a day of the week not associated with a hearing before the Board.

In his letter filed with the Board on April 16, Grievant made factual allegations concerning the circumstances of his dismissal that he had not offered into evidence during the hearings in this matter. We have not considered such allegations in reaching our decision on the merits. Grievant had the opportunity to present such evidence at the hearings, and waived his right to do so.

Motion to Dismiss

The Employer filed a motion on April 7, 2008, to dismiss this grievance. The Employer contends that it is fair for the Board to conclude that Grievant has abandoned his grievance because: 1) at no time prior to the April 3 hearing did Grievant report to the Employer's attorney or the Board that he was unable to appear at the hearing; 2) Grievant failed to appear at the April 3 hearing, and 3) Grievant did not communicate with either the Employer or the Board subsequent to the hearing.

In deciding whether to grant this motion, it is necessary to examine the unusual progression of this case in which Grievant has represented himself. The hearing on the merits was delayed due to pending criminal charges against Grievant. The Board ultimately scheduled a hearing for March 7, although criminal charges against Grievant were still pending, when the Employer's attorney notified the Board that one of its witnesses was planning on moving to Florida in late March or early April. However, the Board bifurcated the hearing on the merits. At the March 7 hearing, the Employer had the opportunity to present its case in it entirety except that the Board did not permit it to

question Grievant as a witness on this date. Grievant was not required to present his case on March 7, and instead was granted the opportunity to present his case on April 3.

The State presented its case through examination of witnesses and admission of exhibits at the March 7 hearing. Grievant left the hearing after the State had examined, and Grievant had cross-examined the first two witnesses. The Chair of the Board panel informed Grievant that the case would proceed in his absence if he left and he would not have the opportunity to cross-examine the State's witnesses. Nonetheless, Grievant elected to leave the premises. Before he left, the Chair informed Grievant that the second day of hearing was scheduled for April 3. After Grievant left the hearing on March 7, the State examined all of its remaining witnesses except for Grievant.

Grievant did not appear at the April 3 hearing despite verbal and written notice he received of the hearing. When the April 3 hearing commenced in Grievant's absence, the Employer's attorney indicated that the State was resting its case. On April 7, the Employer filed the motion to dismiss. On April 16, Grievant filed the above-described letter with the Board.

Given these circumstances and the posture in which this case now rests, we decline to grant the Employer's motion to dismiss. If Grievant had failed to appear on the first day of hearing on March 7, this grievance would have been subject to dismissal for failure of Grievant to proceed with it. However, Grievant did appear and the State presented its case to attempt to meet the burden of proving that just cause existed for Grievant's dismissal. The fact that Grievant left during the hearing does not indicate that he was abandoning his grievance. Instead, we view his departure as a waiver of his

known rights to examine the Employer's witnesses and raise any appropriate objections to evidence the Employer was seeking to introduce.

The failure of Grievant to appear at all on the second day of hearing would have resulted in dismissal of the case if the Employer had asserted and demonstrated prejudice to the Employer as a result of Grievant's absence. For example, the Employer could have asserted and demonstrated prejudice because it wished to examine Grievant as a witness but could not do so since he was absent. The Employer did not make such a showing, and instead rested its case. If Grievant had been at the hearing and the Employer rested its case, there would have been no obligation for him to present a case. He could have left it to the Board's determination whether the Employer had met its burden of demonstrating by a preponderance of the evidence that just cause existed for Grievant's dismissal. Grievant would have been waiving his known rights to present his own evidence and question his own witnesses. In fact, Grievant's failure to appear at the hearing resulted in a waiver of such rights.

In sum, given the circumstances and posture of this case, we are erring on the side of deciding this case on its merits. This is not to condone Grievant's actions in this case. His failure to notify the Board or the Employer's attorney in advance that he was not planning on attending the April 3 hearing resulted in inconvenience and unnecessary expenditure of resources by the Board, the Employer, and witnesses that Grievant had requested be present at the hearing. Our decision to decline to dismiss this case should not be construed as constituting a defense of Grievant's actions.

Merits

We next address Grievant's contention made in his grievance that the Employer violated the requirement of Article 14 of the Contract that "the State will act promptly to impose . . . discipline within a reasonable time of the offense." We conclude that the Employer acted consistent with the contractual requirement for promptness given the various issues that needed to be investigated involving alleged misconduct by Grievant.

Grievant further contends that the Employer violated Articles 14, 15 and 17 of the Contract because: 1) the dismissal was not based on fact or supported by just cause, 2) the Employer improperly bypassed progressive discipline, 3) the Employer failed to apply discipline with a view toward uniformity and consistency, 4) the dismissal decision constituted a discriminatory application of rules and regulations, and 5) the Employer's application of work rules to him was unreasonable. These contentions all can be addressed in determining whether just cause existed for Grievant's dismissal.

The ultimate criterion of just cause is whether an employer acted reasonably in discharging an employee for misconduct. In re Grievance of Brooks, 135 Vt. 563, 568 (1977). There are two requisite elements which establish just cause for dismissal: 1) it is reasonable to discharge an employee because of certain conduct, and 2) the employee had fair notice, express or fairly implied, that such conduct would be grounds for discharge. Id. In re Grievance of Yashko, 138 Vt. 364 (1980).

The 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.

The Employer has made numerous charges against Grievant, as detailed in Finding of Fact No. 24. The Employer first charges Grievant with violation of Employer Work Rules #9 and #10 by his off-duty actions on September 15, 2006, towards his estranged wife, Donna Brassard, and his stepson, Darren Brassard, which led to attempted assault and aggravated harassment criminal charges in New York. The Employer has established this charge to the extent of demonstrating that Work Rule #9 was violated, but has not proven a violation of Work Rule #10.

Work Rule #9 provides that "(n)o employee, whether on or off duty, shall comport himself or herself in a manner that reflects discredit upon the Department". Grievant's off-duty actions towards his wife and stepson constituted a violation of this work rule. Grievant's threatening behavior toward his wife, making her fearful for her safety and those of her children, and physical alteration with his stepson were sufficiently serious to result in his arrest. The arrest for violent and threatening behavior was incompatible with Grievant's responsibilities as a correctional officer to responsibly supervise individuals imprisoned because they have violated the law, and thereby brought discredit upon the Employer. His misconduct was exacerbated because his wife worked in the same facility as him, creating an obvious nexus between the threats he made against her and his employment.

Work Rule #10 provides that no off-duty employee "shall violate any law or ordinance" and that "any conduct constituting a felony or misdemeanor can be the basis for disciplinary action whether or not a prosecution or conviction results". The Employer

contends that Grievant violated this work rule because his actions towards his wife and stepson violated New York criminal statutes. Although we conclude that Grievant committed misconduct warranting discipline due to his violent and threatening behavior, the Employer has not established that Grievant's conduct rose to the level of constituting a felony or misdemeanor. We are not prepared to reach such a conclusion involving the criminal statutes of another state absent a conviction in that state.

The Employer next charges Grievant with acting contrary to Work Rules #9 and #10 by violating conditions of release imposed on him by a Vermont District Court judge on August 3, 2006, in connection with being arrested and charged with lewd and lascivious conduct with a child. One of the conditions of release was that Grievant must not be charged with or have probable cause found for a new offense while the lewd and lascivious conduct case was open. The Employer charges Grievant with violation of this condition due to the New York criminal charges arising from his actions involving his wife and stepson on September 15, 2006.

The Employer has established this charge. The Conditions of Release Order issued by Vermont District Court James Crucitti had the force of law, and was violated by Grievant contrary to Work Rule #10 when he was charged with a criminal offense in the State of New York while the lewd and lascivious conduct case was open. His violation of the order further was at odds with Grievant's responsibilities as a correctional officer to responsibly supervise individuals imprisoned because they have violated the law, and thereby brought discredit upon the Employer in violation of Work Rule #9.

The Employer also charges Grievant with violation of Employer Work Rule #11 by failing to report to the Employer that he had been arrested on either August 3, 2006, or

September 15, 2006. The Employer has established this charge with respect to the August 3 arrest, but not concerning the September 15, 2006, incident.

Work Rule #11 provides that an "employee shall report in writing to his/her supervisor of his/her arrest or citation for criminal activity as soon as possible, but no later than the first day he/she reports to work following the arrest or citation." Grievant violated this work rule by not informing the Employer that he had been charged on August 3, 2006 with lewd and lascivious conduct.

The circumstances surrounding the September 15, 2006, arrest of Grievant are such that we conclude that the Employer has not established that Grievant violated Work Rule #11 with respect to this arrest. First, Grievant was on temporary relief from duty with pay at the time of this arrest. The timing of Grievant's obligations to report an arrest when he was not working was unclear under the rule. The evident intent of the rule to make the Employer aware of an officer's off-duty conduct resulting in arrest or citation for criminal activity before the officer engages with inmates and other employees in the workplace is not implicated when the officer is no longer working. Second, the Employer did not present evidence to refute Grievant's claim that an official at the sheriff's department where he was lodged after the New York arrest told him they would call Grievant's workplace to provide notification of Grievant's arrest.

The Employer further charges Grievant with violating Employer Work Rules #4 and #5 by making numerous dishonest claims during an interview with investigator Peter Canales. These work rules require employees to be honest in describing events to the Employer, and to truthfully answer questions related to their employment during investigations. The bulk of the allegations made by the Employer in this regard concern

Grievant's denial of Jarrad Mesec's involvement in posting Grievant's bail the night of his arrest and driving him back to Vermont, as well as denying that he stayed at Mesec's house for a period of time. The Employer has established that Grievant was dishonest in such denials.

We conclude by a preponderance of the evidence that the Employer also established its allegation that Grievant dishonestly denied during the interview that he did anything to his stepson during the September 15, 2006, incident aside from taking him to the ground and holding him so that he could not hit him anymore. The evidence indicates that Grievant held his stepson tightly around the neck so that his breathing was impaired.

The Employer has not established one of the counts of dishonesty against Grievant during the investigative interview. The Employer contends that Grievant was dishonest when he denied violating New York criminal statutes in his conduct towards his wife and stepson during the September 15, 2006, incident. Such denials by Grievant are more in the way of a legal claim than a false statement of fact, and we are not inclined to view it as dishonest.

The final charge made by the Employer against Grievant is that he violated Work Rules #4 and #5 by dishonestly failing to disclose prior involvement with the court system when the applied for employment as a correctional officer. The Employer has established that Grievant was dishonest in this regard when completing his employment application. Grievant indicated on his application that his involvement with the court system was limited to juvenile court, although he had several criminal charges brought against him as an adult. It was dishonest of Grievant to fail to disclose these prior involvements with the court system.

The bulk of the charges 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 charges justify dismissal. The pertinent factors here are: 1) the nature and seriousness of the offenses and their relation to Grievant's duties and position, 2) the effect of the offenses upon supervisors' confidence in Grievant's ability to perform assigned duties, 3) the clarity with which Grievant was on notice of the prohibited conduct, 4) Grievant's past work record, 5) Grievant's past disciplinary record, 6) the consistency of the penalty with those imposed on other employees for similar offenses, 7) the potential for Grievant's rehabilitation, and 8) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

Grievant's offenses were serious. The nature and extent of Grievant's offenses exhibit a pattern of dishonesty, violent and threatening behavior, and disregard of law and authority incompatible with his duties as a correctional officer.

Grievant engaged in repeated dishonesty over a period of time by falsifying his employment application and making numerous dishonest claims during the investigative interview leading to his dismissal. Dishonesty is a serious offense by an employee against an employer. In re Carlson, 140 Vt. 555, 559 (1982). The nature of a correctional officer's duties requires accurate and truthful reporting of incidents involving offenders, including providing testimony concerning interactions with offenders in various forums where credibility is crucial, and in previous cases we have upheld dismissals of correctional officers where their dishonesty to the employer has been a proven charge. Grievance of Kerr, 28 VLRB 264, 281 (2006). Charnley and Leclair, 24 VLRB at 146, 155. Grievance of Johnson, 9 VLRB 94 (1986). Grievance of Pretty, 22 VLRB 260

(1999). Grievance of Corrow, 23 VLRB 101 (2000). Grievance of Newton, 23 VLRB 172 (2000).

Also, his violent and threatening misconduct involving his wife and stepson demonstrated serious deficiencies given his duties as a correctional officer to responsibly interact with incarcerated individuals. Inappropriate violent and threatening actions are contrary to those needed by correctional officers to adequately perform their duties. Further, Grievant's violation of his conditions of release on a lewd and lascivious conduct criminal charge, and his failure to report an arrest to the Employer, demonstrated a disregard of the law and authority seriously compromising Grievant's ability to supervise individuals imprisoned because they have violated the law.

Grievant's offenses understandably impacted the trust his supervisors placed in him. Grievant's repeated dishonesty seriously undermined supervisors' confidence that he would provide truthful statements with respect to interactions he had with offenders or fellow employees. His violent behavior and disregard of law and authority further reduced the ability of supervisors to have confidence that Grievant would adequately perform his security responsibilities and interact productively with inmates and employees.

Grievant had fair notice that his offenses could result in his dismissal. Fair notice exists when the employee knew or should have known that the conduct was prohibited. Grievance of Towle, 164 Vt. 145, 150 (1995). Grievance of Brooks, 135 Vt. 563, 568 (1977). Knowledge that certain behavior is prohibited and subject to discipline is notice of the possibility of dismissal. Towle, 164 Vt. At 150. The Employer's Work Rules provided fair notice to Grievant that violating his conditions of release, failing to report

his arrest, and engaging in off-duty threats and violent behavior constituted prohibited conduct.

Grievant also should have known that his dishonesty was prohibited. Honesty is an implicit duty of every employee, and thus an employee should know that dishonest conduct is prohibited. Carlson, 140 Vt. at 560. Moreover, Grievant had explicit notice through Employer Work Rules #4 and #5 that dishonesty was prohibited.

Grievant's satisfactory work record and minor discipline during approximately three years of employment operate in his favor, but these factors are substantially outweighed by the seriousness and frequency of his offenses. We cannot conclude that the Employer imposed inconsistent discipline compared to other employees given the lack of evidence of similar extensive misconduct engaged in by other employees. Grievant also has not demonstrated that the decision to dismiss him constituted a discriminatory application of rules and regulations, or that the Employer's application of work rules to him was unreasonable.

Grievant has not demonstrated that he is a good candidate for rehabilitation due to his repeated dishonesty, disregard of law and authority, and an ongoing failure to take responsibility for his misconduct. We conclude that the Employer acted reasonably by bypassing progressive discipline and determining there was no alternative sanction to dismissal that would be effective. In sum, ample just cause existed for Grievant's dismissal.

ORDER

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

Dated this 30th day of May, 2008, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

_____
Richard W. Park, Acting Chairperson

_____
Leonard J. Berliner

_____
James J. Dunn