VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 11-13
TERRANCE RICHARDSON	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On February 8, 2011, Terrance Richardson ("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 ("VSEA") for the Corrections Bargaining Unit effective July 1, 2010 to June 30, 2012 ("Contract") by dismissing him from employment as a Correctional Officer I. Specifically, Grievant alleged that the Employer violated Articles 5, 15 and 17 of the Contract because: 1) the dismissal was in retaliation for Grievant's complaint and grievance activity, 2) the dismissal was not based on fact or supported by just cause, 3) the Employer improperly bypassed progressive discipline and progressive corrective action, 4) the Employer failed to apply discipline with a view toward uniformity and consistency, 5) the Employer failed to impose discipline within a reasonable time of the alleged offense, 6) the dismissal decision constituted a discriminatory application of rules and regulations, 7) the Employer's application of work rules to him was unreasonable, and 8) the Employer's decision to dismiss him constitutes discrimination.

A hearing was held in the Labor Relations Board hearing room in Montpelier on August 4, 2011, before Board Members Richard Park, Chairperson; Louis Lacroix and Alan Willard. Assistant Attorney General Kurt Kuehl represented the Employer. Grievant

represented himself. The Employer and Grievant filed post-hearing briefs on August 18 and 19, 2011, respectively.

FINDINGS OF FACT

1. The Contract provides in pertinent part as follows:

. . .

ARTICLE 5
NO DISCRIMINATION OR HARASSMENT;
and AFFIRMATIVE ACTION

1**. NO DISCRIMINATION, INTIMIDATION OR HARASSMENT**

In order to achieve work relationships among employees, supervisors and managers at every level which are free of any form of discrimination, neither party shall discriminate against, intimidate, nor harass any employee because of race, color, religion, creed, ancestry, sex, marital status, age, national origin, handicap, sexual orientation, membership or non-membership in the VSEA, filing a complaint or grievance, or any other factor for which discrimination is prohibited by law.

. . .

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 or corrective action within a reasonable time of the offense;
   b. apply discipline or corrective action with a view toward uniformity and consistency;
   c. impose a procedure of progressive discipline or progressive corrective action;
   d. In misconduct cases, the order of progressive discipline shall be:
      (1) oral reprimand;
      (2) written reprimand;
      (3) suspension without pay;
      (4) dismissal.

   . . .

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

. . .

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:

    . . .

    (b) gross misconduct;

    . . .

(State's Exhibit 32)

2. State Personnel Policy 5.6 provides in pertinent part:

POLICY AND PROCEDURES

This policy is a guide for agencies and departments regarding general issues of employee conduct. It is understood, however, that individual departments may need to have more specific guidelines and may wish to issue guidelines that are appropriate to their program function and the roles of their employees.

REQUIRED CONDUCT

(1) It shall be the duty of employees to fulfill to the best of their ability the duties and responsibilities of their position. Employees shall pursue the common good in their official activities, and shall uphold the public interest, as opposed to personal or group interests.
(2) Employees shall devote their full time, attention, and effort to the duties and responsibilities of their positions during their scheduled work time, except when other activities are authorized by law, rule, or contractual agreement, or are approved by the appointing authority.
(3) Employees shall conduct themselves in a manner that will not bring discredit or embarrassment to the State of Vermont, whether on or off duty.
. . .

PROHIBITED CONDUCT

. . .
(3) Employees are not permitted to solicit or accept any form of compensation from anyone except their employer for activities which are related to their position, unless it is provided for by law or approved by the employer. Prohibited compensation shall include any gift, reward, loan, gratuity or other valuable consideration, including free meals, provided to

employees, their immediate family, or business associate(s). Activities related to the position include papers, talks, demonstrations, or appearances connected with the job. However, this prohibition shall not extend to uncompensated activities or compensation received for activities not related to the employees' jobs which are done on their own time.
. . .
(State's Exhibit 34)

3. State of Vermont Personnel Policy 17.0 provides in pertinent part:

EMPLOYMENT RELATED INVESTIGATIONS
. . .
EMPLOYEE COOPERATION WITH EMPLOYMENT INVESTIGATIONS

State employees have an obligation to cooperate with their employer regarding employment investigations. It is part of the responsibility of an employee to answer truthfully and fully the work-related inquiries of the State. Refusing to answer, answering incompletely, or answering untruthfully, questions relating to work is a misconduct offense for which an employee may be disciplined up to and including dismissal.
. . .
(State's Exhibit 35)

4. State of Vermont Personnel Policy 17.3 provides in pertinent part:

DRUG-FREE WORKPLACE POLICY
. . .
PURPOSE AND POLICY STATEMENT

As an employer, the State of Vermont is responsible for maintaining safe, efficient working conditions for its employees by providing a drug-free workplace. Therefore, State employees shall not engage in the unlawful manufacture, distribution, possession or use of controlled substances (drugs) on the job or on any State work site.
. . .
(State's Exhibit 36)

5. DOC Directive 408, entitled "Interim Procedure on Contraband Classification and Disposition", effective since March 18, 2006, provides in pertinent part:

DEFINITIONS
. . .

Contraband: Anything not authorized to be in an inmate's possession; used in an unauthorized or prohibited manner; altered in any way; or in excess of allowable limits.

. . .

PROCEDURAL GUIDELINES

1. Contraband Classification – The classification of contraband categories are as follows:

a. Illegal drugs or non-prescribed pharmaceuticals

. . .

(State's Exhibit 37)

6. DOC Directive 408.02, entitled "Tobacco Products", effective since January 5, 2004, provides in pertinent part:

. . .

4.2.1 Each facility superintendent will insure that all tobacco products are put on the facility list of contraband.

. . .

4.2.3 As contraband, the possession of tobacco products in violation of this directive will subject the carrier to Disciplinary Sanctions contained in Directive 410.01 for the inmate population. The Facility Work Rule #1 will be applied for staff violations. The introduction of any contraband to a correctional facility will be handled as a serious matter by the administration.

. . .

(State's Exhibit 38)

7. DOC Directive 409.06, entitled "Inmate Mail", effective since January 16, 2003, provides in pertinent part:

PURPOSE

The purpose of this directive is to establish procedures to handle inmate mail, both incoming and outgoing. It also addresses the inspection of mail and the seizure and disposal of disallowed items or contraband.

. . .

4.5 Incoming Mail

4.5.1 All incoming mail will be opened and inspected for contraband.

4.5.1.1 All letters will be opened and inspected in the presence of the inmate to whom it is addressed. This process will include opening the envelope, inspection of the envelope and the opening of any folded material from within the envelope. **Under no circumstances shall the correspondence be read.** The envelope and contents will be given to the inmate to whom it is addressed.

. . .

> 4.5.1.3 If contraband is discovered, the letter and envelope will be seized until it is determined if the letter itself poses a threat to the security or safety of the facility and employee or an inmate. This shall not take longer than one workday from the discovery of the contraband.
> . . .
> (State's Exhibit 39)

8. Grievant certified on March 4, 2009, that he read and fully understood the DOC Work Rules. The Work Rules provide in pertinent part:

> 1. No employee shall violate any provision of the collective bargaining agreement or a State or Department work rule, policy, procedure, directive, local work rule or post order.
> . . .
> 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, . . . by the Department. This shall include answering fully and truthfully any questions related to their employment.
> . . .
> 7. No employee shall engage in a scale(sic) or lease of property to or from an offender, hire offenders for work or provide services or goods to offenders, except with the permission of supervisory authority. No employee shall lend money to or borrow money from an offender or accept gifts or gratuities from and give gifts or gratuities to an offender.
> . . .
> 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.
> . . .
> 13. . . . Actions are also prohibited which give the appearance of an improper relationship between an employee and an offender. . .
> . . .
> (State's Exhibit 33)

9. 18 V.S.A. §4205 provides: "It shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense or

compound any regulated drug, except as authorized in this chapter." 18 V.S.A. §4228(a) provides: "It is unlawful for any person to knowingly dispense, manufacture, process, package, distribute or sell or attempt to dispense, manufacture, process, package, distribute or sell a noncontrolled drug or substance upon either: (1) the express or implied representation that the drug or substance is a controlled drug; or (2) the express or implied representation that the drug or substance is of such nature or appearance that the dispensee or purchaser will be able to dispense or sell the drug or substance as a controlled drug." (State's Exhibits 40, 41).

10. Grievant was a permanent status correctional officer at MVRCF from May 2001 until he was dismissed on January 10, 2011. At the time of his dismissal, Grievant was a Correctional Officer I. Grievant is an African American (State's Exhibit 19).

11. On August 23, 2005, Grievant was suspended without pay for three days for failure to report for work or call in advance to provide notice that he was not working on the days in question (State's Exhibit 26).

12. Grievant was demoted from the position of Correctional Officer II to the position of Correctional Officer I on April 16, 2006, for his violations of DOC Work Rules 1, 6 and 9 as they related to directives on visiting and searches. The Employer and Grievant executed a Stipulation and Agreement providing for the demotion. The Stipulation and Agreement stated that Grievant "will be subject to discipline up to and including dismissal for future violations of DOC Work Rules" (State's Exhibits 23, 24).

13. On June 7, 2006, Grievant was suspended without pay for three days for not presenting a doctor's note upon request of his supervisor to justify use of two days of sick leave (State's Exhibit 25).

14. Grievant filed a claim of race discrimination with the Vermont Human Rights Commission in 2008 against the Employer and MVRCF Security and Operations Supervisor ("SOS") Mark Jones. Jones had questioned Grievant about the need for Kwanzaa, an African American cultural festival celebrated between December 26 and January 1 given its proximity to Christmas. He also was critical in a conversation with Grievant about parents giving their children what he termed "odd" names which were difficult to pronounce. He further indicated to Grievant that Martin Luther King Day was not a full holiday in Vermont because King was black.

15. Grievant was investigated for alleged misconduct during the same period as his race discrimination claim. In February 2009, the Employer and Grievant executed a Stipulation and Agreement which included a provision that Grievant would withdraw the discrimination claim which he filed with the Human Rights Commission. It further provided for a disciplinary suspension of 30 days due to interactions with an inmate that violated DOC Work Rule 13's prohibition of "actions . . . which give the appearance of an improper relationship between an employee and an offender". Grievant acknowledged that he had provided food from his home and the MVRCF cafeteria to offenders without the knowledge or consent of supervisors, and that he had developed a close relationship with an offender. The Stipulation and Agreement contained the following paragraph:

> Richardson acknowledges that the misconduct mentioned in the suspension letter was serious and further acknowledges that maintaining appropriate boundaries between himself and persons under DOC supervision or control is an essential condition of his continued employment. Accordingly, the parties agree that any future violation by Richardson of DOC Work Rule 13 shall establish just cause for imposing discipline on him up to and including dismissal. Richardson hereby waives any right to contest whether such misconduct establishes just cause for the discipline imposed. However, he reserves the right to dispute whether, as a factual matter, he engaged in the conduct leading to the discipline.
> (State's Exhibit 22)

16. MVRCF Superintendent Phil Fernandez issued Grievant a letter of reprimand on May 20, 2010, for reporting late for duty on his assigned shift (State's Exhibit 29).

17. Superintendent Fernandez issued Grievant a letter of reprimand on August 3, 2010, for submitting a time report form that used inappropriate codes (State's Exhibit 30).

18. The Department of Corrections issued two Security Training Bulletins in 2008 to be included in each correctional facility's security manual. The Bulletins indicated that three correctional facilities had intercepted letters suspected of containing contraband, which often were pills of buprenorphine that had been crushed and concealed in the correspondence. The Bulletins reminded staff to be vigilant and alert for mail that may contain contraband. MVRCF correctional officers were expected to follow these bulletins (State's Exhibits 20, 21).

19. MVRCF instituted a practice in 2008 designed to prevent the introduction of contraband, particularly buprenorphine, into the facility by concealing it in greeting cards addressed to inmates. The practice provided that correctional officers open a greeting card addressed to an inmate so that an inmate can see the card but are not allowed to handle it. The correctional officer then provided a copy of the greeting card to the inmate, but did not deliver the original card to the inmate. The Employer did not issue a memorandum, directive or any other written document on this practice. The Employer has not established that this practice was consistently followed by all MVRCF correctional officers as of June 17, 2010. The Employer has not established that Grievant knew this was a binding practice as of June 17, 2010 (State's Exhibit 7).

20. Grievant regularly worked the first shift, and was assigned to the B Unit. The hours of the first shift were between 6 a.m. and 2 p.m. Grievant worked the first shift, and was assigned to the B Unit, on June 17, 2010.

21. On the morning June 17, 2010, Inmate Doug Walker told SOS Mark Jones that he would reveal a "dirty officer" to him in exchange for Walker not being subject to segregated confinement pending a hearing on a disciplinary rule violation issued to Walker for attempted introduction of contraband. SOS Jones told Walker that he would need a name and information that could be verified. Walker told SOS Jones to review the paperwork and recorded phone conversation associated with the disciplinary rule violation charged against Walker (State's Exhibit 5).

22. Shortly after this conversation, SOS Jones then reviewed the recorded phone conversation. Walker and the other party to the conversation, a female, discussed obtaining "orangies", which SOS Jones recognized to be code for buprenorphine pills because their color is orange. The female discussed "Terry's sister getting some" buprenorphine, and that "she might not be able to get them til like next week but I'll try to find some and if I do find some this weekend I will have him give them to you (State's Exhibits 5, 10).

23. SOS Jones then spoke again to Walker. Walker told him that a card containing buprenorphine would arrive that day in the mail addressed to Inmate Mike Jones. SOS Jones then asked the MVRCF employee who receives and sorts inmate mail to deliver that day's mail to him when it arrived.

24. When the mail was delivered to SOS Jones early on the afternoon of June 17, he discovered three cards addressed to inmates residing in the B Unit – two addressed

to Inmate Mike Jones and one addressed to his cellmate T.C. Smith. SOS Jones inspected the cards and discovered that the card addressed to Smith and one of the cards addressed to Inmate Jones did not contain any contraband. It appeared to SOS Jones that the other card addressed to Inmate Jones had been altered. SOS Jones shined an ultraviolet flashlight through the card and determined that something had been placed between layers of the card. SOS Jones separated the layers of the card enough to look between them. He saw a plastic packet of orange powder that he estimated to be the equivalent of one crushed pill of buprenorphine. SOS Jones requested that Correctional Facility Shift Supervisor Corey Hoague also inspect the card. Hoague agreed with SOS Jones that a substance which appeared to be buprenorphine had been placed between layers of the card. SOS Jones then refolded the card and resealed it in the envelope (State's Exhibits 2, 5).

25. SOS Jones instructed a facility employee to deliver the inmate mail to the various units in the correctional facility. The employee delivered the mail for the B Unit to Grievant. Shortly thereafter that afternoon, SOS Jones walked down to the B Unit and asked Grievant what he had done with the cards addressed to Inmate Jones. Grievant said he had given the cards to Inmate Jones and that they looked "okay" (State's Exhibit 5).

26. SOS Jones ordered two other employees to search Inmate Jones's cell in an attempt to locate the card containing the buprenorphine. They did not find the card in question. At the time the employees checked the cell, there were numerous other greeting cards taped to the wall of the cell. SOS Jones then asked a correctional officer to check

the garbage can in the facility dayroom. The officer found the torn-up remnants of the card in a cake box (State's Exhibit 5).

27. Inmate Jones, Inmate Smith and their cellmate, Inmate Terry, were subjected to urinalyses that day. Inmates Jones and Smith tested positive for the presence of buprenorphine (State's Exhibit 5).

28. MVRCF Acting Assistant Superintendent Thomas Giffin sent a memorandum to MVRCF Superintendent Phil Fernandez dated June 17, 2010, which provided:

> On 6/17/10, at approximately 1300 hours, I was attending the scheduled MVRCF shift supervisor meeting. In attendance were CFSSs Beaudet, Hoague, Polhemus, Denton, Shaddock and SOS Jones.
>
> SOS Jones informed the shift supervisors that he had information from Inmate Doug Walker that drugs were going to be mailed into the facility for Inmate Mike Jones and CO1 Terrance Richardson was going to deliver the contraband to I/M. Jones today. SOS Jones also stated he had intercepted the card and he discovered "bups" in the card which was witnessed by CFSS Hoague. SOS Jones continued to state that he resealed the envelope and had the mail delivered to the units to see if CO1 Richardson would give the card to I/M. Jones in B Pod.
>
> I questioned SOS Jones regarding the drugs being allowed into the facility as I told him I believed there was a ruling recently that we could not allow drugs to be used in such a manner and that Canales was involved with such events. I also inquired if he took a picture of the bups and he said he did not. SOS Jones stated that Canales tried to get Richardson two other times before and failed and now he was going to do it his way.
>
> Superintendent Fernandez arrived at the meeting at approximately 1320 and SOS Jones informed him of the mail contraband situation. Superintendent Fernandez ordered SOS Jones to retrieve the mail and contents from I/M. Jones. SOS Jones reported back to Supt. Fernandez that he recovered the envelope, but not the bups. Supt Fernandez then asked if I/M. Jones had been shaken down and SOS Jones reported that he had not and left the meeting to search I/M Jones's cell. SOS Jones also confirmed that COI Richardson did deliver the card with the contraband to I/M. Jones.
> (State's Exhibit 3)

29. Superintendent Fernandez sent a memorandum to the Department of Human Resources Investigations Unit dated June 18, 2010, which provided:

> On 6/17/10, at approximately 1000, SOS Mark Jones approached me with some information gathered from an inmate informant. This information concerned contraband introduction into the facility via USPS mail with the assistance of a facility correctional officer. SOS Jones voiced an intention of checking the day's mail when it arrived to see if this information was accurate.
>
> Later on 6/17/10, at approximately 1330, I returned to the facility from an outside appointment and joined in with the CFSS meeting that had already begun. I asked about the material I had missed as to get up to speed with the conversations. SOS Jones reported that he had indeed found the alleged contraband in the day's mail and had decided to let it through to see if the officer mentioned was truly involved with the introduction. Because the contraband was enclosed in a greeting card, facility procedure would require the officer to not allow the card into the inmate's possession. SOS Jones had deduced that if the officer let the card through then the allegations about his involvement would be proven.
>
> At that point, I asked if I was correct in my understanding that he had allowed contraband into the building. SOS Jones acknowledged it and said he was about to go back down to the living units to see how the officer had handled the greeting card. I suggested that this was likely in violation of the direction all facilities had received from Bob Kupec regarding this type of investigative maneuver. We had been told to not allow contraband into the facilities if its presence was known.
>
> I directed SOS Jones to go down to the living units immediately and get the card back. SOS Jones returned a short while later with just the envelope from the card. He stated that the card had been allowed in to the inmate to which it had been addressed. I asked if he had ordered the cell searched as to hopefully get the contraband before it would be consumed or passed around. SOS Jones had not given the direction to the staff present. I directed him to do so immediately.
>
> SOS Jones returned a short time later with the findings from the cell search. They were able to recover the torn up remains of the card, but there was no contraband found. I stated that it would now be difficult to hold any of the inmates accountable for the contraband possession. SOS Jones replied that he was not focusing on catching the inmates. His intention was to catch the officer.
>
> After the CFSS meeting had ended, I was approached by Acting Ass't Supt Tom Giffin. He informed me that he had discussed with SOS Jones the plan to catch the officer. Mr. Giffin reported that he had told SOS Jones to not follow through on the plan as it would be contrary to the memo sent out by Mr. Kupec. SOS Jones apparently responded that the previous attempts by the Investigations Unit at catching the officer had failed and that he was going to handle it himself this

> time. I then directed Ass't Supt Giffin to write a report as to the earlier conversation with SOS Jones.
>
> It is my belief that SOS Jones willfully violated policy regarding procedures in pursuing contraband introduction. It is especially concerning given that introduction into a correctional facility is a crime under Vermont statute. These concerns are further aggravated by the purposeful disregard of the direction given by Ass't Supt Giffin.
>
> It is my request that this situation be referred to the Investigations Unit for their consideration.
> (State's Exhibit 1)

30. Superintendent Fernandez reported to the Department of Human Resources Investigation Unit that he had concerns with Grievant's conduct during the June 17 incident. Peter Canales of the Investigations Unit was assigned to investigate these concerns (State's Exhibits 8, 10).

31. Superintendent Fernandez informed Grievant by letter dated August 27, 2010, that he was temporarily relieved from duty with pay "to permit the State to conduct and complete an investigation into allegations of misconduct . . . by your interactions with offenders to include but not limited to the sale and/or distribution and/or facilitation of allowing contraband items into (MVRCF)" (State's Exhibit 9).

32. Canales interviewed Grievant on August 27, 2010, to discuss the incident. During the August 27 interview, Grievant told Canales that he had never had conversations with any offenders about bringing contraband into the MVRCF. Grievant also told Canales during the August 27 interview that he had spoken with Inmate Craig Smiley about contraband issues (State's Exhibits 8, 10).

33. During the August 27 interview, Grievant stated that he did not recall specifically distributing any cards to any offenders on June 17. Later in the interview, when Canales explained to Grievant that SOS Jones had reported that a card in the June

17 mail addressed to Inmate Jones had been altered, Grievant indicated to Canales that he did not see anything wrong with the card he gave to Jones and that he would not have given it to him if he had seen anything wrong with it (State's Exhibit 10).

34. During the August 27 interview, Grievant told Canales that as of June 17, 2010, inmates were allowed to receive cards. Grievant indicated that the practice had changed after June 17 so that inmates were no longer allowed to have cards.

35. Canales interviewed Grievant a second time on September 20, 2010. During this interview, Grievant stated that he frequently had conversations with offenders about bringing contraband into the MVRCF (State's Exhibit 11).

36. During his investigation of the contraband incident, Canales received information that Grievant may have entered into a business arrangement with Timothy McGuire to repair Grievant's personal automobile during a time McGuire was under the supervision of the DOC while living in the community. Canales investigated this issue (State's Exhibit 11).

37. McGuire first met Grievant when he was incarcerated at MVRCF. He has known Grievant for many years, both in and out of prison. He had several periods of incarceration for violating the terms of his furlough supervision. Grievant saw McGuire during these periods of incarceration.

38. In September 2010, McGuire was not incarcerated. He saw Grievant drive by him in his van which had a broken rear window. McGuire offered to replace the broken window. Grievant told McGuire that he had a friend who could fix the window, but Grievant and McGuire agreed at some point that Grievant would pay McGuire $20 to replace the window. McGuire came to Grievant's house in September and replaced the

rear window in Grievant's van. Grievant was at his house on this occasion and knew McGuire was replacing the window. Grievant did not pay McGuire for the window replacement. McGuire was under DOC supervision on furlough status when he replaced the window in Grievant's vehicle.

39. During his investigation of the contraband incident, Canales received an allegation that Grievant allowed an inmate to mail personal checks from MVRCF while he was incarcerated. Canales investigated this allegation, and found that it was unsubstantiated. No discipline was imposed on Grievant with respect to this issue.

40. Canales submitted a report of his investigation of Grievant on September 13, 2010, to Department of Corrections Commissioner Andrew Pallito. He subsequently submitted three addenda to the report dated September 20, 2010; September 28, 2010; and October 13, 2010 (State's Exhibits 10, 11, 12 and 13).

41. On October 14, 2010, Superintendent Fernandez interviewed McGuire at the request of Canales to inquire whether Grievant had asked McGuire if he was under DOC supervision when the agreement was made for McGuire to replace Grievant's window. McGuire told Fernandez that Grievant knew he was under supervision so there was no need for Grievant to ask this question (State's Exhibit 14).

42. Superintendent Fernandez met with Department of Corrections upper level managers, attorneys and Department of Human Resources employees in early November 2010 to discuss what action to take based on the investigation of Grievant. It was decided at the meeting that Fernandez would send Grievant a *Loudermill* letter.

43. Superintendent Fernandez sent a letter to Grievant dated November 12, 2010, which provided in pertinent part:

As a result of your behavior described below, the Department of Corrections ("DOC") is contemplating imposing serious disciplinary action up to and including dismissal from your position as a Correctional Officer I . . .

Disciplinary action is contemplated for the following reasons:

These charges are based on an Investigative Report and three (3) Addenda dated September 13, 2010, September 20, 2010, September 28, 2010, and October 13, 2010 respectively, prepared by State Investigator Peter Canales. . .

. . .

B. Potential Violations of Vermont Personnel Policies 5.6, 17.0, and 17.3; DOC Work Rules 1, 4, 5, 7, 9, 10, and 13; DOC Directives 408, 408.02, and 409.06; and Vermont Statutes 18 V.S.A. §4205 and 4228.

Investigation

On June 17, 2010, you were assigned to the first shift of the Bravo Unit at the Marble Valley Regional Correctional Facility (MVRCF) in Rutland, Vermont, your regularly assigned post. As the Bravo Unit CO, you were responsible for thoroughly inspecting incoming mail addressed to inmates and for ensuring no contraband entered the facility through the mail service.

Sometime in early June of 2010, SOS Jones suspected you had knowingly trafficked contraband, including tobacco and illicit narcotics, into MVRCF on more than one occasion with the intention to sell to offenders. His concerns stemmed from various sources of information, including an Offender's allegation you regularly allowed contraband to enter MVRCF along with the Offender's prediction you would permit buprenorphine to enter MVRCF on June 17, 2010 in a greeting card addressed to Offender MJ.

SOS Jones also developed concerns after reviewing a series of recorded telephone conversations had between non-inmates and offenders who seemed to reference you specifically while stating you had brought twenty-two Percocets from an offender's girlfriend, among other things. Some of these conversations were conducted using "coded" terminology, referring to the term "orangies", a code name for buprenorphine.

Upon learning a greeting card containing contraband might enter the facility on June 17, 2010, SOS Jones reviewed the incoming mail before it was forwarded to you in the Bravo Unit. His inspection revealed two (2) cards addressed to Offender MJ, one of which had been altered and contained what appeared to be one (1) crushed pill of buprenorphine. The substance was orange and was observed with an ultraviolent flashlight. SOS Jones further tampered with the card, creating a lump in the card and scratching the inside of the card. According to SOS Jones, he intended the tampering to appear obvious, and

reasoned that any CO charged with searching for contraband would notice the card had been altered. SOS Jones then placed the card back into the unit mail so it would be delivered to you.

Approximately fifteen (15) minutes later, SOS Jones approached you in the Bravo Unit and requested to inspect the two (2) cards Offender MJ received. You replied you had already given the cards to Offender MJ because they looked "okay" to you. SOS Jones instructed the staff to search the Offender's cell. The card was ultimately discovered in a trash can located in the unit's common area. The card had been placed inside a cake box, and had been torn and ripped. The substance, believed to be buprenorphine, was no longer present in the card. Subsequent drug testing revealed two (2) of the inmates, including Offender MJ, tested positive for buprenorphine in their system.

In addition, Offender MH reported he previously worked with you, Offender TS, and Offender TS's girlfriend to bring contraband into MVRCF. According to Offender MH, he packaged the contraband slugs with tobacco or drugs, gave the slugs to Offender TS's girlfriend who would deliver them to you, and then you would bring the contraband into MVRCF, accepting $100.00 as compensation for each delivery.

In her interview, Offender MJ's former girlfriend stated she had personal knowledge contraband was delivered to you so you could bring contraband into MVRCF. She was present when packages containing contraband were delivered to Offender CH's mother, who then delivered the package to you. According to MVRCF staff, Offender CH is a known trafficker of contraband at the facility.

According to Superintendent Fernandez, Assistant Superintendent Griffin, SOS Jones, and CFSS Hoague, a memorandum was issued in or around 2007 prohibiting inmates from possessing greeting cards. This policy requires CO's to copy the card if the inmate wishes, but to destroy the original card. The policy was promulgated to prevent contraband from entering the facility, and according to CFSS Hoague, every other CO on your shift is aware of and abides by this policy.

During the course of the investigation, it was also discovered that you entered into an oral agreement with Offender TM wherein the offender agreed to install a window in your personal green Ford Van while he was under DOC's supervision and on community release. Because of the crimes Offender TM committed, his conditions of release prohibited him from performing any auto maintenance work.

Concerns were also raised that you may have inappropriately mailed bank checks for Offender JM.

On August 27, 2010, Peter Canales, State Investigator, conducted an investigative meeting with you. You agreed you were responsible for handling the inmates' mail in the Bravo Unit on June 17, 2010. You denied bringing or allowing contraband into MVRCF on any occasion. You denied having prior knowledge of the greeting card at issue entering the facility. You claimed as of June 17, 2010, MVRCF did not have a policy prohibiting inmates to possess greeting cards. You stated the policy came into effect after June 17, 2010. You denied having an arrangement with Offender MH to traffic contraband into MVRCF. You admitted Offender TM replaced the broken window in your personal vehicle. You stated you had agreed to pay $20.00 for this service, but you neither paid for the window nor the service. You denied knowing Offender TM was under DOC's supervision.

Contraband

It appears you may have knowingly permitted contraband in the form of illicit narcotics to enter MVRCF on June 17, 2010. You denied having prior knowledge the greeting card intended for Offender MJ contained buprenorphine.

However, the evidence in this matter suggests otherwise. The recorded phone conversations had between non-inmates and offenders allude to you as a participant in trafficking contraband into MVRCF. Several offenders allege you have been involved in permitting and bringing contraband in the form of tobacco and drugs into MVRCF. In addition, a non-inmate witness stated she possessed personal knowledge the contraband had been delivered to you.

Notably, the Offender who directly reported you to SOS Jones corroborated his allegation with his claim a greeting card would be delivered to Offender MJ on June 17, 2010 and would contain buprenorphine. The card addressed to Offender MJ was in fact delivered on June 17, 2010, and the card contained what appeared to be buprenorphine. Moreover, you delivered the card to the inmate, despite the fact the card had been tampered with in an obvious fashion, and the recipient of the card later tested positive for buprenorphine. The totality of these circumstances supports the conclusion that you may have been trafficking contraband.

Therefore, it appears your actions of knowingly permitting and/or bringing contraband in the form of illicit narcotics into MVRCF on June 17, 2010 may have violated Vermont Personnel Policy 17.3, DOC Policies 408 and 409.06, as well as the 2007 MVRCF Memorandum prohibiting inmates from possessing greeting cards. It also appears you may have smuggled and delivered contraband in the form of drugs and tobacco to MVRCF inmates in the past, thereby violating the above rules, as well as DOC Policy 408.02 defining tobacco as contraband. For every instance of trafficking contraband, it also seems you violated Vermont Personnel Policy 5.6 and DOC Work Rules 1 and 9 by failing to devote your full time, attention and effort to your duties, and by conducting yourself in a manner that could potentially bring discredit or embarrassment to the State of Vermont.

Illegal Drug Activities

Based on the evidence, it appears you may have also violated 18 V.S.A. §§ 4205 and 4228 on several occasions when you knowingly distributed a regulated drug and/or noncontrolled drug or substance to the inmate population. Consequently, your actions may have violated Vermont Personnel Policy 17.3, which mandates a drug-free workplace, and DOC Work Rule 10, which prohibits a DOC employee from violating any law or ordinance, and provides any conduct constituting a felony or misdemeanor can be the basis for disciplinary action whether or not prosecution or conviction results.

Insubordination

Seemingly, you were insubordinate when you purposely delivered a greeting card to an inmate under your supervision in direct violation of the 2007 MVRCF Memorandum prohibiting an inmate from possessing greeting cards, thereby violating Vermont Personnel Policy 5.6 and DOC Work Rules 1 and 9.

Insufficient Performance of Duties

It appears you failed to perform your duties to the best of your ability when you allowed an inmate to possess a greeting card containing drugs. You either permitted this card to enter the facility knowing it contained contraband, or, at the very least, you permitted the card to enter the facility without properly inspecting the card for contraband beforehand. Because the card had been tampered with at least twice and in fact contained contraband, an inspecting CO should have noticed the card had been altered. Seemingly, you failed to perform a seminal duty by delivering outside mail without properly inspecting the card beforehand, and further violated the 2007 MVRCF Memorandum prohibiting an inmate from possessing greeting cards. Overall, it seems you violated Vermont Personnel Policies 5.6 and 17.3, and DOC Work Rules 1 and 9 by failing to devote your full time, attention and effort to your duties, and by conducting yourself in a manner that could potentially bring discredit or embarrassment to the State of Vermont.

Boundary Violations

In addition, it seems you failed to remain within the permissible boundaries of a CO-Offender relationship when an Offender under DOC supervision agreed to repair the window in your personal vehicle. The Offender was also precluded from conducting auto maintenance as a condition of his release. Thus, it seems you may have violated Vermont Personnel Policy 5.6, DOC Work Rules 1 and 9, as well as DOC Work Rule 7, which prohibits an employee from accepting gratuities from an offender, and DOC Work Rule 13, which prohibits the appearance of an improper relationship between an employee and an offender.

Dishonesty during Investigation

Furthermore, it appears you were untruthful and answered incompletely during the employment investigation. You denied you had ever purposely allowed and/or brought contraband into MVRCF. To the contrary, the weight of the evidence suggests you possessed prior knowledge the greeting card would contain contraband and you knowingly delivered the card and drugs to the Offender. The investigation also revealed you may have engaged in trafficking contraband in the past. It also seems unlikely you were truthful when you claimed you were unaware the offender who repaired your vehicle was under DOC's supervision.

You claimed the MVRC did not have a policy prohibiting inmates from possessing greeting cards until after the June 17, 2010 incident. However, Superintendent Fernandez, Assistant Superintendent Griffin, SOS Jones, and CFSS Hoague all state the policy has been in effect for several years – directly contradicting your assertion.

Your investigative interview was replete with contradictions. For instance, you claimed you did not recall giving a card to Offender MJ, but you later stated that the card you delivered did not appear to have been altered. You also claimed you never engaged in conversations with offenders related to contraband issues, but you later stated you had spoken previously with two offenders about contraband issues.

Overall, your apparent failure to honestly recount the events in question violated DOC Work Rules 1, 4, and 5; and Vermont Personnel Policies 5.6 and 17.0.

C. <u>Conclusion</u>

Your actions described above appear to constitute misconduct, gross neglect of duty and/or gross misconduct. Your actions are extremely serious because it seems you jeopardized the safety of the DOC staff and inmate population when you knowingly allowed buprenorphine to enter the facility and when you subsequently delivered the drugs to an Offender under your supervision. Not only were your actions dangerous and careless, but they were also illegal. As the Bravo Unit CO, you also violated your duties to prevent contraband from entering the facility, and to act as a role model for Offenders. You have violated your duty to remain within the permissible bounds of a CO-Offender relationship, and your disciplinary record suggests you have a history of boundary issues. You further violated your duty to be honest to your employer concerning the details of the investigation. There are few offenses more serious than misleading your employer. Your actions discredit and undermine the reputation of the Department of Corrections and the State of Vermont, and raise a significant question about your ability to satisfactorily – and credibly – carry out the responsibilities of your position.

Accordingly, based on the above information, it appears that your conduct provides just cause for disciplinary action up to and including dismissal from your position as a CO with the DOC.

Your disciplinary history as a state employee will also be considered in making a determination. Our records indicate your disciplinary history is as follows:

- Suspension, Three (3) days (August 2005);
- Demotion (April 2006); and
- Thirty day (30) Suspension and "Last Chance" Stipulation (2008), Paragraph 9, relevant language as follows:
  "Richardson acknowledges that the misconduct mentioned in the suspension letter was serious and further acknowledges that maintaining appropriate boundaries between himself and persons under DOC supervision or control is an essential condition of his continued employment. Accordingly, the Parties agree that any future violations by Richardson of DOC Work Rule 13 shall establish just cause for imposing discipline on him up to and including dismissal. Richardson hereby waives any right to contest whether such misconduct establishes just cause for discipline imposed. However he reserves the right to dispute whether, as a factual matter, he engaged in the conduct leading to the discipline."

D. <u>Process</u>

You must notify me within <u>twenty-four (24) hours</u> after receiving this letter whether you wish to respond to the above allegations. . .

If you wish to respond *orally*, I will schedule a meeting with you and your representative . . .

44. Superintendent Fernandez and Department of Human Resources employee Laura Deforge met with Grievant on November 19, 2010, in a *Loudermill* hearing to allow Grievant to respond to the allegations made against him. Grievant appeared without a VSEA representative or attorney. Grievant acknowledged at the *Loudermill* hearing that he was aware that McGuire had a long history with DOC and that he should have checked the computer at MVRCF to verify whether McGuire was under DOC supervision, but that he did not do so, and that he should have been more careful as it would have been likely that McGuire was under supervision (State's Exhibits 16, 18).

45. Superintendent Fernandez met with Department of Corrections upper level managers, attorneys and Department of Human Resources employees in December 2010. They determined that Grievant had engaged in the conduct set forth in the November 12, 2010, letter.

46. Superintendent Fernandez sent a letter to Grievant dated January 9, 2011, which provided in pertinent part:

> This is to notify you of your dismissal from the position of Correctional Officer I, effective January 10, 2011, for gross misconduct. You will not receive two weeks pay in lieu of two weeks notice. By letter dated November 12, 2010, you were notified that DOC was contemplating your dismissal, and were given an opportunity to respond to charges of misconduct. I met with you on November 19, 2010, to hear your response.
>
> The reasons for this action are those that are outlined in the above-referenced letter of November 12, 2010, which are incorporated herein by reference.
> . . .
> (State's Exhibit 31)

47. In deciding to dismiss Grievant, Superintendent Fernandez determined that Grievant's involvement with contraband introduction to inmates and receipt of services from offenders illustrated the risk he presented to the safe and secure running of a correctional facility. He concluded that Grievant undermined his responsibilities to provide safety and security, and act as a role model for offenders. He considered the previous disciplinary actions received by Grievant. He also considered multiple letters of supervisory feedback which Grievant had received. Fernandez determined that as a result of Grievant's current misconduct, coupled with his previous discipline, Grievant's supervisors and management staff had no confidence that Grievant could satisfactorily perform the assigned duties of a correctional officer. He determined that dismissal of Grievant for violations of inmate/correctional officer boundaries was consistent with the

"last chance agreement" entered into in 2009 as a result of Grievant's violation of boundary issues. He considered that Grievant had received multiple notices of rules that he violated. He concluded that Grievant did not have potential for rehabilitation because his repeated violation of work rules made it unlikely for him to refrain from recurrence. He ultimately decided that no sanction short of dismissal would be adequate or effective (State's Exhibit 19).

48. SOS Jones did not participate in the decision to dismiss Grievant. The Employer investigated Jones as a result of the June 17, 2010, incident, but he was not disciplined as a result of it. Subsequent to the incident, Jones was subject to a voluntary demotion from SOS to Shift Supervisor.

OPINION

Grievant alleges that the Employer violated Articles 5, 15 and 17 of the Contract by dismissing him from employment as a Correctional Officer I because: 1) the dismissal was in retaliation for Grievant's complaint and grievance activities, 2) the dismissal was not based on fact or supported by just cause, 3) the Employer improperly bypassed progressive discipline and progressive corrective action, 4) the Employer failed to apply discipline with a view toward uniformity and consistency, 5) the Employer failed to impose discipline within a reasonable time of the alleged offense, 6) the dismissal decision constituted a discriminatory application of rules and regulations, 7) the Employer's application of work rules to him was unreasonable, and 8) the Employer's decision to dismiss him constitutes discrimination.

We first address Grievant's contention 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 Grievant has not demonstrated that this contractual provision was violated. There were a number of allegations against Grievant which resulted in an extensive investigation, including allegations on two issues which did not surface until the investigation on other allegations were well underway. Given these circumstances, the length of time of the investigation of approximately four months was reasonable.

The Employer then prepared a detailed *Loudermill* letter and conducted a *Loudermill* hearing within approximately one month of the receipt of the investigation report. The Employer then dismissed Grievant approximately one and one-half months after the *Loudermill* hearing. This constituted imposing discipline within a reasonable time of the conclusion of the investigation given the extent and nature of the allegations against Grievant. In sum, we conclude that the length of time of the Employer's investigation and imposition of discipline does not provide a reasonable basis to rescind the disciplinary action imposed on Grievant.[1]

Also, Grievant has not demonstrated that he was prejudiced by the timing of disciplinary action. We note that he was on temporary relief from duty with pay status during the investigation. Absent demonstrated prejudice, we are not prepared to conclude that the time it took the Employer to impose disciplinary action against Grievant affected the validity of the ultimate decision to dismiss him.[2]

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[1] Grievance of Kerr, 28 VLRB 264, 276-77 (2006).
[2] Grievance of Scott, 22 VLRB 286, 301-02 (1999). Grievance of Sileski, 28 VLRB 165, 191 (2006). Grievance of Abel, 31 VLRB 256, 274 (2011).

We next address Grievant's contention that the Employer violated Article 5 of the Contract by discriminating against him due to race in dismissing him. In determining whether an employee was discriminated against on account of the prohibited factor of race, the Board has adopted the analysis developed by the U.S. Supreme Court in cases where discrimination based on race is alleged.[3] The U.S. Supreme Court articulated the burdens of proof in disparate treatment cases, distinguishing between the burden of proof in a "pretext" case and a "mixed motive" case[4]

In a "pretext" case, the issue is whether the legitimate business reason offered by the employer for the adverse action is just a pretext for the real reason of discrimination.[5] The issue in pretext cases is whether illegal or legal motives, but not both, were the true motives behind the decision.[6] In pretext cases, the analysis used is that which is set forth in U.S. Supreme Court cases.[7]

First, the complainant carries the initial burden of establishing by a preponderance of the evidence a *prima facie* case of discrimination.[8] The burden of establishing a *prima facie* case of disparate treatment is not onerous.[9] The complainant must prove by a preponderance of the evidence that he or she was subject to an adverse employment action under circumstances that give rise to an inference of discrimination.[10] A *prima facie* case of discrimination when employment termination is involved consists of

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[3] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). Grievances of Choudhary, 15 VLRB 118 (1992); *Affirmed*, (Unpublished Decision, Supreme Court Docket No. 92-317, February 4, 1994). Grievance of Day, 14 VLRB 229, 286 (1991). Gamez v. Brandon Training School, 12 VLRB 160 (1989).
[4] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
[5] Id.
[6] Id.
[7] Burdine, supra. Grievance of Lowell, 15 VLRB 291, 329 (1992).
[8] Id.
[9] Burdine, 450 U.S. at 253. Lowell, 15 VLRB at 330.
[10] Id.

proving that: 1) the employee belongs to a protected class, 2) he or she was qualified for the position, and 3) despite such qualifications he or she was terminated.[11] The burden of demonstrating that an employee is qualified for a position is limited to showing that she or he possesses the basic skills for such a position.[12]

If the employee succeeds in proving the *prima facie* case, then the burden is shifted to the employer to articulate a legitimate non-discriminatory reason for the adverse action.[13] The employer need not persuade the court or the board that the proffered reason was the true motivation for the action. It must only raise a genuine issue of fact as to whether the employer engaged in discrimination.[14] To accomplish this, the employer must clearly set forth, through the introduction of admissible evidence, the reasons for its actions.[15] The employer must produce admissible evidence that would allow the court or the board rationally to conclude that the employer's actions had not been motivated by discriminatory animus.[16] The determination whether the employer has met the burden of production involves no credibility assessment.[17] If the employer fails to meet its burden of production, then the employee prevails on his or her claim of discrimination as a matter of law.[18]

Finally, if the employer carries this burden, the employee must then prove by a preponderance of the evidence that the legitimate reasons offered by the employer were

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[11] McDonnell Douglas Corp., 411 U.S. at 802. Carino v. University of Oklahoma Board of Regents, 750 F.2d at 818. Day, 14 VLRB at 288. Grievance of Smith, 12 VLRB 44, 53 (1989).
[12] Grievances of Choudhary, 15 VLRB 118, 158 (1992).
[13] Burdine, 450 U.S. at 253. Smith, 12 VLRB at 53.
[14] Burdine, 450 U.S. at 254.
[15] Id. at 255.
[16] Burdine, 450 U.S. at 257.
[17] St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742, 2748 (1993).
[18] Id. Grievance of Day, 16 VLRB 312, 344 (1993).

not its true reasons, but were a pretext for discrimination.[19] The ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the complainant remains at all times with the complainant.[20] A complainant may succeed in this burden of persuasion either directly by establishing that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.[21] In determining whether the employer's explanation was pretextual, the trier of fact may consider the evidence, and inferences properly drawn therefrom, previously introduced by the complainant to establish a prima facie case.[22]

There is sufficient evidence to conclude that Grievant has established a *prima facie* case of discrimination. Grievant belongs to a protected class as an African American. He possessed the basic skills to be a correctional officer, and despite these qualifications he was dismissed from his correctional officer position.

The Employer has met its burden of production by articulating legitimate, non-discriminatory reasons for dismissing Grievant. The stated reasons by the Employer for dismissing Grievant all constitute legitimate, non-discriminatory reasons for dismissing him. The Employer has produced admissible evidence that would allow the Board rationally to conclude that the employer's actions had not been motivated by discriminatory animus.

We conclude that Grievant has not proven by a preponderance of the evidence that these legitimate reasons offered by the Employer were not its true reasons, but were a

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[19] Burdine, 450 U.S. at 253. McDonnell Douglas, 411 U.S. at 804. Grievance of Rogers, 11 VLRB 101, 126 (1988).
[20] Burdine, 450 U.S. at 253. Rogers, 11 VLRB at 125-26.
[21] Burdine, 450 U.S. at 256. Lowell, 15 VLRB at 336.
[22] Burdine, 450 U.S. at 255, n.10. Lowell, 15 VLRB at 336-37.

pretext for discrimination. Security and Operations Supervisor Mark Jones made some racially insensitive comments to Grievant. However, Jones was not involved in the decision whether to dismiss Grievant. Further, Grievant has not established that Superintendent Fernandez or others involved in the decision were motivated by discriminatory animus against Grievant due to his race.

Grievant also has not proven his discrimination claim under a "mixed motive" analysis. In a mixed motive case, the employee challenges an adverse employment decision on the grounds that the decision was the product of a mixture of legitimate and illegitimate motives.[23] Once an employee shows that a prohibited factor such as race played a motivating or substantial part in an employment decision, the burden shifts to the employer to prove that the same decision would have been made if the prohibited factor had not played such a role.[24] Grievant's claim fails under a mixed motive analysis because he has not established that race played a motivating or substantial part in the dismissal decision.

We next address Grievant's contention that the Employer violated Article 5 of the Contract by dismissing him as a result of discrimination and retaliation against him due to his grievance activities. In cases where employees claim the employer took action against them for engaging in protected activities, the Board employs the analysis used by the United States Supreme Court in Mt. Healthy City School District Board of Education v. Doyle[25]: once the employee has demonstrated his or her conduct was protected, she or he must then show the conduct was a motivating factor in the decision to take action against

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[23] Price Waterhouse, 490 U.S. at 244- 249. Grievance of VSCFF (Re: Yu Chuen Wei), 18 VLRB 261,294 - 295 (1995)
[24] Id. Grievance of McCort, slip op. at 11-15 (Vt. Supreme Court, Docket No. 93-237, 1994).
[25] 429 U.S. 274 (1977).

him or her. Then the burden shifts to the employer to show by a preponderance of the evidence it would have taken the same action even in the absence of the protected conduct.[26]

There is evidence before us that Grievant engaged in the protected conduct of complaint and grievance activities prior to his dismissal. Grievant must demonstrate that this protected conduct was a motivating factor in the Employer's decision to dismiss him. The factors the Board reviews in determining whether protected conduct constituted a motivating factor in an employer's adverse action against an employee are: 1) whether the employer knew of the protected activities, 2) whether a climate of coercion existed, 3) whether the timing of the action was suspect, 4) whether the employer gave protected activity as a reason for the decision, 5) whether the employer interrogated the employee about protected activity, 6) whether the employer discriminated between employees engaged in protected activities and employees not so engaged, and 7) whether the employer warned the employee not to engage in such activity.[27]

Grievant has not demonstrated that his grievance activities constituted a motivating factor in the dismissal decision. Although Superintendent Fernandez, the appointing authority who dismissed Grievant, was aware of Grievant's protected activities, Grievant has not demonstrated that any of the other factors discussed above providing evidence of animus for protected conduct existed here. Under these circumstances, we dismiss Grievant's claims of discrimination and retaliation based on his protected activities.

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[26] Grievance of Sypher, 5 VLRB 102 (1982). Grievance of Roy, 6 VLRB 63 (1983). Grievance of Cronin, 6 VLRB 37 (1983). Grievance of Danforth, 22 VLRB 220 (1999).
[27] Ohland v. Dubay, 133 Vt. 300, 302-303 (1975). Horn of the Moon Workers Union v. Horn of the Moon Cafe, 12 VLRB 110, 126-27 (1988).

The remaining allegations made by Grievant can all be reviewed in connection with Grievant's primary claim that the Employer dismissed him without just cause. The ultimate criterion of just cause is whether an employer acted reasonably in discharging an employee for misconduct.[28] 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.[29]

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.[30] Once the underlying facts have been proven, we must determine whether the discipline imposed by the employer is reasonable given the proven facts.[31]

The Employer made various charges against Grievant, as detailed in Finding of Fact No. 43. The Employer first charges Grievant with misconduct in violation of Department of Corrections ("DOC") Work Rules and Directives, and State Personnel Policies, by knowingly permitting contraband in the form of illegal narcotics to enter MVRCF on June 17, 2010. Specifically, the Employer charged that Grievant gave Inmate Mike Jones a greeting card which he knew contained buphrenorphine.

The Employer supports this charge by relying on a practice at MVRCF in place at the time of the incident designed to prevent the introduction of contraband, particularly buprenorphine, into the facility by concealing it in greeting cards addressed to inmates. The practice provided that correctional officers open a greeting card addressed to an

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[28] In re Grievance of Brooks, 135 Vt. 563, 568 (1977).
[29] Id. In re Grievance of Yashko, 138 Vt. 364 (1980).
[30] Grievance of Colleran and Britt, 6 VLRB 235, 265 (1983).
[31] Id. at 266.

inmate so that an inmate can see the card but are not allowed to handle it. The correctional officer then provides a copy of the greeting card to the inmate, but does not deliver the original card to the inmate.

However, the Employer did not issue a written document on this practice, and has not established that this practice was consistently followed by all MVRCF correctional officers as of June 17, 2010. Further, the Employer has not established that Grievant knew this was a binding practice as of June 17, 2010. The Employer also has not established that Grievant knew that the greeting card he gave Inmate Jones contained buphrenorphine. Thus, the Employer has not proven this charge against Grievant by a preponderance of the evidence.

The Employer makes a related charge against Grievant that he smuggled and delivered contraband in the form of drugs and tobacco to MVRCF inmates in the past in violation of rules and policies. The Employer has not proven this charge by a preponderance of the evidence.

The Employer makes another related charge against Grievant that he violated Vermont statutes, Vermont Personnel Policy 17.3 and DOC Work Rule 10 on several occasions when he knowingly distributed a regulated drug and/or a noncontrolled drug or substance to the inmate population. The Employer has not proven this charge by a preponderance of the evidence.

The Employer also charges Grievant with insubordination by purposely delivering a greeting card to an inmate under his supervision on June 17, 2010, in direct violation of a 2007 MVRCF memorandum prohibiting an inmate from possessing greeting cards, thereby violating Vermont Personnel Policy 5.6 and DOC Work Rules 1 and 9. As

discussed above, the Employer did not issue a written document on this practice, and has not established that this practice was consistently followed by all MVRCF correctional officers as of June 17, 2010. Further, the Employer has not established that Grievant knew this was a binding practice as of June 17, 2010. Thus, we conclude that the Employer has not established this charge of insubordination against Grievant by a preponderance of the evidence.

The Employer charges Grievant with insufficient performance of duties on June 17, 2010, by either permitting the greeting card to enter the facility knowing it contained contraband or permitting the card to enter the facility without properly inspecting it for contraband. As discussed above, the Employer has not established that Grievant knew that the greeting card he gave Inmate Jones contained buphrenorphine. We also conclude that the Employer has not established by a preponderance of the evidence that the appearance of the resealed envelope containing the greeting card was sufficiently altered so that Grievant should have inspected it more closely for contraband.

The Employer next charges Grievant with failing to remain within the permissible boundaries of a correctional officer-offender relationship in violation of State Personnel Policy 5.6 and DOC Work Rules when Offender Timothy McGuire, who was under DOC supervision, agreed to repair the window in Grievant's personal vehicle. We conclude that the Employer has established the essence of this charge by a preponderance of the evidence.

Grievant contends that he did not know that McGuire was under DOC supervision when he agreed to pay him $20 to replace the window. Given McGuire's extensive history under DOC supervision, Grievant should have realized the need of checking

whether he was under DOC supervision before entering into a business transaction with him. He had entered into an agreement with the Employer the previous year providing for a 30 day suspension due to interactions with an inmate that violated DOC Work Rule 13's prohibition on "actions . . . which give the appearance of an improper relationship between an employee and an offender", and acknowledged that maintaining appropriate boundaries between himself and offenders under DOC supervision was an essential condition of his continued employment. Grievant and the Employer agreed that any future violation by Grievant of Work Rule 13 "shall establish just cause for imposing discipline on him up to and including dismissal."

Given this agreement which placed Grievant on perilous ground concerning his continued employment, and given Grievant's knowledge that McGuire had several periods of incarceration at MVRCF, Grievant should have checked the computer at MVRCF to verify whether McGuire was under DOC supervision. His failure to do so resulted in him failing to remain within the permissible boundaries of a relationship between a correctional officer and an offender by hiring an offender under DOC supervision to perform work for him.

Grievant thereby violated, as charged, DOC Work Rule 13's prohibition on actions which give the appearance of an improper relationship between an employee and an offender. He did this by hiring an offender to perform work on his personal vehicle, an action prohibited by DOC Work Rule 4, another work rule cited by the Employer in this charge against Grievant. Grievant also violated Work Rule 9 and Personnel Policy 5.6 as charged by conducting himself in a manner that reflected discredit upon the Employer.

The Employer further charges Grievant with several counts of dishonesty during the investigation into whether he committed misconduct. The Employer has not proven by a preponderance of the evidence some of these counts of dishonesty. The Employer has not established that Grievant was untruthful when he: 1) denied ever purposely allowing and/or bringing contraband into the facility, 2) claimed he was unaware that McGuire was under DOC supervision, and 3) claimed MVRCF did not have a policy prohibiting inmates from possessing greeting cards until after the June 17, 2010, incident.

The Employer has proven the remaining counts of dishonesty. The Employer has established that Grievant was dishonest during the investigative interview when he claimed he did not recall giving a greeting card to Inmate Jones but later stated that the card he delivered to Inmate Jones did not appear to have been altered. The Employer also has established that Grievant was dishonest during the investigative interview process when he claimed he never engaged in conversations with offenders related to contraband issues, but later stated he had spoken previously with offenders about contraband issues.

Grievant's dishonesty during the investigation violated DOC Work Rules 1, 4 and 5; and State Personnel Policy 17.0; as charged in that he was not honest and complete in his description to the investigator for the Employer of events occurring in the workplace, and he did not answer fully and truthfully questions during an investigation related to his employment.

In sum, the Employer has established some of the charges against Grievant. The fact that all of the charges against Grievant have not been proven in their entirety does not necessarily mean that his dismissal was without just cause. Failure of an employer to prove by a preponderance of the evidence all the particulars of a dismissal letter does not

require reversal of a dismissal action.[32] In such cases, the Board must determine whether the proven charges justify the penalty.[33]

We look to the factors articulated in Colleran and Britt to determine whether the Employer exercised its discretion within tolerable limits of reasonableness.[34] The pertinent factors here are: 1) the nature and seriousness of the offenses and their relation to Grievant's duties and position, 2) the clarity with which Grievant was on notice of any rules that were violated in committing the offenses, 3) Grievant's past disciplinary record, 4) the effect of the offenses upon Grievant's ability to perform at a satisfactory level and their effect on supervisors' confidence in Grievant's ability to perform assigned duties, 5) the consistency of the penalty with those imposed upon other employees for the same or similar offenses, 6) the potential for Grievant's rehabilitation, and 7) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

We first consider the nature and seriousness of Grievant's offenses and their relation to Grievant's duties and positions. Although we have concluded that Grievant's offenses were not as serious as alleged by the Employer, his proven offenses were serious. Grievant's agreement with Offender McGuire to replace the window in his vehicle undermined his ability to objectively and fairly supervise McGuire in the future if necessary, and his actions placed him and the Employer in a vulnerable position to be taken advantage of by McGuire.[35] Grievant's misconduct in this respect is particularly serious because he recently had received a 30 day suspension for failing to maintain

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[32] Grievance of McCort, 16 VLRB 70, 121 (1993).
[33] Id.
[34] 6 VLRB at 268-69.
[35] Grievance of Corrow, 23 VLRB 101, 125 (2000). Grievance of Abel, 31 VLRB 256, 278 (2011).

appropriate boundaries with an offender and had agreed he could be dismissed if a similar boundary violation occurred in the future.

Grievant exacerbated his misconduct by his dishonesty during the Employer's investigation of the charges against him. Dishonesty is a serious offense by an employee against an employer.[36] 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.[37]

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.[38] He had explicit notice through the agreement he had entered into with the Employer the previous year that maintaining appropriate boundaries between himself and offenders under DOC supervision was an essential condition of his continued employment, and that any future violations in this respect could result in his dismissal.

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.[39] Moreover, Grievant had explicit notice through DOC Work Rules 4 and 5 that dishonesty was prohibited.

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[36] In re Carlson, 140 Vt. 555, 559 (1982).
[37] 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).
[38] Grievance of Towle, 164 Vt. 145, 150 (1995). Grievance of Brooks, 135 Vt. at 568.
[39] Carlson, 140 Vt. at 560.

Grievant's disciplinary record is a significant factor supporting his dismissal. He had an extensive disciplinary record in the five years preceding his dismissal. He was demoted for violations of work rules, received two suspensions of three days, and received two written reprimands. Most significantly, as discussed above, he was suspended for 30 days for an improper relationship with an offender and agreed that failure in the future to maintain appropriate boundaries with offenders under DOC supervision could result in his dismissal. His lengthy record of progressive discipline imposed over several years weighs heavily against retention of his employment.

Grievant's offenses, considered together with the ongoing and repeated nature of his misconduct, demonstrated that he was unable to reliably perform his duties and responsibilities. His supervisors reasonably lost confidence that he would adhere to DOC work rules as they related to interactions with offenders and that he would be truthful in reporting workplace interactions.

Grievant has not established that he was treated inconsistently with other officers engaging in similar offenses. He also has not shown that the Employer applied rules and regulations to him in a discriminatory manner, or that the Employer's application of work rules to him was unreasonable.

Grievant has not demonstrated a potential for rehabilitation given his offenses when considered together with his extensive record of serious disciplinary action. The Employer acted reasonably in determining that no alternative sanction to dismissal would be effective under the circumstances. In sum, progressive discipline was appropriately applied in this case and 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 Terrence Richardson is dismissed.

Dated this 27th day of October, 2011, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

Richard W. Park, Chairperson

/s/ Louis P. Lacroix

Louis P. Lacroix

/s/ Alan Willard

Alan Willard